JUDITH HIPPLER BELLO*

Current Developments in the Opening of New Markets by the United States Government

In the last fifteen or so months, the U.S. Government has mounted an increasingly aggressive campaign to open foreign markets to exports of U.S. goods and services and to U.S. investment, and to improve protection in those markets of intellectual property rights. Like all campaigns, this one has many fronts, players, phases, and measures of success. This paper outlines these efforts: long-term, mid-term, and short-term; multilateral, bilateral, and unilateral. It then assesses their progress, and finally suggests practical ways for counsel to would-be U.S. exporters or investors to enlist the government's efforts in their behalf.

I. Reasons for the U.S. Government's Market Access Campaign

Before exploring *how* the U.S. is trying to open new markets to U.S. exports of goods and services and investment, we should first consider briefly *why* these efforts are such a high priority within the Administration. The major reason quite clearly is our historic trade deficit, now running close to about $150 billion, and the political and economic pressures it has engendered. Recent indications are that the trade and current account deficits may finally be leveling off. Since the September 1985 Plaza Agreement, the dollar has fallen nearly 40 percent against the yen and Deutsche mark, although less so against other currencies. (Estimates of the dollar's trade-weighted fall against major currencies range from about 32 percent, by Institute for International Economics Director Fred Bergsten, to only about 19 percent, by International Trade Commissioner Paula Stern.) Obviously this readjustment has made affected imports into the U.S.

*Deputy General Counsel to the U.S. Trade Representative.

relatively more expensive and therefore less competitive, and our exports to some countries relatively cheaper and therefore more competitive. We are only now beginning to see the results of these currency readjustments because of the twelve- to eighteen-month time lag (the "J curve") it takes for currency changes to translate first into price changes by producers, second, to shifts in purchasing patterns by consumers, and finally, to actual shipments and recorded data.

Will these readjustments among major developed countries' currencies significantly reduce, if not eliminate, the trade deficit? Will they ease the pressure on our need to export? They will help, certainly. But there has been no meaningful exchange rate adjustment between the dollar and many currencies, such as the Canadian dollar, many Far Eastern currencies pegged to the U.S. dollar, and Latin American currencies. Because a great deal of our trade volume is with those countries, we are likely to face continued high trade deficits until we experience some adjustment in the dollar against those currencies, too.

Even if currency adjustments had been comprehensive, other causes of the trade deficit persist. First, our budget deficit must be reduced dramatically. We are still spending and borrowing far too much, reducing the funds available for private sector investment, and prolonging our dependence on foreign capital.

Second, our trading partners—particularly Japan and West Germany—must improve their rates of economic growth, and thus their market for imports from the U.S. and other countries. The U.S. has grown at twice the rate of other industrialized nations since the recession ended—about 4 percent in the U.S. versus only 2 percent in Europe, for example. Our faster growth acted like a magnet for imports into the U.S., while our exports dropped due to slack demand abroad. We must narrow the growth gap between the U.S. and other countries to correct the economic disequilibrium that has distorted trade flows.

Third, the continuing LDC debt crisis has had a sizable effect on our trade balance with the high-debt developing countries. When these countries found themselves unable to boost exports enough to service their staggering debt, they necessarily cut their imports. Like the industrialized nations' slow economic growth, this severely reduced the market for our exports of goods and services.

Fourth, both Secretary Baldrige and Deputy Secretary Darman have argued recently that the trade deficit stems in part from a loss of U.S. industrial competitiveness. Secretary Baldrige reprimanded U.S. industry for shortsighted management, citing in particular steelmakers' failure to modernize, automakers' obsession with style rather than quality, and the consumer electronics industries' lack of aggressive management. Secretary Darman focused on "corporacy": "bloated, risk-averse, inefficient

and unimaginative" corporate America. No doubt the debate in the 100th Congress on the alleged crisis in American competitiveness and its causes will be lively. If some of our industries indeed have become uncompetitive, this problem obviously contributes directly to the trade deficit.

Lastly (and I use that term deliberately), some share of our trade deficit may be attributable to the closed foreign markets of many of our trading partners. I stress the possible causal relationship, because a change in one variable in a complex international trade equation can set off a chain reaction of other changes, not necessarily to our commercial advantage. If we persuade Japan to import soybean oil, for example, we may sell significantly more soybean oil to Japan. On the other hand, the price rise that would flow from a more liberal Japanese soybean oil import policy may be insufficient to make American soybean farmers or crushers competitive. Instead we could achieve a windfall for possibly more efficient Latin American soybean farmers and crushers. Even if we did export more soybean oil to Japan, significantly cheaper soybean oil in the Japanese market might result in reduced imports into Japan of sunflower oil from the U.S. Moreover, increases in U.S. soybean oil exports could have implications for the costs of our subsidies to American soybean farmers under the 1985 farm bill. It is often unclear, then, what effects, if any, opening foreign markets would have on the U.S. trade deficit.

Why, then, is increased access to foreign markets such a high priority for the Administration? First, closed markets are unfair, and Americans—who maintain the most open market in the world—bridle at unfairness. Second, as a matter of economics, closed foreign markets without doubt distort conditions of trade, regardless whether their net effect on the U.S. trade deficit is positive or negative. And third, as a matter of politics, we must energetically attack unfair trading practices to preserve political support in the United States for freer trade. If Americans and their elected representatives in the Congress believe that we are being snookered by trading partners who close off their markets to our exports but enjoy relatively free access to the American market, destructive, protectionist legislation could be enacted despite the harm it would cause to our economy.

II. The Comprehensive, Long-Term Market Access Campaign

The best, most comprehensive, but longest-term effort underway to open foreign markets to exports of goods and services and to U.S. investment, and to improve protection of intellectual property rights, is the Uruguay Round of multilateral trade negotiations. Launched last September with a Ministerial Declaration calling for their conclusion within four years, these negotiations will involve efforts: (1) to establish new international rules for trade in services and trade-related investment measures

and for the protection of intellectual property rights; and (2) to improve and extend existing rules for trade in goods (agriculture in particular) and for the settlement of disputes. A Trade Negotiating Committee—to be chaired at the political level by Minister Iglesias of Uruguay and by GATT Director General Arthur Dunkel at the "bureaucratic" level—is the body to which each of the as yet undetermined negotiating groups will report. The boundaries of these groups, their chairmen, and negotiating plans are scheduled to be determined before the end of 1986.

Multilateral trade negotiations are the best hope for an open international trading system and thus open markets for U.S. exports and investment. If we can agree on mutually advantageous rules in these areas, we have the greatest possible certainty that market barriers will be reduced and that the market will reflect comparative advantage rather than government interference and resulting trade distortion. Our competitive farmers, industries, and firms could export. Intellectual property owners would not have to fear that their trademarked, patented, or copyrighted materials would be pirated abroad because of inadequate intellectual property laws or their inadequate enforcement. Governments would refrain from trade-related investment measures that impede investment in order to encourage inefficient domestic production. And when these rights allegedly are violated in a particular case—as inevitably happens in any system—then an improved dispute settlement process would ensure a sound and expedited resolution of the disagreement.

In addition to the Uruguay Round, we also are discussing a free trade agreement with our most significant trading partner, Canada. In 1985, the U.S. and Israel concluded a free trade agreement liberalizing nearly all trade between the two countries, as authorized by article XXIV of the GATT. An agreement with Canada would be a second, and far more significant, experiment. While recently the negotiators have not been overly optimistic about their chances for concluding such an agreement, talks continue and significantly liberalized trade between the two nations could be the result.

III. The Mid-Term Market Access Campaign

While the Uruguay Round and Canada free trade talks offer the prospect of the farthest reaching, most comprehensive improvement in market access, they are likely to continue for some time and their benefits could even then be phased in gradually. To complement and perhaps stimulate these developments, the U.S. also must wage faster paced bilateral and even unilateral campaigns.

Section 303 of the Trade and Tariff Act of 1984 requires the Trade Representative to compile and transmit to the Congress an annual report

of significant trade barriers to U.S. exports of goods and services and to U.S. investment abroad. Ambassador Yeutter recently submitted the second such report, entitled *National Trade Estimate: 1986 Report on Foreign Trade Barriers*. It describes major trade barriers (not all of which are unfair), estimates to the greatest extent possible the commercial effect of such barriers, and chronicles our Government's efforts to resolve these problems.

Normally the U.S. expresses concern about another government's trade barriers through bilateral consultations. These can occur during regularly scheduled meetings of formal bilateral groups, such as the U.S.-Japan Trade Subgroup or the U.S.-Brazil Trade Subgroup. They can also occur in connection with state visits, or for the sole purpose of addressing a particular concern, as by calling foreign embassy officials in to see officials at USTR, the Department of Commerce, or elsewhere, or by instructing officials in the U.S. embassies abroad to deliver a "message" to appropriate foreign officials. The point is that the U.S. communicates bilaterally with other governments on a regular basis, and concerns about trade barriers are part of this ongoing dialogue.

Sometimes, however, there are reasons (such as unusually strong political pressures) that prevent the foreign government from responding favorably to informal pressure from our government. In such cases consultations alone—even repeated consultations at high levels—may not induce the trading partner to eliminate the barrier. Further measures then are called for. This can mean seeking dispute resolution under an applicable trade agreement, or perhaps under section 301 of the Trade Act of 1974.

For example, after consulting to no avail with Japan about its import quotas on various agricultural products, the U.S. asked for the establishment of a panel under article XXIII:2 of the GATT. The GATT Council approved the request in October, and both parties will make their arguments about the application of article XI on quotas before the panel.

In addition to dispute settlement, the U.S. has used section 301 of the Trade Act of 1974 as leverage in seeking the elimination or at least improvement of unfair foreign government trade barriers. Section 301 authorizes the President to increase duties or impose other restrictions on imports of goods or services, in response to foreign governmental acts, policies, or practices that are inconsistent with trade agreements or that are otherwise unjustifiable, unreasonable, or discriminatory and that burden or restrict U.S. commerce. The Administration's object in using section 301 is *not* to retaliate, however, but to employ the credible threat of retaliation to achieve: (1) elimination of, (2) improvemnt of, or (3) at least compensation for an unfair trade barrier. While section 301 may be used

with respect to unfairly traded imports into the U.S., its principal use is to seek fair and equitable access to foreign markets.

What kind of success has the Administration had in using section 301? In some cases, it has achieved its preferred objective: elimination altogether of the foreign trade barrier. Many recent cases fall into this preferred category. For example, Korea agreed last July to introduce legislation for enactment by mid-1987 that will dramatically improve protection in Korea of intellectual property rights. While the U.S. had long sought such improved protection, this agreement was reached under the shadow of a section 301 proceeding begun in November 1985 by the Trade Representative at the President's direction, without any petition having been filed by U.S. industries.

Korea agreed in July as well to provide better access to its market for insurance services. Previously limited in the types of insurance they could underwrite in Korea, U.S. firms now will be able to participate broadly in the $5 billion Korean insurance market.

In another section 301 case, the Japanese Government agreed in October to suspend altogether its tariff on imports of cigarettes. It also agreed to stop collecting excise taxes on cigarette imports more quickly than on domestically produced cigarettes, and to eliminate discriminatory practices regarding the distribution of cigarettes. We expect that after many years of fruitless efforts to penetrate this long protected market, we will finally see U.S. cigarette sales in Japan reflect the true competitiveness of our high quality products.

And as you have all read in the press, Japan agreed ad referendum in July—and the agreement was concluded in September—to open its market to all foreign-based semiconductor producers (not just U.S. firms). For the first time, this agreement provides hope that U.S. and third country semiconductor producers will be able to penetrate the previously mostly closed Japanese market. We now expect to see semiconductor sales in Japan reflect real competition, and not Japanese government-induced purchases from only Japanese firms.

Yet another example of a clean sweep is the President's determination under section 301 in August that Taiwan had breached an agreement to value imports for customs purposes based upon "transaction value" (usually the invoice price). He directed the Trade Representative to propose retaliatory measures. That development provided the additional leverage needed to get Taiwan to implement its obligations in this regard. It agreed in August to propose regulations in September, for adoption by October 1, to provide for valuation of imports for customs purposes based on transaction value. Punctually on October 1, the new regulations took effect.

But not all section 301 cases are perfect victories for open markets. Sometimes the best we can attain is an amelioration of an unfair trade practice. For example, in connection with Portugal's and Spain's accession to the European Communities, the EC acted inconsistently with its GATT obligations. It replaced the low, bound tariffs on corn and sorghum in Spain with a far higher variable levy without compensating affected trading partners in advance. It also established quotas in Portugal not permitted under article XXIV on customs unions. It reserved part of Portugal's grain market for grain produced in other EC member states. Further, it limited the importation into Portugal of oilseeds and oilseed products, as well as the consumption in Portugal of certain vegetable oils. Determining that these measures were actionable under the criteria of section 301, the President established quotas on certain imports from the EC (chocolate, candy, apple juice, certain beer, and white wine) to mirror the quotas in Portugal. (To date, both sides have kept the quotas "nonrestrictive"—i.e., large enough that they are not impeding imports.) He also suspended temporarily our tariff bindings on imports of certain other products from the EC (including certain cheeses, endive, carrots, olives, and alcoholic beverages), in response to the variable levy actions in Spain. Those duties, however, have not been increased because on July 2, 1986, the U.S. and EC negotiated an interim resolution. U.S. corn and sorghum exporters are effectively to be held harmless; the EC has agreed to ensure that any shortfall in the normal level of exports to Spain of these products will be compensated for by increased exports to other EC member states (through reduced levies). The EC declined to roll back the GATT-illegal quotas in Portugal or to suspend the variable levy in Spain until it first negotiated compensation. These trade barriers remain in place. Yet we achieved at least a temporary settlement that protects U.S. exports.

Another illustration of improvement regarding an unfair trade practice is the EC citrus case. Thanks to the leverage gained through U.S. retaliation in 1985 against imports of pasta from the EC, the EC finally agreed to reduce its tariffs on various citrus products. (The EC also agreed to lower its tariffs on nuts, mainly almonds, in return for a larger share of our cheese quota and lower U.S. tariffs on several products—anchovies, olives, paprika, and fermented cider—subject to U.S. implementing legislation, of course.) Yet the EC still maintains tariffs on citrus products that discriminate in favor of imports from certain Mediterranean countries, and thus have an adverse effect on competing U.S. (and non-Mediterranean third country) products.

In still other cases, the trading partner remains obdurate about eliminating or reducing the trade barrier concerned. Japan, for example, was unwilling to eliminate restrictions on the importation of leather and leather

footwear for domestic political reasons. Nevertheless, it agreed to compensate the U.S. for these GATT-illegal barriers, by reducing and binding tariffs on numerous other items of interest to the U.S., worth an estimated $236 million. As a result, U.S. producers of other goods—such as aluminum—will enjoy increased access to the Japanese market, even though our leather and leather footwear industries are as hindered as ever in their efforts to export to Japan.

Finally, some section 301 cases simply have not succeeded at liberalizing trade. Although regrettable, sometimes the U.S. must retaliate against continued unfair trade practices to maintain the credibility of the threat of retaliation—which is, of course, the leverage that often produces liberalization. In the Japan leather and leather footwear cases, for example, in addition to the compensation mentioned above, the U.S. also retaliated to the tune of an estimated $24 million in increased duties on leather and leather goods from Japan. This retaliation signaled our unhappiness that Japan's trade barriers continued.

And to date the U.S. plans to retaliate against Taiwan for its restrictions on the distribution and sale of U.S. beer, wine, and tobacco products. In October the President determined under section 301 that Taiwan's discriminatory and monopolistic practices were actionable under section 301, and directed the Trade Representative to propose specific proportional countermeasures. Unless Taiwan agrees to open its market satisfactorily, we will—with regret—take action against Taiwanese imports into the U.S.

Thus section 301 has been used quite successfully in the past year to open foreign markets to U.S. exports. Yet this very success has fueled proposed amendments to reduce drastically the President's discretion under it and to require more "self-initiated" investigations. Congress likes an aggressive section 301 program, and wants to ensure its continuation through statutory reform. Even many of the Administration's best friends on the Hill, the freer traders on both sides of the aisle, may support a requirement for more section 301 cases and for mandatory retaliation where liberalization proves impossible on the timetables provided in U.S. law.

IV. The Day-to-Day Market Access Campaign

The Departments of Commerce and Agriculture in particular offer a wide range of services designed to assist U.S. businesses in their efforts to export goods or services. The U.S. and Foreign Commercial Service maintains offices in 127 major foreign cities in 64 countries, staffed by more than 180 commercial officers and over 500 foreign service nationals. They provide a full range of business, investment, and financial counseling services, including credit risk analysis, advice on financing sources and

market entry strategy, and major project identification and assistance. U.S. and Foreign Commercial Service officers in overseas posts can introduce U.S. firms to local business and government leaders, help in trade disputes, and facilitate relationships with the foreign business community. Domestically the Service operates forty-eight district offices throughout the nation, where experienced trade specialists provide information about trade and investment opportunities abroad, foreign markets for U.S. products and services, financing assistance, insurance from the Foreign Credit Insurance Association, international trade exhibitions, export documentation requirements, and export licensing and import requirements.

The Service offers many trade assistance programs at no cost to beneficiaries. For example:

- In fiscal year 1986, under the Foreign Buyer Program, the Service gave over 1,600 firms participating in eight domestic trade shows an opportunity to meet nearly 24,000 foreign attendees without incurring the high cost of overseas travel.
- The Service sponsors "matchmaker" events around the world, bringing together U.S. firms with pre-identified potential representatives for their products lines. For example, over fifty U.S. firms participated in a recent matchmaker event in London; all reported that they subsequently negotiated with potential candidates for representation there.
- Under the Trade Fair Certification program, Commerce designates and promotes overseas trade fairs organized by the private sector, in which U.S. firms can participate.

In addition to its many free programs, the U.S. and Foreign Commercial Service offers many specialized services for modest fees attractive to budget-minded U.S. firms. For example:

- *Commercial News USA* is a publication distributed to more than 80,000 overseas agents, distributors, government officials, and end-users. Participants advertising their products or services for export normally receive about fifty inquiries each from buyers, agents, and distributors interested in buying or promoting the product or service described.
- *World Traders Data Reports* provide information about a foreign firm's reputation and payment history, assess its suitability as a trading partner, and specify trade and credit references. This service may be used to evaluate and screen potential customers, agents, and distributors before a U.S. firm enters into a business relationship or ships any goods. These reports can be a cost effective way to obtain useful information, especially in less developed countries, where even routine commercial information may be hard to get.
- The *Trade Opportunities Bulletin* and Trade Opportunities Notice Service help to identify new sales leads abroad. The bulletin contains all new trade opportunities known to the U.S. and Foreign Commercial

Service at the time of printing. On average, each bulletin describes 300 to 400 potential trade opportunities. More selectively, the notice service individually advises subscribers of business opportunities involving the countries, products/services, and object (e.g., sale, distribution arrangement, or foreign government tenders) specified by the subscriber. These services can be an effective, economical way to focus sales efforts overseas.

- The Agent/Distributor Service of the U.S. and Foreign Commercial Service offers a customized search for qualified agents and distributors for a firm's products or services. Within ninety days it gives up to six names of qualified, interested agents and distributors, depending on the demand for the product or service concerned and the availability of local representation. (If no appropriate agents are available, it provides that information.)

In addition to the U.S. and Foreign Commercial Service, trade promotion activities are also conducted within Commerce's industry-oriented Trade Development (TD) unit. TD's goal is to advance U.S. business interests in international trade by giving each industry a central point of contact in the Department able to service all its needs. TD's integrated sectoral program includes units on aerospace, automotive affairs and consumer goods, basic industries, capital goods and international construction, science and electronics, services, and textiles and apparel.

TD offers export promotion activities that help American firms compete for contracts associated with large industrial and infrastructure projects overseas. It works closely with the Export-Import Bank, the Overseas Private Investment Corporation, the State and Treasury Departments, other agencies, and the U.S. and Foreign Commercial Service to support these efforts. For example, in fiscal year 1986, TD recruited and staged about forty trade missions, ninety exhibitions, and twenty-five other types of trade promotion events, assisting thousands of U.S. firms in their efforts to market U.S. goods and technology abroad.

TD also administers the Export Trading Company Act, under which small and medium-sized companies can establish or expand their export capabilities and improve their international competitiveness through joint export ventures. TD annually sponsors a number of conferences across the country on use of the Export Trading Company Act to familiarize U.S. business interests with its advantages.

TD also offers individual marketing assistance, such as Export Development Plans. Coordinating carefully with trade associations, TD prepares a number of plans each year, with a view toward industry assuming a more active leadership role in promoting exports. A plan describes private sector promotional initiatives that could be undertaken, activities the Commerce Department could engage in to support those efforts, and

joint steps that could be taken by the Department and the private sector to encourage expanded exports.

V. A Little Practical Advice

Counsel to U.S. businessmen facing foreign barriers to U.S. exports or investments abroad may advise efforts to enlist the U.S. Government's aid in overcoming those barriers. Requests for such assistance should be made directly to responsible agencies. Businessmen need not approach the Executive Branch indirectly through members of Congress or the press. These avenues may be appropriate subsequently, but normally need not be pursued in the first instance unless the object is legislation.

If a firm or industry is trying to export an agricultural product, the principal U.S. Government actors are USTR and the Department of Agriculture. If the export or barrier concerned involves a manufactured product, the principal actors are USTR and the Department of Commerce. The Department of the Treasury takes a keen interest in investment issues in particular, and the Department of State naturally plays a role in all cases since relations with other governments are concerned. Other agencies often play a significant role, depending upon the circumstances. Counsel should advise his client which agencies to contact, and whom to contact within each agency.

The issue of whom to contact raises the debate whether, in a given matter, it is more advisable to start at the top of the organization and work down, thus ensuring bureaucrats' diligent attention to the issue; or to start at the staff level and work up to the extent necessary. Access to Cabinet officials obviously is limited. The "top down" approach can waste time and be counterproductive if the staff has not been prepared so they in turn can properly brief the boss. Normally the better approach is to begin at the staff level, and up the ante only when stalemated by resistance, lassitude, or internal conflict.

When seeking to enlist the government on his client's behalf, counsel should advise brevity and clarity. The message—which should be summarized in writing—should explain the problem encountered and efforts to date to resolve it. It should then explain as precisely as possible what the client would like the government to do. A nonspecific cry for help is less likely to elicit aggressive government action than a detailed action plan. A party seeking the government's help should not only specify what he wants the government to do, but also why those actions would be in the government's broader interests as well as his. Moreover, it may be advisable to anticipate and rebut major arguments against the client's proposed course of action.

Finally, the client would be well advised to exhaust any private remedies available to him before seeking the government's aid. Government action should not be considered an alternative to private action, but rather a supplement where private actions alone have proven unsuccessful. Industry representatives should outline how they are competitive, thus establishing that the foreign market barrier—not problems of their own making—is responsible for their lack of success in foreign markets.

If the client is interested in using section 301, counsel should educate the client about its limits as well as its strengths. In particular, businessmen should appreciate that section 301 is politically discretionary and that results in section 301 proceedings are uncertain. Even in a "winning" case, the result could be retaliation against a foreign country's exports to the U.S. rather than elimination or even reduction in the foreign market barrier impeding U.S. exports or direct investment.

If the client remains interested in a section 301 proceeding, counsel should also advise the preparation of a draft petition, to be reviewed prior to filing by not only USTR, but also the entire interagency section 301 committee. Such review provides an indication of agencies' views on the merits of the case, and can avoid a decision not to initiate an investigation on the basis of inadequate information (usually a lack of evidence that the foreign government act, policy, or practice has burdened or restricted U.S. commerce). It also offers an opportunity for counsel or the client to confer directly with each major agency concerned. (Counsel or the client may ask to meet with the section 301 committee directly to accomplish this purpose most efficiently.) Because section 301 is very much an interagency process, direct contact facilitates understanding and can significantly aid the client's interests.

If an investigation is initiated, counsel and client effectively assume an advisory role to the government in what has become a U.S. Government case. Counsel's most productive role, then, is to remain abreast of developments, stimulate activity if it otherwise flags, anticipate opportunities provided in the case by other developments in relations with the country concerned, advise concerned members of Congress and/or their staffs of developments to facilitate their support when needed, and suggest options for leverage, tactics, and outcomes to the agencies concerned. A client needs to be prepared to propose a second or even third best outcome if attainment of the preferred objective becomes impractical.

In summary, the government is ready, willing and able to serve U.S. persons interested in exporting goods or services or in investing abroad. Therefore, exporters and investors should consider enlisting its aid, particularly if foreign government practices impede imports or investment

from the U.S. In seeking the government's help, businessmen should treat the government like a potential client to whom a presentation is being made. A clear, specific, and logical appeal stressing the identity of interests between the businessman and the government is most likely to garner the support sought.