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The Honorable Paula Stern

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ARTICLES

REGULATING U.S. TRADE AND FOREIGN INVESTMENT

THE HONORABLE PAULA STERN*

I. INTRODUCTION	1
II. OVERVIEW OF U.S. FAIR TRADE LAWS	2
III. REASSESSING THE TRADE LAWS	4
IV. ALTERNATIVE APPROACHES TO THE UNFAIR TRADE LAWS	8
V. SECTION 301 AND FOREIGN MARKETS	11
VI. REGULATING FOREIGN INVESTMENT IN THE UNITED STATES	13
VII. CONCLUSION	15

I. INTRODUCTION

In the United States, there are two basic structures for dealing with trade complaints. The first structure is the *rule-oriented* system of settling trade disputes. Here problems are resolved within the framework of legal standards. The second structure utilizes the *political* system. Relief can be sought from either Congress or the President. The rule of law system is designed to produce certainty of results. When complaints allege unfair competition, the relevant statutes require investigations with little room for political influ-

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ence. Instead experts, evidence, data, and analyses play significant roles.

II. OVERVIEW OF U.S. FAIR TRADE LAWS

The U.S. International Trade Commission (ITC) is the paragon of the *rule-oriented* approach to settling trade disputes.¹ An independent agency of the U.S. government, it is often called the shield of Congress—an instrument that allows a swift, non-political approach to trade issues that would be difficult for an elected body to resolve.² At the ITC, all industries and countries—large and small—can get their day in court. With the ITC anchoring the system, there is a reliance on expert opinion, and a definite procedure is apparent to all litigants.³

Most ITC investigations involve alleged unfair competition from subsidized or dumped imports.⁴ Complaints are filed under antidumping and countervailing duty statutes (Title VII of the Tariff Act of 1930).⁵ The majority of these investigations concern possible injury to a domestic industry as a result of dumping or the sale of imported goods in the United States at less than fair value (“LTFV”).⁶

Sales at LTFV in the United States are sales at less than the market price in the country of origin.⁷ If the Department of Commerce (“Commerce”) determines that sales of imports are at less than fair value, the ITC is charged with determining whether a domestic industry is currently being or is likely to be materially

1. See 19 U.S.C.A. § 2252 (West Supp. 1989). Section 2252 provides guidelines regulating petitions for import relief, investigations and recommendations by the U.S. International Trade Commission (ITC), and reports submitted to the President. *Id.*

2. See Stern & Wechsler, *Escape Clause Relief and Recessions: An Economic and Legal Look at Section 201*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 195, 199 (1986).

3. See 19 U.S.C. § 1331(a)(1)(A)(ii) (1982) (empowering the ITC to procure the services of experts and consultants). See 19 U.S.C.A. § 2252 (West Supp. 1989) for an outline of the procedure to be observed in pursuing trade disputes before the ITC.

4. See U.S. INT'L TRADE COMMISSION ANN. REP. 6 (1988) [hereinafter ANN. REP.]. In 1988, the ITC conducted 68 antidumping and countervailing duty investigations out of a total of 107 Title VII investigations. *Id.*

5. See 19 U.S.C.A. § 1671a (West Supp. 1989) (initiating a countervailing duty investigation); 19 U.S.C.A. § 1673a (West Supp. 1989) (initiating an antidumping duty investigation).

6. See ANN. REP., *supra* note 4, at 6. In 1988, the ITC conducted 56 antidumping investigations out of a total of 107 Title VII investigations. *Id.*

7. See 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 446.

injured, or is prevented from being established by reason of the importation of such merchandise into the United States.⁸ A positive determination by the ITC results in an order by Commerce under which a dumping duty is collected by the Customs Service on the articles sold at less than fair value.⁹

The ITC conducts a similar type of investigation relating to allegations of imports subsidized by foreign governments.¹⁰ These investigations can result in the imposition by Commerce of countervailing duties on the subsidized imports.¹¹

Since 1979, the statutes governing both types of investigations have included a material injury test for signatories to the Tokyo Round codes of the General Agreement on Tariffs and Trade (GATT).¹² The subsidized or dumped imports themselves are not illegal. A countervailing or antidumping duty will be applied only when a material injury to a U.S. industry can be shown.¹³ The duty is not intended to be punitive, rather it is calculated to remove any future unfair advantage.¹⁴

Implicit in the concept of fairness in the law is the notion that American workers and businesses should compete on the basis of comparative advantage—that they should not have to adjust to unfairly traded goods. While consumers are expected to forgo the lower prices which would result from dumping or subsidies in order to protect the interests of the domestic producers of the product, a duty is applied only when the petitioner can demonstrate that it is being *materially injured*.¹⁵ Thus the material injury test is, in effect, a compromise between diverging points of view, accommodating the concern for the welfare of domestic workers and producers in the affected industry in a manner that minimizes the disruption of commerce and attempts to maximize value to the consumer.

Fairness also plays a major role in the U.S. protection of intellectual property—ownership conferring the right to possess, use or

8. See 19 U.S.C. § 1673 (1982 & Supp. V 1987).

9. See 19 U.S.C. § 1673e(a) (1982).

10. See 19 U.S.C. § 1671(a) (1982 & Supp. V 1987).

11. See 19 U.S.C. § 1671e(a) (1982 & Supp. IV 1986).

12. See 19 U.S.C.A. § 1677(7) (West Supp. 1989) (“[M]aterial injury means harm which is not inconsequential, immaterial, or unimportant.”).

13. See 19 U.S.C. §§ 1671(a), 1673 (1982 & Supp. V 1987) (countervailing duty and antidumping duty, respectively).

14. See Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 549-50 (1987).

15. See *supra* note 13.

dispose of products created by human ingenuity—under Section 337 of the Tariff Act of 1930.¹⁶ Section 337 cases encompass a wide variety of intellectual property causes of action: patent, trademark, or copyright infringement; passing off an item as being made by another, well-known firm or misappropriation of another firm's distinctive packaging for its product; and misappropriation of trade secrets.¹⁷ If the ITC determines that imports violate the intellectual property rights of a U.S. industry, it may impose cease and desist and/or exclusion orders on the infringing import.¹⁸

The original purpose of Section 337 was to protect and consequently encourage American production, jobs, and capital from unfair import competition.¹⁹ Given the changes made in Section 337 by the Omnibus Trade and Competitiveness Act of 1988,²⁰ the law has become less a trade law and more a law aimed at preventing violations of intellectual property rights. Nevertheless, if the ITC finds a violation and fashions a remedy, it still must also consider public interest factors, which in some cases might outweigh the need for relief.²¹

III. REASSESSING THE TRADE LAWS

From the point of view of exporters to the United States, the unfair trade laws are damaging weapons in the arsenals of American commercial firms. However, pursuit of these cases is costly for petitioner and defendant alike.²² Unfair trade practices of other nations, however vexing to individual U.S. industries, are not the chief menace to the international trading system or even to

16. Tariff Act of 1930, ch. 497, 46 Stat. 590, 703 (codified as amended at 19 U.S.C.A. § 1337 (West Supp. 1989)).

17. See 19 U.S.C.A. § 1337(a) (West Supp. 1989).

18. See 19 U.S.C.A. § 1337(e),(f) (cease and desist orders and exclusion orders, respectively).

19. See J. DOBSON, *TWO CENTURIES OF TARIFFS* 103 (1976).

20. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. 19 U.S.C.A. § 1337(a) (West Supp. 1989) explicitly states that patents, copyrights, and trademarks are protected under this section and, in effect, dispenses with the injury requirement.

21. See 19 U.S.C. § 1337(d) (1982) (the ITC must consider such factors as the effect of an exclusion of the article upon the public health and welfare, competitive conditions in the U.S. economy, production of like or directly competitive articles in the United States and, finally, U.S. consumers).

22. U.S. GEN. ACCT. OFF., *INTERNATIONAL TRADE: PURSUIT OF TRADE LAW REMEDIES BY SMALL BUSINESS*, GAO/NSIAD-89-69BR (1988) (Briefing Report to Congressional Requesters).

America. At the height of activity on the ITC's docket in the mid-1980s, had the ITC sustained all unfair trade allegations by domestic industry, less than five percent of the total value of imports into the United States would have been called into question.²³ In recent years this figure has dropped to less than one percent.²⁴

The administration of trade law has become very complex and can have a chilling effect on overall trade as a result. Reference to three very complicated cases illustrates the difficulties that have accreted in the practice of the unfair trade laws. These cases raise fundamental questions about their fairness and relevance in a globalized economy where firms are losing their national identity: Forklift Trucks from Japan,²⁵ Forged Undercarriages from Italy,²⁶

23. See P. Stern, *The Trade Deficit: Ways to Spell Relief*, at the National Economists Club Trade Policy Forum 7 (Nov. 12, 1985) (unpublished speech available in the offices of the Inter-American Law Review, University of Miami School of Law).

24. As Ambassador Rufus H. Yerxa has stated:

The fact is that the volume of U.S. imports affected by antidumping and countervailing duty investigations as a share of total imports amounted to only two-tenths of one percent in 1987, four-tenths of one percent in 1988, and two-tenths of one percent during the first half of 1989. Furthermore, the *average* level of antidumping duties assessed in 1987 on dumped or subsidized goods was only 1.20 percent. The average was 3.70 percent in 1988, and 1.84 percent during the first half of 1989.

Statement by Ambassador Rufus H. Yerxa on GATT Trade Policy Review Mechanism (Dec. 14, 1989) (emphasis added).

25. *Internal Combustion Engine Forklift Trucks from Japan*, USITC Pub. 2082, Inv. No. 731-TA-377 (May 1988). The ITC found that U.S. producers were being materially injured by Japanese imports of forklift trucks at less than fair value ("LTFV"). The production of internal combustion forklift trucks is characterized by substantial international integration. As a result, the ITC was compelled to make a threshold determination as to what constitutes a domestically produced forklift truck. Petitioners proposed a frame-based definition. If the frame is produced in the United States, the forklift truck is U.S.-produced for purposes of the antidumping statute. Respondents countered by proposing a value added test for determining whether a forklift truck is U.S.-produced. For instance, if the value added in the United States is over 35%, the forklift truck is U.S.-produced.

In this instance, the ITC adopted the frame-based test proposed by petitioners. At the same time, the problems inherent in a frame-based test did not go unnoticed. Because the frame of a forklift truck typically constitutes only 10% of the value added of a forklift truck, it would be possible to have a forklift truck whose frame was made in the United States but whose engine, tires, steering mechanism, *etc.* were made overseas classified as U.S. produced. Did Congress intend that a product which is 90% foreign value added be classified a U.S. product? Alternatively, when the frame is imported but seventy to ninety percent of the forklift is U.S. value added, should this forklift be classified as non U.S.-produced? The frame-based test clearly presents potential problems for determining what is a U.S. product under the antidumping laws. As "domestic" producers rely increasingly on extensive importation of finished and nearly finished products, the line between U.S. and non-U.S. industry and products continues to blur.

26. *Forged Undercarriage Components from Italy*, USITC Pub. 1465, Inv. No. 701-TA-201 (Dec. 1983). The ITC made a determination that the domestic industry was suffering

and Subway Cars from Canada.²⁷ These cases raise a number of questions. What is a U.S. company? What is a U.S. product? Is the law retarding "unfair" trade practices? Does the law help American workers or enhance America's manufacturing capacity? Or does the law merely advance the commercial strategy of multinationals that may or may not be American-owned and directed and that may or may not be producing within the United States?²⁸

In recent years, the integrity of the unfair trade law practice has further deteriorated because the Reagan Administration tended to act to advance businesses' adjustment to changes in international competition only when the industry alleged "unfairness." Then, when the political stakes from sectoral pressure got too heated, the "unfair trade" investigations would result in fully politicized "settlements" or "suspension agreements" whereby exporting nations would agree to quantitative restrictions on their shipments to the United States.²⁹ The effect of these settlements,

material injury as a result of imports of semifinished forged undercarriage links and rollers, which were alleged to be subsidized. The author dissented from this determination, finding that factors other than subsidized imports from Italy were causing decline in the domestic industries' performance.

In this case, the major domestic producer of semifinished links, Caterpillar, was also a significant importer. Caterpillar, therefore, would have to have been inflicting injury upon itself if the imports in question were truly injurious. Exclusion of Caterpillar from the group identified as "domestic producers" would significantly bias and distort any analysis of the "domestic industry." The presence of a major U.S. producer who also imports extensively created a problem for the ITC. Categorizing Caterpillar with other U.S. producers reduced the likelihood of any showing of material injury to U.S. producers while failure to categorize it as a U.S. producer served to create a distorted data base representing U.S. producers.

27. Rail Passenger Cars from Canada, USITC Pub. 1277, Inv. No. 701-TA-182 (Aug. 1982). The ITC made a determination that a domestic manufacturer of rail passenger car shells was likely to suffer material injury as a result of the importation of rail passenger car shells allegedly subsidized by the Canadian government. In this case, the domestic producer, the Budd Company ("Budd"), submitted a bid to the New York Metropolitan Transportation Authority which called for production of the car shells in Portugal. Budd's reasons for sourcing the shell in Portugal included: the availability of government-supported export financing and the lack of capacity to manufacture additional shells in its domestic facilities. Despite this election to source the shells overseas, the ITC determined that Budd was a "domestic producer" of shells. The majority found that the adverse consequences of a business decision to source offshore in order to compete with an allegedly subsidized foreign prime contractor was a factor which the ITC could consider in analyzing whether material injury exists with regard to a domestic industry. The author dissented, determining that there was no basis for treating Budd as a "domestic" producer of shells when, had its bid been successful, its domestic shell manufacturing capability would not have been utilized.

28. See *supra* note 25.

29. See Yochelson, *Outlook for U.S. Economic Diplomacy: Europe and the Pacific Basin*, in *THE UNITED STATES AND THE WORLD ECONOMY: POLICY ALTERNATIVES FOR NEW REALITIES* 23-24 (1985).

at a minimum, has been to undermine the claim that the "unfair" trade laws were rule-oriented and not political.

In the 1988 Omnibus Trade and Competitiveness Act, Congress added new complexity to the antidumping and countervailing duty laws.³⁰ For example, the new trade law contains several provisions intended to plug "loopholes" in the administration of the unfair trade laws dealing with dumped or subsidized imports.³¹ These new provisions, however, may actually have a chilling effect on importers, foreign investors and even American companies since today most American manufacturers also import.

Depending on their implementation by Commerce, the greatest potential irritants are the provisions to prevent circumvention of the trade laws. These provisions allow the government to impose duties on goods assembled in the United States from imported parts that are used to produce finished products where those parts have been found to be dumped or subsidized, if the value added in the United States is "small."³² The idea is to prevent a foreign manufacturer from trying to evade import duties by bringing the components into the United States in a form requiring only trivial changes (and, therefore, creating no new jobs or productive capacity). "Small," however, is a concept that is highly subjective and easy to manipulate. Therefore, this rule could have a chilling effect on foreign producers contemplating assembly operations in the United States—an effect that may not be in America's overall economic interest.

This provision could also ensnare companies which the legislators did not intend to include. For example, if the U.S. government finds Japanese companies guilty of dumping semiconductors and an unrelated U.S. manufacturer imports wafers made by one of the subject Japanese companies, the U.S. manufacturer could possibly wind up paying dumping duties, if its product's value added in the United States was not considered large enough. This duty would hurt the U.S. manufacturer's competitiveness vis-à-vis its foreign competition.

A similar provision would subject imports of *finished* goods from third countries to antidumping duties if they are made from

30. See Harbrecht & Dryden, *A Trade Bill Filled with Trade-Offs*, BUS. WK., May 9, 1988, at 42-43.

31. See 19 U.S.C.A. § 1677j (West Supp. 1989); 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1632-37.

32. 19 U.S.C.A. § 1677j(a)(1)(C) (West Supp. 1989).

components produced in a country that is subject to these duties on the same or a similar finished product.³³ So, hypothetically, if the Japanese semiconductor company shipped components to Singapore for assembly, Singapore's exports of semiconductors could be subject to the same antidumping or countervailing duties to which the Japanese company who supplied the components is subject, if the value added in Singapore was considered "small."

While the change in the law was intended to prevent circumvention of existing law, it could open a Pandora's box of problems for innocent U.S. companies that attempt to enhance their competitiveness by importing components. The new provision could also sideswipe multinationals who may "taint" their finished product by inadvertently using components that are also used by the supplier to make products subject to U.S. unfair trade actions.

In sum, the policing purpose of these new provisions may be achieved at the price of injecting new uncertainty and inefficiencies into the world trade system. At a minimum, this change calls for knowledgeable and fair administration of these provisions by persons sensitive to the requirements of the global economy.

IV. ALTERNATIVE APPROACHES TO THE UNFAIR TRADE LAWS

Historically, as the United States worked to liberalize international commerce, it also created exemptions or shelter for declining or particularly powerful domestic industries.³⁴ In the process, the so-called fairness laws have sometimes been manipulated by practitioners in pursuit of the immediate interests of domestic producers, distorting the original intent of the law. As a result, protection against imports in the United States—whether or not they were unfairly traded—soared from eight percent coverage in 1975 to twenty-one percent in 1984.³⁵ Unfortunately, the protection afforded, usually either tariffs or quotas, has fallen short of its intended goal of making beneficiaries more competitive. Indeed, much of the recent productivity gains in U.S. manufacturing has

33. 19 U.S.C.A. § 1677j(b)(1) (West Supp. 1989).

34. A well known example is the steel industry. For a detailed examination of restrictive measures applied for the benefit of the steel industry see Comment, *The Anatomy of Protectionism: The Voluntary Restraint Agreements on Steel Imports*, 35 UCLA L. REV. 953 (1988).

35. G. HUFBAUER, D. BERLINER & K. ELLIOTT, *TRADE PROTECTION IN THE UNITED STATES: THIRTY-ONE CASE STUDIES* 20 (1986).

been in industries hit hardest by foreign competition.³⁶ Clearly if the United States is to regain its competitiveness, it needs an affirmative government demanding change, not simply protecting against it. America's chief concern should not be whether the trading field is level. Instead of focussing on the tilt of the field, it must concentrate instead on rebuilding the strength of the team it puts on the field.

U.S. industry is facing fundamental competitiveness problems that will not be resolved merely by passing new trade laws or encouraging depreciation of the dollar. Low-wage competition has hit many U.S. manufacturers hard. Inadequate investment and poor management practices have also hurt American competitiveness.³⁷

America's trade relations with Japan illustrate this point. The productivity of U.S. industry is disappointing compared with that of Japan.³⁸ Thus, even a further fall in the dollar and removal of export barriers in Japan would still likely leave the United States with a continuing problem in its ability to compete with Japanese businesses, either in the United States or in Japan.

What, then, can the world trade system—and the legal mechanism for its regulation—do to adjust to the internationalization of world commerce?

Some reforms of the GATT system are on the table for the Uruguay Round,³⁹ but longer range concepts to build political support for limiting unfair practices in individual countries should be considered. The following are some examples of options which could be discussed. They represent sharp departures from the path we have been following.

First, in the subsidy/countervail area, if country A imposes a countervailing duty on a subsidy of country B, country B should be able to go to a GATT panel and demonstrate that country A is not in substantial compliance with the GATT subsidy code, even if

36. See Berger, *Productivity: Why It's the No. 1 Underachiever*, *BUS. WK.*, Apr. 20, 1987, at 54-55.

37. For a detailed analysis of flawed American industry practices and strategies examined in light of Japanese practices see J. BARANSON, *THE JAPANESE CHALLENGE TO U.S. INDUSTRY* (1981).

38. See Berger, *supra* note 36.

39. The Uruguay Round is a series of trade negotiations undertaken by officials from seventy-four countries and conducted under the auspices of the General Agreement on Tariffs and Trade (GATT). The goals of the Uruguay Round are to create better trade relationships around the world and to combat protectionist policies. See Koeppe, *A Launch for the Uruguay Round*, *TIME*, Sept. 29, 1986, at 55.

country A's subsidies are in another product line. If the GATT panel concludes that country A is not in compliance with the subsidy code, then country B would have the right to ask for compensation for country A's original countervailing duty action. In practice, if a GATT panel determines that country A was not in compliance with the subsidy codes and orders it to pay compensation to country B, country A will stop imposing the countervailing duty. Eventually, in both countries, industries which seek to eliminate subsidized foreign competition would insist on the elimination of subsidies at home.⁴⁰

A second, even more radical solution would eliminate antidumping and countervailing duty laws altogether. The European Community has adopted this policy between its member states. Canada and the United States could move in that direction in the United States-Canada Free Trade Pact.⁴¹ The truth is that the average U.S. businessperson cares little about prices of his foreign competitor in the foreign market or whether his foreign competition receives government aid. Instead, the U.S. businessperson is worried about prices and competition in the United States. Thus, the antidumping and countervailing duty laws have little foundation in the daily lives of the injured parties and often lead the parties down an expensive, time-consuming, and often unpredictable path. Because the Title VII laws are intended to exclude only *unfair* trade, the United States tends to label *all* trade which it excludes as unfair, merited or not. The United States might better promote its own interests and provoke less foreign resentment if it stopped wrapping itself in the flag of "fair trade."

A third reform would make the "fair" trade escape clause less burdensome for a country to utilize. It could also move away from the present fixation on the "unfair" nature of import problems. Like the first proposal, it would require a new GATT panel. This panel would examine adjustment plans for industries receiving escape clause relief. If the panel finds the adjustment plan adequate to resolve the problems which it was intended to address, then there would be no requirement for the country using import relief under the escape clause to compensate its affected trade partners. This would reward appropriate, efficient use of the escape clause.

40. The author wishes to acknowledge discussions with Peter Ehrenhaft on this topic.

41. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851.

Even if these more radical solutions are not explored at the GATT, the administration of U.S. trade law should no longer rely primarily on the "unfair trade" laws, which are beginning to lose their meaningful place in the globalized world of commerce. Instead, section 201—the escape clause⁴²—should be better utilized to provide industries and workers adjustment relief to changing trade patterns. Section 201 is an amalgam of the rule oriented and political approach. It provides import relief for industries adjusting to new international competition even where there is no allegation of unfairness.

There is much the United States can do in administering section 201 to create an effective policy for adjustment to import competition. The United States must act to insure that new public investments assist industries in earning lasting returns. Aid to distressed industries must follow from a comprehensive analysis of the competitive challenge. Finally, the government must condition its action on the cooperative efforts of all who gain from its help, all who can contribute to an industry's viability in the new international environment.

In sum, the United States needs to move away from its fixation on "unfair" imports as a problem and on import relief as the sole solution. Instead, it should use a more appropriate test to trigger assistance—an assessment of an industry's ability to compete in the international market. The 1988 Omnibus Trade and Competitiveness Act moves in this direction.

V. SECTION 301 AND FOREIGN MARKETS

As the dollar declined from its 1985 heights and U.S. firms consequently became more price competitive, changes in the 1988 Trade Act reflected U.S. policy which was focusing less on the fairness of imports sold in its domestic market, and more on the fairness of access for its exports in foreign markets.⁴³ The "super 301"

42. Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011-14 (codified as amended at 19 U.S.C.A. § 2252 (West Supp. 1989)). Section 201 allows domestic industries to petition for import relief in order to make them more competitive or allow them to effect an orderly transfer of resources to more productive pursuits. Such relief is predicated on the petitioner passing a three-part test. First, there must be a showing that competitive imports have increased. Second, the petitioner must show that the domestic industry has been seriously injured or is threatened with serious injury. Finally, the petitioner must show that those competing imports are a substantial cause of the injury.

43. See, e.g., Neff, Magnusson & Holstein, *Rethinking Japan*, Bus. Wk., Aug. 7, 1989,

provision in the new trade bill, for example, has stimulated more Section 301 complaints.⁴⁴

Section 301 underscores three major themes in the Omnibus Trade and Competitiveness Act: first, Congress's desire to battle *unfair* trade practices overseas; second, its desire to shift the focus of U.S. trade policy away from deference to diplomatic considerations and, consequently, away from complete Presidential discretion; and, third, its desire to push for export opportunities. Complaints can no longer languish on the President's desk. In fact, the President's authority to make legal determinations and to decide what is the course of action under Section 301 is transferred to his U.S. Trade Representative (USTR).⁴⁵ New requirements on the USTR to identify and pursue trade liberalization priorities with specific "priority foreign countries,"⁴⁶ new deadlines for initiating cases,⁴⁷ reduced time limits on the USTR's negotiations with trading partners⁴⁸ and mandated retaliation (with some provisos) against international legal rights of the United States⁴⁹ are all stimulating the filing of more complaints with the USTR. The strengthened 301 is prompting greater Congressional monitoring⁵⁰

at 50; Sanger, *Negotiations Are Rejected by Japanese*, N.Y. Times, May 27, 1989, at 31, col. 1.

44. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (codified as amended at 19 U.S.C.A. § 2411 (West Supp. 1989)). Under the "super 301," the United States Trade Representative, appointed by the President, is required to determine whether foreign countries are employing discriminatory or unfair trade barriers which effectively limit the access of American industries to those foreign markets. Once the Trade Representative has identified the countries, the Trade Representative will attempt to negotiate agreements which will provide for a reduction of the practices, elimination of the practices or compensation for the ill-effects of the foreign discriminatory practices on domestic industries. 19 U.S.C.A. § 2420(c) (West Supp. 1989). If negotiations fail, the Trade Representative is empowered to impose duties or other import restrictions on the goods or services exported into the United States from those countries. 19 U.S.C.A. § 2411(c) (West Supp. 1989).

45. 19 U.S.C.A. § 2411 (West Supp. 1989). Carla Hills is the current United States Trade Representative. She evaluates petitions filed by the interested parties, initiates investigations and identifies countries that have erected unfair barriers against American exports. She also negotiates with representatives of those countries, seeking greater access for American exports. If these negotiations fail, she in some cases, must, in other cases, may retaliate against the offending countries by limiting their access to the lucrative American market. Her power to take such action is subject to the specific direction, if any, of the President.

46. 19 U.S.C.A. § 2420(a)(1)(B) (West Supp. 1989).

47. 19 U.S.C.A. § 2412(a), (b) (West Supp. 1989).

48. 19 U.S.C.A. § 2413(a) (West Supp. 1989).

49. 19 U.S.C.A. § 2411(a)(1) (West Supp. 1989).

50. See 19 U.S.C.A. § 2419(3) (West Supp. 1989). This subsection requires the Trade Representative to submit reports, semi-annually, to the House of Representatives and the Senate describing the status of petitions filed, any action taken by the Trade Representative, and the commercial effects of action taken under Section 301.

and is forcing market access issues onto the United States agenda with many of its most important trading partners.

VI. REGULATING FOREIGN INVESTMENT IN THE UNITED STATES

Meanwhile, interest in import barriers against goods—whether they are erected at home or overseas—is giving way to interest in barriers to capital. This trend will continue as long as foreigners continue to hold American dollars and as long as American assets remain attractively priced in depreciated dollar terms. Foreign investment will remain a source of trade disputes as long as Americans watch foreigners buy assets in the United States while the foreigners's own domestic markets restrict similar foreign investment.⁵¹

Foreign investments of all kinds in the United States total \$1.5 trillion.⁵² That sounds like an intimidating figure; but, it needs to be broken down. All but \$200 billion has come since 1974.⁵³ Eighty percent of the total is passive, held in government securities or as a portfolio investment in common stocks and other long-term holdings.⁵⁴ And a great deal of this—about \$290 billion—is the financing that temporarily covers our national debt.⁵⁵ Our deficits are being met today with savings from abroad, savings Americans will have to repay in the future, with interest.

Meanwhile, foreign control is limited to under five percent of U.S. assets, and Japanese control is only sixteen percent of that total.⁵⁶ But direct foreign investment, whether for majority ownership or minority influence, has the nationalist bells sounding. The echo of those bells is found in the figure of a startlingly high percentage of Americans who favor curbs on foreign investment in the United States. A recent survey found that a vast majority of Americans favor limits on this investment from overseas.⁵⁷ Obviously, many Americans fear losing control of the nation's economy and destiny.

51. See Neff, Magnusson & Holstein, *supra* note 43, at 47.

52. Scholl, *The International Investment Position of the United States in 1988*, SURV. CURRENT BUS., June 1989, at 41, 43.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Buy America While Stocks Last*, ECONOMIST, Dec. 16, 1989, at 63.

57. See Baer, *Anxiety in America's Heartland*, U.S. NEWS & WORLD REP., Apr. 25, 1988, at 24.

Restrictions on foreign investment in the United States are now seriously under consideration. In fact, the 1988 trade bill assigned new responsibilities to the Defense Department as watchdog over foreign acquisitions of U.S. firms.⁵⁸ The Exon-Florio amendment (Section 5021) grants the President new authority to review certain mergers, acquisitions and takeovers of U.S. firms on national security grounds.⁵⁹ The Defense Department has the power to trigger an investigation of foreign takeovers in the name of national security. The President has final say in blocking any deal. Just before President Reagan left office, he delegated his authority to an inter-agency Committee on Foreign Investment in the United States ("CFIUS").⁶⁰

Secretary Brady of the Treasury Department chairs the committee. In February 1989, the first Exon-Florio decision reached the committee, but President Bush declined to stop the takeover of Monsanto Electric Materials by a West German company.⁶¹ Subsequently, in the fall of 1989, one proposed Japanese takeover of a New Jersey ceramic firm was modified as a consequence of CFIUS's recommendation that it be blocked. At this writing, there are nine other cases that have reached the cabinet-level committee, awaiting final decision.

So far the amendment has had an unexpected consequence. U.S. companies and even some foreign companies are rushing to the Pentagon to shield or promote proposed mergers. As former Deputy Undersecretary Robert McCormack said recently, "We could become the ultimate takeover defense."

Congress is taking a keen interest in the actions of the CFIUS and its implementation of Section 5021. There is growing concern in Congress over the rising volume of foreign investment in the United States. This rests on not only desires to protect national security, but also on fears that the U.S. high technology infrastructure is jeopardized by foreign acquisitions in certain "strategic" sectors such as microelectronics.

Cutting the flow of investment or globalization of capital flows,

58. See H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 1960 (1988).

59. Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26.

60. See Exec. Order No. 12,661, 54 Fed. Reg. 779 (1988) (amending Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975)).

61. See Robertson, *Monsanto Sale To Get U.S. O.K.: No Threat Seen Despite Opposition by Industry*, ELECTRONIC NEWS, Jan. 23, 1989, at 1.

however, would only signal to our trading partners—who up to now have taken our dollars in exchange for their goods—that those dollars won't have the buying power they thought. This would have catastrophic consequences for their willingness to trade—or invest—with the United States in the future. The consequences in the world trading system would be disastrous—not to mention what it would mean for our efforts to sustain a budget deficit without foreign financing.

VII. CONCLUSION

The United States must come to terms with its trading partners' rise to economic and technological parity with it. It must come to grips with the fact that our political allies across the Atlantic and Pacific are also some of our fiercest commercial competitors. The United States must both treat these allies with increased respect in line with their newfound economic stature, and rethink its policies if it hopes to recapture global competitiveness. In turn, in order to rebuff accusations of unfair trade practices, our allies must adapt their economic and trade policies to correspond to an enhanced role in the Western alliance. Meanwhile, in order to continue prospering through increasing trade and to avoid the irritants which flow from our different notions of fairness, trade professionals must redouble their efforts to keep open the highways of commerce by facilitating a better understanding of the rules of the road.