

HOW TO AVOID AIRBUS II: A PRIMER FOR DOMESTIC INDUSTRY

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INTRODUCTION

Recently, the threat of European Community ("EC") high technology¹ international consortiums ("consortia")² that produce fully assembled products,³ have become a concern for the United States. It is not the actual formation of EC consortia that are the cause for alarm, but that they will often be subsidized by EC member state governments⁴ as demonstrated by Airbus Industrie ("Airbus").⁵

To date Airbus is the primary EC subsidized consortia that concerns the U.S and its domestic industries. However, this is bound to change as EC member states enter into closer economic and political collaboration with one another in an effort to gain international market share.⁶

There are three other primary reasons why EC subsidized consortia in high-tech industries are likely to be formed. The first involves the French law under which Airbus was created. French law has crafted a special form of partnership, a *Groupement d'Interet Economique*, which is conducive to the formation of EC consortia.⁷ A legal entity formed under this law is not

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1. This article is concerned with high-tech EC consortia because of the large sums of money that are necessary to start-up and run such industries.

2. For the purposes of this article, international consortia are defined as commercial enterprises whose members are companies of different states and their respective governments who are signatories of political and economic support agreements.

3. As opposed to component parts.

4. This article presumes that the entire EC will not be involved with a consortia, but only several member states. Hence, the term EC denotes that these consortia consist of only several EC member state governments.

5. Richard W. Stevenson, *Will Aerospace be the Next Casualty*, N.Y. TIMES, Mar. 15, 1992, § 3, at 1, 6. See *Making Air Waves—Turbulence—Tensions Rise as Trade Talks Approach with Subsidized Airbus*, SEATTLE TIMES, Sept. 20, 1990, at B1 [hereinafter *Making Air Waves*]; see also *Outside Chance of Senate Trade Bill Passage by Independence Day Recess*, 4 Int'l Trade Rep. (BNA) 838 (July 1, 1987). Presently, there other subsidized EC consortia that may fit this description: European Arianespace, Eureka Electronics and Jessi Semi-Conductors.

6. See, e.g., Richard Wright, *Comment on "The World Trading System After the Uruguay Round"*, 8 B.U. INT'L L.J. 287, 288 (1990).

7. Gellman Research Associates, *An Economic and Financial Review of Airbus Industrie*, at 1-2 (Sept. 4, 1990) [hereinafter Gellman] (on file at California Western International Law Journal).

required to report financial results,⁸ thereby protecting subsidies given to the consortia by member state governments from public scrutiny.

Secondly, since participation costs are expensive in high-tech industries, many of these EC consortia will only be able to start-up and remain competitive through member state government infusions of monies granted or loaned at non-commercial rates.⁹ Therefore, subsidization will likely exist through a portion of the consortia's lifetime.

The last reason why there may be a surge in the formation of subsidized EC consortia is that there are several immeasurable non-monetary benefits the member state governments and the EC receive. These include: spill over effects into other industries; national prestige; and support for other domestic and foreign policy objectives.¹⁰ Therefore, the cost of subsidizing the consortia may be offset by non-monetary benefits accruing to the member state governments. This rationale has been attributed as a reason for the long-term subsidies that Airbus' member state governments have contributed to the consortia.¹¹

Since EC subsidized consortia are likely to increase as an economic threat to U.S. industry, it is important that the U.S. prepare to meet their challenge. This article will examine how the U.S. handled the Airbus threat in the forum of the General Agreement on Tariffs and Trade ("GATT") and why that was and is an ineffective forum to protect U.S. high-tech industries. Secondly, the recent agreement reached between the U.S. and the EC over Airbus subsidization will be explored, including its problems and justifications. Next, this article will examine several benefits that U.S. domestic industry competing against a subsidized EC consortia can gain by taking action under the U.S. countervailing duty law and Section 301 of the U.S. Trade Act of 1974. These were unavailable in the GATT actions against Airbus. Finally, this article will look at whether the benefits achieved by the U.S. unfair trade laws outweigh their negative aspects for U.S. high-tech industry in fighting a subsidized EC consortia.

I. AIRBUS: A CASE STUDY

"Anyone who thinks there is going to be a winner in a trade war of this kind is drinking some very strange beverage."¹²

Airbus is an international consortium consisting of four EC member state government sponsored aircraft manufacturers, the Deutsche Airbus unit of

8. *Id.*

9. See Guy De Jonquieres, *A New Landscape Takes Shape*, THE FIN. TIMES, Jan. 11, 1989, at 20.

10. Gellman, *supra* note 7, at 1-10.

11. *Id.*

12. Steven Dryden, *Jet Makers Inch Toward World Trade Market: U.S. Industry Opposes European Competitor's Subsidies*, Nov. 29, 1991, THE RECORDER, at 1 (quoting Alan Boyd).

Germany's Daimler-Benz AG, Britain's British Aerospace PLC, France's Aerospatiale and Spain's Casa.¹³ Airbus, (formed in 1968), was "designed to catapult Europe into the commercial aviation business that the U.S. had dominated since World War II."¹⁴ It has accomplished this mission, but only with large member state government subsidization.¹⁵

The governments of the member companies are signatories of agreements among themselves that guarantee political and financial support for Airbus programs.¹⁶ Furthermore, as evidenced by the negotiating stance of Airbus in GATT recently, it unsurprisingly has the support of the EC.¹⁷ This will not be an unprecedented alliance in EC consortia, as the EC seeks to expand its economic success and prestige in high-tech areas that it only recently has begun exploiting.¹⁸

Airbus is now a peculiar EC success story. As of December 31, 1990 it had delivered 652 new aircraft¹⁹ and its "share of commercial aircraft orders has almost quadrupled in the past decade, from 7 percent in 1980 to 27 percent [in 1989]—close to the consortium target of gaining a 30 percent market share by the mid-1990s."²⁰ During the same time period, the market share of U.S. manufacturers declined from eighty-seven percent in 1980 to sixty-four percent in 1989.²¹

Airbus' gain in market share caused the two U.S. civil aircraft manufacturers, Boeing Co. ("Boeing") and McDonnell Douglas ("McAir"), to lose a substantial amount of sales.²² These manufacturers and the U.S.

13. *McDonnell Douglas Asks U.S. to Broaden Airbus Subsidy Charges*, REUTER BUSINESS REPORT, May 15, 1991 available in LEXIS, Nexis Library, Curmt File; see *U.S. Weighs Trade Charges Against Airbus*, CHI. TRIB., May 8, 1991, at C3.

14. See Stuart Auerbach, *Turbulence Ahead for the Airbus Talks; Bush Administration Threatens Trade Complaint if Subsidy Issue Isn't Settled by Sept. 30*, WASH. POST, Sept. 16, 1990, at H1; see also *Making Air Waves*, supra note 5, at B1; *Monthly Import/Business Review 1991* ITC LEXIS 1241, Dec. 1991, available in LEXIS, ITRADE Library.

15. See generally Gellman, supra note 7 (discussing the subsidization of Airbus and its effects on the civil aircraft industry).

16. Gellman, supra note 7, at ES-1. Each of the Airbus company members is a diversified aerospace manufacturer that serves the civil and military markets. *Id.* at 1-8. Airbus member companies have agreed not to undertake programs that are competitive to Airbus programs either by themselves or in partnership with other non-Airbus companies. *Id.* at 5-1.

17. See *Airbus Consortium Countries Pledge to Negotiate with U.S. in GATT Framework*, 8 Int'l Trade Rep. (BNA) 978 (June 26, 1991); *Airbus Allegations that U.S. Firms Receive Subsidies are Diversion Attempts*, USTR Says, 6 Int'l Trade Rep. (BNA) 532 (Apr. 13, 1988).

18. For example, a similar alliance has occurred with Arianespace.

19. *Monthly Import/Business Review*, supra note 14, at 1241.

20. Auerbach, supra note 14, at H1.

21. *Id.*

22. For example, McAir has decreased dramatically its production rate for its MD-11 civil aircraft, at least in part because of foreign competition. See Bruce Smith, *MD-11 Production Hit by Industry Slump*, AVIATION WK. & SPACE TECH., Oct. 26, 1992, at 18; Anthony L. Velocci, Jr. *U.S. Aerospace Firms Seek Greater Government Support*, AVIATION WK. & SPACE TECH., Aug. 24, 1992, at 33; See also *Making Air Waves*, supra note 5, at B1. The potential for lost sales is still growing. See *Now, Airbus is Cruising Comfortably*, BUS. WK. July 27, 1992, at 33.

alleged that the reason for Airbus' "commercial" success was that it utilized large government subsidies from its member state governments, equaling US\$13.5 billion.²³ If interest is calculated at the approximate commercial rate for borrowing in Europe, the total level of subsidization would rise to approximately US\$26 billion.²⁴

Adding insult to injury to the U.S. and its civil aircraft industry is that Airbus has never made a profit on the sale of its aircraft.²⁵ Airbus programs, whether taken individually or as a group, have not achieved commercial viability.²⁶ All Airbus programs have had a negative net present value when cash flows are discounted at an average rate of 8.7% per year, which reflects the rate of commercial borrowing costs in Europe.²⁷

If member state governments are repaid, neither they nor Airbus would receive a positive net present value from their participation in Airbus programs.²⁸ For member state governments this means that even if repayment was made, it would not be sufficient to provide an 8.7% real return on their investments.²⁹ For Airbus, repayment would only worsen its financial picture leading to reduced company nominal cash flow and it is unlikely that consortium would be able to repay the governmental funds advanced for many of its aircraft programs.³⁰

A. Basic Views of Industry on the Airbus Threat

"It can be concluded that [Airbus] was able to enter and remain in the commercial aircraft industry only through substantial amounts of government support."³¹

The positions taken by Boeing, the world civil aircraft market leader, and McAir, who has been pushed out of the number two spot in the industry by its EC competitor,³² against Airbus subsidization typify the position that similarly situated high-tech industries would probably take. As with most high-tech manufacturers, Boeing and McAir perceive their future commercial

23. Gellman, *supra* note 7, at 2-3.

24. *Id.*

25. *Making Air Waves*, *supra* note 5, at B1.

26. Gellman, *supra* note 7, at 4-3 to 4-8. ("Commercial viability" is defined as what a "private-sector firm would be willing to invest in a project; that is, expected revenues exceed all costs, including repayment of government supports, by an amount sufficient to defray the cost of funds employed.") *Id.* at 4-3.

27. Gellman, *supra* note 7, at ES-1; see *Making Air Waves*, *supra* note 5, at B1.

28. Gellman, *supra* note 7, at 4-6.

29. *Id.*

30. *Id.*

31. Gellman, *supra* note 7, at 2-13.

32. Dryden, *supra* note 12, at 1.

success in their access to global markets.³³ However, they feared that Airbus, because of its subsidization and political and economic ties, would eventually make it extremely difficult for them to sell their products on a competitive basis in the U.S. and foreign markets.

Their fear of limited access to foreign markets was justified by the political and economic ties that this EC consortia has in Western Europe. Not only are the Airbus member state governments tied by political and economic agreements via the consortium, but they have economic and political ties to the rest of Western Europe through the Treaty of Rome and the European Free Trade Association.³⁴ This political and economic cohesion will increase in intensity as more nations gain associated and permanent status in the EC.³⁵ Because of these ties, the Airbus member states and many European nations may purchase Airbus aircraft, rather than U.S. aircraft, to demonstrate their support to Europe.³⁶

Boeing and McAir's fear of the economic effect of Airbus subsidization is not unfounded in light of the civil aircraft marketplace, which is limited to the sale of only several hundred aircraft per year worldwide.³⁷ Given this limited number of sales, very few civil aircraft manufacturers sell enough aircraft to take advantage of declining production costs and to cover their sunk costs.³⁸ A similar market situation exists in most high-tech industries which effectively limits the number of entrants and the number of manufacturers who can remain commercially viable in a given high-tech industrial sector.

This market scenario originally allowed Boeing and McAir to become world leaders in the civil aircraft industry. However, due to EC consortia subsidization,³⁹ Airbus has been able to threaten the U.S. civil aviation industry's economic position because its start-up costs and losses were supported and covered primarily by funds received from member state governments.⁴⁰

Additionally, unlike Airbus, U.S. civil aircraft manufacturers must bear the full market risk for the development and production of new civil aircraft.⁴¹ This limits the U.S. civil aircraft industries' profit margins and ability to invest in new technologies for future competition. Airbus, through

33. *Id.*; Michael Borrus & Judith Goldstein, *Symposium: The Political Economy of International Trade Law and Policy: United States Trade Protectionism: Institutions, Norms, and Practices*, 8 J. INT'L L. BUS. 328, 332 (Fall, 1987).

34. See Robert Z. Lawrence & Robert E. Litan, *The World Trading System After the Uruguay Round*, 8 B.U. INT'L L.J. 247, 256 (1990).

35. See *id.*

36. See *id.*; Gellman, *supra* note 7, at A-6.

37. Gellman, *supra* note 7, at 5-1.

38. *Id.*

39. *Id.*

40. See generally Gellman, *supra* note 7, ch. 2. This will also be the case with other EC high-tech consortia that compete with U.S. high-tech industry.

41. See generally Gellman, *supra* note 7, ch. 5.

government subsidies, does not have to bear these risks.⁴² Therefore, the U.S. civil aircraft industry has been imminently threatened with material economic injury from the consortia because of its subsidization.

B. *Subsidies Given to Airbus*

One interesting avenue that EC consortia take and will continue to take, as demonstrated by Airbus, is that subsidies do not directly flow from member state governments to the consortia, but instead run from member state governments to the member companies of the consortium.⁴³ The member state governments transfer these monies to the consortia members in various forms.⁴⁴

These subsidies include, but are not limited to: development and launch grants for programs; funding of research programs for development intended to support the consortium and its programs; equity infusions and loans; and exchange-rate guarantees.⁴⁵ In future high-tech EC consortia, as with Airbus, only a nominal amount of these funds will be repaid to member state governments. Additionally, those funds that are repaid might not be repaid at a commercial rate of return.⁴⁶ EC high-tech consortia that compete with U.S. industry are likely to receive similar types of subsidies as those received by Airbus.

C. *Actions to Date*

Despite the past injury and the threat of material injury facing Boeing and McAir with each aircraft Airbus sold, there was surprisingly little action taken by the U.S. to protect its domestic industry.

In 1984, the U.S. began negotiations with the EC to limit and eventually eliminate subsidies paid to Airbus.⁴⁷ This process lingered on for years with U.S. accusations of domestic subsidies paid to the consortium by its member state governments.⁴⁸

Meanwhile, the U.S. civil aircraft industry sat quietly on the sidelines watching Airbus displace McAir from its number two position in the

42. 1991 National Trade Estimate Report on Foreign Trade Barriers, Office of the United States Trade Representative, at 78 (1991).

43. See generally Gellman, *supra* note 7, ch. 2.

44. E.g., loans and research and development grants.

45. Airbus has also received various other subsidies. See generally Gellman, *supra* note 7, ch. 2 (not every member state government has given each type of subsidy).

46. See Gellman, *supra* note 7, at 1-12.

47. *Hearing of the Technology and National Security Subcommittee of the Joint Economic Committee—Foreign Investment in Aviation*, Federal News Service, Feb. 27, 1992 available in LEXIS, Nexis, Curmt File.

48. *Id.*

industry. Even then, the U.S. government and the domestic civil aircraft industry did nothing more than continue its informal negotiations.⁴⁹

The United States' position of inaction did not change until it discovered an export subsidy granted to Airbus by the German government in the form of an exchange-rate guarantee program.⁵⁰ The U.S. quickly brought an action against Germany to GATT for resolution over Germany's granting of an export subsidy to the German Airbus partner.⁵¹ Only after this event did the U.S. take the initiative to file an action for Consultation in GATT against Airbus' domestic subsidization.⁵² While the earlier action apparently was resolved, the latter action sat, a victim of international politics.⁵³

Finally, on April 1, 1992, a "tentative agreement" was announced between the U.S. and the EC on EC and U.S. domestic subsidization limits to the civil aircraft sector in general, and EC subsidization limits to Airbus in particular.⁵⁴ It was officially signed on July 17, 1992 thus presumably ending the latter GATT action and closing the Airbus subsidization issue.⁵⁵

Interestingly, barely a week went by over the past eight years of talks where the U.S. domestic industry did not vocally complain about Airbus and its unfair encroachment in the civil aircraft market. However, the U.S. civil aviation industry did not take any official action itself. This author urges that future U.S. high-tech industries facing a subsidized EC consortia refrain from Boeing's and McAir's misguided ways, and instead fight the consortia under the U.S. unfair trade laws.⁵⁶

49. See, e.g., 54 Fed. Reg. 24438 (June 7, 1989) (the U.S. refused to act officially (under Super 301) against domestic subsidies provided to Airbus since it felt that bilateral and multilateral negotiations were the appropriate forum).

50. One possible reason the U.S. may have pursued this action is because export subsidies have in the past been primarily applied on agricultural, not industrial products. Therefore, the U.S. may have been trying to stop industrial export subsidies from gaining a foothold in the realm of acceptability in international trade. See, e.g., KENNETH W. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* 266 (1970).

51. Michael Harrison, *GATT Rules Against Europe in Airbus Subsidy Row*, *THE INDEPENDENT*, Jan. 16, 1992, at 24.

52. *GATT Subsidies Committee Agrees to Hear U.S. Complaint Against EC Airbus Funding*, 8 Int'l Trade Rep. (BNA) 579 (Apr. 17, 1991).

53. See *id.* The U.S.-German GATT action only appeared to be resolved because the EC rejected the decision. *EC Rejects Panel on Airbus Exchange Rates, Germany Suspends Arrangement*, *INSIDE U.S. TRADE*, May 1, 1992, at 10.

54. *U.S., EC Reach "Tentative" Agreement on Curbing Civil Aviation Subsidies*, Int'l Business Daily (BNA) (Apr. 2, 1992) available in LEXIS, Nexis Library, Curmnt File.

A possible reason that the Airbus domestic subsidy issue was resolved was that the Congress had become extremely nervous about the proposed McAir-Taiwan joint venture, which McAir claims is necessary for it to afford to build future aircraft that will keep it competitive in the world marketplace. *Hearing of the Technology and National Security Subcommittee of the Joint Economic Committee-Foreign Investment in Aviation*, *supra* note 47 (Congress feared that such a joint venture could lead to the creation of a Taiwanese Airbus).

55. *Agreement Concerning the Application of the GATT Agreement on Trade in Civil Aircraft*, available at Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506 [hereinafter *Civil Aircraft Agreement*].

56. See *infra* Section IV.

II. CHARGES AGAINST AIRBUS INDUSTRIE IN GATT

The actions that have been brought in GATT against Airbus demonstrate the legal uncertainty, the tactic of delay and the political implications of using GATT as a forum to combat a subsidized EC consortia. These problems were compounded since the U.S. government initiated these GATT actions on its own accord, without the use of a U.S. statutory basis,⁵⁷ such as Section 301 of the 1974 Trade Act, which delineates time limits and actions the government must take in GATT. Accordingly, the Executive Branch has had utmost control over the pace and direction of these actions.

A. GATT and Subsidies

GATT is a multilateral agreement that governs most aspects of international trade.⁵⁸ It also provides a forum for multilateral trade negotiations and dispute resolution among its Signatories.⁵⁹ Article VI of GATT authorizes importing member countries to impose countervailing duties on imported goods to offset subsidies that "cause or threaten material injury to an established domestic industry. . ."⁶⁰

Article VI was expanded in 1980 to "reduce or eliminate the trade restricting or distorting effects of non-tariff measures."⁶¹ Hence, the GATT Subsidies Code was established as the governing international legal regime relating to subsidies.⁶² The U.S. and the EC member states are parties to GATT and the Subsidies Code.⁶³

The Subsidies Code differentiates between the use of "export subsidies" which are linked directly to export activity, and "domestic subsidies."⁶⁴ The Subsidies Code further distinguishes between subsidies paid on

57. This was problematic for U.S. industry since the U.S. government had control over the pace and the course of the GATT action. See *infra* Section IIID.

58. Operation of the Trade Agreements Program, 42nd Report 1990, U.S. ITC Publication 2403 (July 1991).

59. *Id.* There are 108 signatories to GATT. See Keith Bradsher, *Progress in Trade Talks with Europe*, N.Y. TIMES, Nov. 3, 1992, at D1.

60. Theodore W. Kassinger, *Regulation of International Trade Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (GATT Subsidies Code)*, 1 B.D.I.E.L. 79 (Nov. 1989); see William Lay, *Redefining Actionable "Subsidies" Under U.S. Countervailing Duty Law*, 91 COLUM. L. REV. 1495, 1496 (1991); Kenneth W. Abbott, *Regulation of International Trade The General Agreement on Tariffs and Trade*, 1 B.D.I.E.L. 3 (Nov. 1989).

61. Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 1186 U.N.T.S. 204 Preamble [hereinafter Subsidies Code].

62. THOMAS J. SCHEONBAUM, *ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT: AN EVALUATION AND A PROPOSAL FOR A UNIFIED REMEDY FOR UNFAIR INTERNATIONAL TRADE 16* (Dean Rusk Center Monograph 1987).

63. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, 55 U.N.T.S. 194 [hereinafter GATT].

64. SCHEONBAUM, *supra* note 62, at 16-17.

“primary” products and on nonprimary or industrial products.⁶⁵ This portion of the article examines export and domestic subsidies paid on nonprimary industrial products in GATT focusing upon such monies paid to Airbus from member state governments. However, similar government subsidies will also be a concern for other U.S. high-tech industries that are facing a subsidized EC consortia.

B. GATT and Export Subsidies

The U.S. government brought an action in GATT in February of 1991 against the German government in the context of privatizing Messerschmidt-Boelkow-Blohm (“MBB”) and its wholly owned subsidiary, Deutsche Airbus, an Airbus partner.⁶⁶ The privatization of MBB through a Daimler-Benz-MBB merger was made conditional on the (West) German government’s ability to cover the financial risks of current and future Airbus projects.⁶⁷ One element of the government support plan was an exchange-rate-guarantee scheme covering Airbus aircraft sales until the year 2000, which took the form of an exchange credit insurance program.⁶⁸ Since 1989, the German government used this program to offset adverse exchange-rate fluctuations between the Deutschemark, in which production costs were incurred, and the U.S. dollar, the currency of the civil aviation market.⁶⁹ Because this payment arrangement allowed MBB to pay low premiums back to the German government, it gave MBB more coverage against currency fluctuations than, for instance, if it was self-insured.⁷⁰

1. The Action⁷¹

Export subsidies are prohibited on nonprimary products under the Subsidies Code.⁷² Therefore, if a GATT Signatory finds that another

65. Subsidies Code, *supra* note 61, arts. 9 and 10. Primary products are defined as “any product of farm, forest or fishery.” GATT, Art. XVII(B)(1); *see* Subsidies Code, *supra* note 61, art. 9. By implication, nonprimary products include all other items for purposes of the Subsidies Code.

66. Operation of the Trade Agreement Program, 41st Report, 1989, U.S. ITC Publication 2317, 96-97 (Sept. 1990).

67. *Id.*

68. *Id.*

69. Harrison, *supra* note 51, at 24.

70. Telephone conversation with Dr. Maurice R. Manner, Professor of Business and Economics at Marymount College, Tarrytown, New York, on March 1, 1992.

71. While the arguments submitted by the Parties and the final decision of the GATT Dispute Resolution Panel remain confidential, some facts are available through news reports and certain assumptions can be made.

72. Subsidies Code, *supra* note 61, art. 9; Material injury to an industry because of the export subsidy is also a requirement for an export subsidy to be found. Identification of “export subsidies” is defined by the Subsidies Code providing an illustrative list of subsidies. However, there is uncertainty over the list’s status as it was not adopted formally by the Signatories. *See*

Signatory has granted an export subsidy, they have the right to bring an action in GATT for Consultation.⁷³ If a mutually acceptable solution is not reached in thirty days, the Signatory may request Conciliation and ultimately move for Dispute Settlement.⁷⁴ This is the mechanism the U.S. utilized in bringing the German exchange-rate mechanism to Dispute Resolution in GATT.

The U.S. alleged in GATT that the German exchange-rate guarantee program was an export subsidy and was therefore inconsistent with the Subsidies Code.⁷⁵ The U.S. claimed that this export subsidy was worth US\$2.5 million on each Airbus aircraft delivered in 1990.⁷⁶ The wider U.S. complaint is that Airbus has received more than \$13.5 billion in subsidies.⁷⁷

In response Germany and the EC argued that the exchange-rate support scheme was necessary to enable the transfer of Deutsche Airbus from state control into the private sector.⁷⁸ This, they claimed, was consistent with the Subsidies Code.⁷⁹ The German defense was ultimately rejected.

A GATT disputes panel found, in a January 15, 1992 ruling, the exchange-rate guarantee given to the German Airbus partner breached international trade rules under the Subsidies Code.⁸⁰ Presumably, the violation that was found was the German government's exchange-rate guarantee program was an export subsidy under the Annex to the Subsidies Code, section (j). Section (j) lists insurance programs for exchange rates that are used to guard against "increases in the costs . . . of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the

Robert E. Hudec, *Reforming GATT Adjudication Procedures: the Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1452 (1988) [hereinafter Hudec, *Reforming GATT*] (despite the requirement of bi-level pricing in Article 16(4), by adopting the Subsidies Code and stating in art. 9(1) that "Signatories shall not grant export subsidies on products other than certain primary products" GATT did away with the bi-level pricing requirement) (citations omitted); *id.* at 1473-81 (bilateral pricing held in a round-about-way not to be a viable defense for an export subsidy in the DISC case, since it must have happened in a few cases and because interest free-deferral of tax liability was part of the Illustrative List of export subsidies, it was presumed to have occurred); *id.* at 1474-81 (legislative history to GATT indicates that export subsidies were to be prohibited outright).

73. Subsidies Code, *supra* note 61, art. 12.

74. Subsidies Code, *supra* note 61, art. 17 and 18.

75. *Id.*; see *GATT Subsidies Committee Agrees to Hear U.S. Complaint Against EC Airbus Funding*, *supra* note 52, at 579. Presumably, the U.S. also argued that its domestic industry was materially injured or threatened with material injury because of the exchange-rate guarantee program.

76. Harrison, *supra* note 51, at 24.

77. *Id.*

78. Paul Betts, *Dispute over Subsidy for Airbus Intensifies*, FIN. TIMES, Jan. 16, 1992, at 6.

79. *Id.*

80. McDonnell Douglas Asks U.S. to Broaden Airbus Subsidy Charge, *supra* note 13; Harrison, *supra* note 51, at 24; Betts *supra* note 78, at 6.

long-term operating costs and losses of the programmes” as an example of an export subsidy that is inconsistent with GATT.⁸¹

2. Success or Failure

Despite the success of the U.S. in its action over the German exchange-rate guarantee in GATT, there was a negative aspect to this decision—its effectiveness.⁸² This decision was ineffective because the adoption of the ruling⁸³ in the GATT Council was blocked by the EC.⁸⁴ This tactic used by the EC is likely to reoccur in future actions against EC consortia because it was an effective way for the consortia to retain the benefit of the subsidy without being found in violation of GATT.

The probable reason why the EC blocked the GATT decision is strategic: it served to lessen the effect of action taken against it if it lost on the second U.S. GATT complaint concerning the overall level of member state government subsidies given to Airbus.⁸⁵ Therefore, despite the Panel decision in this action, the U.S. civil aircraft industry was possibly left in the same place that it started—competing against a consortia that receives large export subsidies.⁸⁶ Fortunately for the U.S. civil aircraft industry, the EC Commission approved an agreement with the U.S. in July of 1992 that will end the German exchange rate subsidies.⁸⁷ Such an agreement, however, is not guaranteed in future actions.

81. Subsidies Code, *supra* note 61, at annex. As of the date of the publication of this article, the GATT panel ruling originally rendered against Germany was not released, therefore this author is not certain that the German government was found to have violated Section (j) of the Annex to the Subsidies Code.

82. Another negative aspect to this decision, namely the lack of an enforcement mechanism in GATT, will be discussed in Section II(C)(1).

83. Export subsidies were not covered in the “tentative agreement” between the EC and the U.S. reached on April 1, 1992. *U.S., EC Reach “Tentative” Agreement on Curbing Civil Aviation Subsidies*, *supra* note 54.

84. *EC Rejects Panel on Airbus Exchange Rates, Germany Suspends Arrangement*, *INSIDE U.S. TRADE*, May 1, 1992, at 10; see Harrison, *supra* note 51, at 24 (the EC has hinted that it may object to the ruling arguing that aircraft manufacturers should be governed by the GATT Civil Aircraft Code, not the Subsidies Code); see also Betts, *supra* note 78, at 6; Hudec, *Reforming GATT*, *supra* note 72, at 1489-90 (the panel only makes recommendations that are then forwarded to the GATT signatories or the GATT Council, which alone have the right to make authoritative rulings). *But see Panel Decides German Payments to Airbus Consortium Contravene GATT, Sources Say*, *Int'l Trade Daily (BNA)* (Jan. 17, 1992) (“GATT officials said they did not expect the EC to challenge the ruling.”)

85. Harrison, *supra* note 51, at 24.

86. The tentative agreement over civil aircraft subsidization between the U.S. and the EC neglects to mention export subsidies.

87. Michael Mecham, *Germany Shifts Deutsche Airbus Shares as Part of Subsidy Trade Off*, *AVIATION WK. & SPACE TECH.*, July 20, 1992, at 25.

C. Airbus Domestic Member State Subsidies and GATT

1. The Second Complaint

Filed in May 1991, the second U.S. complaint covered all member state government domestic subsidies given to Airbus over the past twenty years.⁸⁸ It alleged that Airbus had received more than US\$13.5 billion in domestic subsidies from the governments of member states from 1968 to 1989. This equals as much as US\$26 billion because of easy repayment terms.⁸⁹ However, the complaint was not aggressively pursued by the U.S. in the context of GATT. This inaction was typical of the eight long years of negotiations over the domestic subsidization of Airbus.

a. Legal Reasons for Delay. There are several possible legal reasons for the U.S. failure to expeditiously pursue the action against Airbus domestic subsidization in GATT. The most likely rational is the ambivalence expressed in the Subsidies Code concerning domestic subsidies.⁹⁰ Under GATT, domestic subsidies are not per se prohibited.⁹¹ To the contrary, the Subsidies Code recognizes that domestic subsidies are "widely used as important instruments for the promotion of social and economic policy objectives and that it [GATT] does not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives . . . they consider desirable."⁹²

This ambivalence is compounded by GATT's unclear definition of the term "domestic subsidy."⁹³ Although the Subsidies Code enumerates various types of domestic subsidies in Article II, they are not expressly actionable.⁹⁴ The ambiguity over the definition of domestic subsidies stems from the Signatories' different conceptions regarding the proper role of government in the economy.⁹⁵ Because of the lack of a firm definition, i.e. the fact that the Subsidies Code only enumerates, but does not explicitly define domestic subsidies, successful U.S. GATT action against Airbus was uncertain.

There is another legal problem under GATT. Had the EC or the Airbus member state governments chose to block a Disputes Panel ruling against

88. *Deadlines Approach for Two GATT Airbus Complaints, Boeing Official Tells ABA*, 8 Int'l Trade Rep. (BNA) 1628 (Nov. 6, 1991).

89. Harrison, *supra* note 51, at 24; *Boeing Has no Comment on GATT Panel Report*, REUTERS, Jan. 15, 1992, available in LEXIS, Nexis Library, Currrnt File.

90. See Hudec, *Reforming GATT*, *supra* note 72, at 1449-50; Lay, *supra* note 60, at 1496.

91. Lay, *supra* note 60, at 1496.

92. Subsidies Code, *supra* note 61, art. 11(1). This includes, "to encourage research and development programmes, especially in the field of high-technology industries," an area that Airbus member state governments have contributed largely to. *Id.* art. 11(1)(d).

93. See Lay, *supra* note 60, at 1496-98 ("nowhere in the GATT is 'subsidy' defined.").

94. Subsidies Code, *supra* note 61, art. 11(3).

95. See Abbott, *supra* note 60, at 5.

Airbus, the subsidies paid to Airbus would not necessarily have ceased.⁹⁶ Even if a ruling against Airbus was agreed to by all of the GATT Signatories, there was still another problem, namely that GATT adjudication procedures are generally “governed by the practice of consensus decision making.”⁹⁷ This often leads to vague decisions that allow Signatories to take advantage of gaps in rulings because, for instance, the violating conduct is not completely prohibited or identified in the ruling.⁹⁸

Of perhaps greater importance, if a Signatory does not comply with a GATT decision, there is no true enforcement mechanism.⁹⁹ The Subsidies Code provides that if the Committee finds that a Signatory is bestowing subsidies in opposition to the Code, it will recommend the elimination of the subsidy.¹⁰⁰ Since this is only a “recommendation,”¹⁰¹ there is no legal requirement that the affected Signatory conform its behavior to a GATT decision. If the subsidy is still not eliminated, the Subsidies Code empowers the Committee to authorize appropriate countermeasures, including the withdrawal of GATT concessions or obligations.¹⁰² However, this is a drastic action for GATT,¹⁰³ and it could still fail to rectify the subsidization issue.¹⁰⁴ It could also endanger the existence of GATT itself.¹⁰⁵

b. Political Reasons for Delay. There are also political reasons for the inaction by the U.S. in GATT over the domestic subsidization of Airbus.¹⁰⁶

96. See Hudec, *Reforming GATT*, *supra* note 72, at 1484 (where Parties to a dispute blocked a decision on the territoriality principle of tax, this action limited what the definition of an export subsidy was under GATT).

97. Hudec, *Reforming GATT*, *supra* note 72, 1462-63; see Robert E. Hudec, “*Transcending the Ostensible*”: *Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 213 (1987) [hereinafter Hudec, *Transcending*].

98. Hudec, *Reforming GATT*, *supra* note 72, at 1470; see also Lawrence & Litan, *supra* note 34, at 251.

99. Hudec, *Transcending*, *supra* note 97, at 214; Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT’L L.J. 145, 159-67 (1980).

100. Subsidies Code, *supra* note 61, art. 13(4).

101. *Id.*

102. GATT, *supra* note 63, art. 23. This has only occurred once. *Report of Working Party on Netherlands Action Under Article XIII(2) to Suspend Obligations to the U.S.*, in B.S.I.D., Supp. 1, at 62 (1953).

103. In all but one action, GATT declined action for retaliation. J. KOLASA, LAW-MAKING AND LAW-ENFORCEMENT FOR INTERNATIONAL TRADE, SOME REFLECTIONS ON THE GATT EXPERIENCE 30 (1976); see *United States v. Netherlands*, B.S.I.D., Supp. 1, at 32 (1953) (GATT found U.S. dairy policies to be a violation of art. 23 as the U.S. refused to comply with the ruling and GATT permitted the Netherlands to limit like imports from the U.S.).

104. See *id.*

105. For example, by withdrawing GATT concessions or obligations the nation that is subject to such action will have greater incentive to continue its misbehavior in international trade because it may have no benefit to gain by conforming to the behavior mandated by the agreement.

106. Other political problems included the EC’s insistence that this action be resolved under the GATT Civil Aircraft Code [*Airbus Consortium Countries Pledge to Negotiate with U.S. in GATT Framework*, 8 Int’l Trade Rep. (BNA) 978 (June 26, 1991)] and that the EC produced a report which alleged the U.S. had given its domestic civil aircraft industry domestic subsidies

First, the U.S. may have been fearful of jeopardizing trade relations with the EC as it moves toward closer political and economic cohesion. The U.S. may have been concerned that if it took a tough stance against Airbus subsidization, the EC would enact stringent trade counter measures which would adversely affect American exports to the EC, most notably civil aircraft, the largest U.S. export.¹⁰⁷ Therefore, the U.S. may have felt the civil aircraft industry and the U.S. economy would not benefit from attacking Airbus subsidization in GATT.

Second, politics are the vehicle by which most trade disputes get resolved in GATT.¹⁰⁸ It is not surprising that United States Trade Representative ("USTR") Carla Hills wanted, and received, a negotiated settlement of the Airbus issue. She stated that she considered this solution better than litigation.¹⁰⁹

through military and space programs. *Airbus Allegations that U.S. Firms Receive Subsidies are Diversion Attempts*, USTR Says, 6 Int'l Trade Rep. (BNA) 532 (Apr. 13, 1988).

U.S. civil aircraft manufacturers argued that they could not assign commercial aircraft costs to a military program and even if they could, the profit margins that they receive on military contracts are small.

The United States has given the following rebuttal answers to Airbus' charges of U.S. subsidization:

- strict U.S. law prevents the use of [Department of] [D]efense expenditures for subsidizing private commercial activities;
- the Defense Department recoups the cost of research conducted by civil aircraft contractors on a pro rata basis;
- the government requires a recovery-of-cost provision to recoup its investment in cases where NASA's research and development programs offer significant consumer potential for market sales;
- Airbus member governments also provide research funding for military research projects and civilian aeronautical research; and
- military and other government business conducted by Airbus exceeds similar business conducted by Boeing or McDonnell Douglas over recent years by a substantial margin.

Id.

107. *Industry and Trade Summary: Aircraft, Spacecraft and Related Equipment*, U.S. ITC Publication 2430 (ME-1) (Nov. 1991).

108. For example, the U.S. and the EC are currently playing tit-for-tat over alcoholic imports from the EC in trying to reach an agreement on EC subsidization levels for this and other products. Keith Bradshaw, *Caught in the Crossfire of Trade War*, N.Y. TIMES, Nov. 2, 1992, at D1; see also *Attorneys See Environmental Issues as Element of Future Trade Discussions*, 8 Int'l Trade Rep. (BNA) 1206 (Aug. 14, 1991).

109. See Dryden, *supra* note 12, at 1; *Attorneys See Environmental Issues as Element of Future Trade Discussions*, *supra* note 108, at 1206; U.S., EC Reach "Tentative" Agreement on Curbing Civil Aviation Subsidies, *supra* note 54. The actual agreement was signed under the direction of acting USTR Michael H. Moskow. USTR, *Fact Sheet: U.S. and EC Sign Trade Agreement on Commercial Aircraft*, July 17, 1992 [hereinafter *Fact Sheet*] available at Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506. For a discussion of the negotiated settlement see *infra* Section III(A).

Another probable political reason for the U.S.'s inaction was to allow time for voluntary compliance.¹¹⁰ Governments often use delay tactics in GATT disputes in hopes the other nation will voluntarily eliminate the unfair trade measure in question before any official action is taken.¹¹¹ While GATT gives certain time periods in the Subsidies Code, these only delineate when action can be taken, as opposed to when actions must be taken.¹¹² The tactic of delay is often used by Signatories in GATT to allow trade practices to "disappear" and save a complaining country from taking politically unattractive litigious actions.¹¹³ This appears to have been at least a part of the U.S. strategy used against Airbus' domestic subsidization.

Thus, the U.S. action against the domestic subsidies of Airbus was unlikely to reach fruition in GATT. The apparent causes of this inaction lead to the conclusion that GATT is a relatively ineffective forum to address an EC subsidized high-tech consortia because these same problems will likely reoccur in any U.S. government self-initiated action in GATT over domestic subsidies. Hence, the domestic industry may find, in the long-run, the U.S. unfair trade laws better suited to defend against this type of EC trade practice.

III. THE EVENTUAL OUTCOME OF AIRBUS

A. *The Agreement*

The Airbus domestic subsidization issue had been solved, at least between the U.S. and the governments of the EC. On April 1, 1992 a tentative bilateral agreement was reached over domestic subsidies given to the civil aircraft industry, focusing in particular on domestic subsidies given to Airbus.¹¹⁴ This agreement was officially signed by the parties on July 17, 1992.¹¹⁵ The agreement provides for a "cap" on member state government support to Airbus (and to U.S. industry) for developing all new civil aircraft programs. The "cap" is thirty-three percent of the program's total development costs.¹¹⁶ The U.S. had estimated that the previous level of such

110. See Hudec, *Transcending*, *supra* note 97, at 217-19 ("[B]oth politicians and diplomats regard tomorrow as the preferred time for dealing with unanswerable problems. Some tomorrow are particularly propitious, such as the one that occurs the day after the trade problem has subsided and the offending measure has been withdrawn.")

111. *See id.*

112. *See, e.g.* Subsidies Code, *supra* note 61, art. 13(1) and (2); *see also* Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (Jagdish Bhajwahic & Hugh T. Patricks eds., 1990).

113. *See Hudec, Transcending*, *supra* note 97, at 217-19.

114. Roger Cohen, *U.S. and Europe Agree on Limits to Subsidies for Aircraft Makers*, N.Y. TIMES, Apr. 2, 1992, at A1 (it appears likely that both the Bush administration and Brussels will approve the agreement).

115. *Civil Aircraft Agreement*, *supra* note 55.

116. *Id.* art. 4; *Fact Sheet*, *supra* note 109, at 2.

support by member state governments of the consortia was approximately sixty to seventy percent of production costs.¹¹⁷ U.S. cross-over military support, that the EC has claimed Boeing and McAir receive, is also limited to three to four percent.¹¹⁸

The agreement also provides for “transparency requirements for verification” on subsidies received by the civil aircraft industry.¹¹⁹ However, the agreement is far from perfect as it applies only to future support, as opposed to support on past and current projects.¹²⁰

B. U.S. Justification for Agreement

This section discusses two justifications that may have led the United States to reach an agreement on the subsidization of Airbus.

1. Exports Exceed Imports

The first possible justification for the U.S. entering into an agreement with the EC over the domestic subsidization of Airbus was to protect U.S. competitiveness. U.S. civil aircraft manufacturers rely on exports more than domestic sales to keep them financially sound.¹²¹ It is therefore very important for the U.S. civil aircraft industry to be allowed to freely market its goods on a world-wide basis, including in the EC.

If the U.S. had carried out the GATT action or started an action, under the U.S. unfair trade laws, it is likely the EC would have retaliated by enacting protectionist trade measures detrimental to U.S. civil aircraft manufacturers’ export of products to the EC. The Bush Administration’s agreement with the EC may have been developed as protection from EC retaliatory measures that would have stemmed from a successful GATT action or action under the U.S. unfair trade laws. These measures would

117. Cohen, *supra* note 114, at A1. Though, in announcing the *Civil Aircraft Agreement*, the U.S. placed previous member state government support for development and production costs at 75 to 100 percent. *Fact Sheet*, *supra* note 109, at 2.

118. *Id.* Presumably, this would also apply to the EC if member state governments of Airbus chose to finance the consortia in this manner. *Fact Sheet*, *supra* note 109, at 3; *Civil Aircraft Agreement*, *supra* note 55, art. 5.

119. The transparency requirements that are subject to the agreement include, but are not limited to: supplying a complete list of commitments already disbursed or committed; information on disbursements and repayments for Airbus programs; and any changes to these commitments which renders its terms and conditions more favorable to Airbus. *Fact Sheet*, *supra* note 109, at 2-3; *Civil Aircraft Agreement*, *supra* note 55, art. 8.

120. See generally *Civil Aircraft Agreement*, *supra* note 55, art. 2. For a discussion on the status of export subsidies see Section II(B)(2).

121. See *Industry and Trade Summary: Aircraft, Spacecraft and Related Equipment*, I.T.C. Publication 2430 (ME-1) (Nov. 1991) (the U.S.’s largest export in terms of monetary value is civil aircraft); *Fact Sheet*, *supra* note 109, at 5 (“[i]n 1991, the U.S. shipped \$7 billion of large civil aircraft to the EC,” while the U.S. “imported \$1.3 billion worth of civil aircraft from the EC.”)

have effected the domestic industry's competitiveness abroad by decreasing their marketshare.¹²²

2. Airbus' Aim is Third Countries

The second justification revolves around the possibility that Airbus' real commercial aim is to develop third country¹²³ markets for its aircraft. The saturation of third country markets by Airbus aircraft, especially if subsidized at the levels in effect prior to the agreement, could have devastating effects on the U.S. civil aircraft industry.

While a successful resolution of the current GATT action could have rectified this subsidization issue, a U.S. victory was barely assured due to the political nature of the arena. And, even if the U.S. pursued an action under the U.S. unfair trade laws, its remedy would not reach the problem of subsidization of Airbus aircraft in third country markets. Therefore, the Bush Administration may have decided that a predictable level of subsidization was preferable to unrestrained subsidization in third country markets.¹²⁴

C. Problems with the Airbus Agreement

While this agreement may appear to be a significant step in rectifying the Airbus domestic subsidization issue, in fact the U.S. is condoning the subsidization of Airbus, while winning little in exchange.¹²⁵ First, Airbus will continue to cover one-third of its development costs with subsidies provided by member state governments. This does not amount to "a level playing field" for the U.S. civil aircraft industry.¹²⁶

Second, while the agreement provides for transparency in financial information concerning subsidies given to Airbus, this is not guaranteed, since Airbus was formed under a French law that does not require financial disclosure.¹²⁷ Therefore, it is not unrealistic to assume that the consortia

122. Though under the *Civil Aircraft Agreement*, the U.S. aircraft industry may still bring, with some political difficulty, a suit under the U.S. unfair trade laws. This however, gives the EC the right to abrogate the agreement. *Civil Aircraft Agreement*, *supra* note 55, art. 10.

123. Third countries for the purpose of this article are all nations excluding the U.S. and those nations that form the EC.

124. For example, the *Civil Aircraft Agreement*, *supra* note 55, annex 1, *Interpretation of Article 4 of the GATT Agreement on Trade in Civil Aircraft by Signatories of the Agreement*, art. 4.4, prohibits the EC and the U.S. from providing inducements "which would create discrimination against suppliers from any signatory." *See also id.* art. 4.2.

125. Cohen, *supra* note 114, at A1 quoting Sen. John C. Danforth.

126. *But see Fact Sheet*, *supra* note 109, at 1 quoting Acting USTR Michael H. Moskow ("[t]his agreement represents an important achievement in leveling the playing field for the U.S. aircraft industry. . .").

127. *See supra* note 8 and accompanying text.

will not be one-hundred percent honest when opening its books to public scrutiny.¹²⁸

Finally, such an agreement, while nominally limiting support to Airbus, will not rectify market access problems that U.S. industry faces in the Airbus member states and the other EC countries. In the long term, this agreement may be a catalyst that will lead to higher tariff rates in the EC for U.S. exports of civil aircraft.¹²⁹ Senator John C. Danforth called upon the Executive Branch to abandon the agreement and to proceed under the U.S. unfair trade laws to fight Airbus subsidization.¹³⁰

D. Lessons to be Learned

There are valuable lessons for a U.S. high-technology industry to learn from the Airbus subsidization scenario in spite of the recent resolution. The first lesson is that GATT is a relatively ineffective forum for resolving a subsidization issue involving an EC consortia. Second, if domestic industry relies on the U.S. government to solve a subsidization issue with the EC it may have to wait for years until a politically acceptable agreement is accomplished. The third lesson is that even when a political agreement is arrived at, if it allows the continuation of large subsidization, domestic industry, while somewhat better off, is still competing on an unlevel playing field. Finally, as Senator Danforth expressed, such an agreement may lead to high tariffs in the EC for U.S. manufactured products to counter lost subsidies.¹³¹ This may effectively block U.S. industry access to EC markets.

IV. U.S. UNFAIR TRADE LAW

United States unfair trade law has as its goal, the advancement of free-market principles by promoting and maximizing market efficiency. Market efficiency is achieved when each nation follows free trade principles that allow them to export the goods they produce most efficiently, and import the products they can produce only at a higher cost.¹³² When foreign nations and producers frustrate this standard by not complying with the free-market standard promoted by the U.S., their actions are deemed "unfair" trade

128. See *Civil Aircraft Agreement*, *supra* note 55, art. 8.

129. Cohen, *supra* note 114, at D5.

130. *Id.*

131. *Id.*

132. See John J. Barcelo, *Subsidies and Countervailing Duties—Analysis and Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 786-88 (1977).

practices.¹³³ The U.S. has enacted a complex system of laws to protect its industries from such unfair trade practices.¹³⁴

The U.S. countervailing duty law will be examined as an alternative to bringing an action in GATT against the subsidization of an EC high-tech consortia. This analysis is concerned with how U.S. law remedies the deficiencies discussed in the GATT-Airbus context. These inadequacies include: the ambiguities concerning domestic subsidies; the decision-making problems; the lack of enforcement mechanisms; the inherent delay; and political aspects. This section will also examine the International Consortium provision of the U.S. countervailing duty law. This provision was enacted specifically to aid the U.S. civil aircraft industry by levying a countervailing duty against Airbus.¹³⁵

This section will also examine Section 301 of the U.S. Trade Act of 1974; particularly how Section 301 provides a set standard of retaliation and serves as an effective mechanism for ensuring GATT actions are handled in a timely manner. Section 301 will also be examined in terms of export targeting, an additional weapon available under the U.S. trade laws for domestic industries battling an EC high-tech consortia.

A. *The U.S. Countervailing Duty Law*

The countervailing duty law¹³⁶ provides a legal weapon for U.S. industries and government to defend against a foreign, unfair trade practice, namely, the subsidization of foreign exports to the United States, which are detrimental to U.S. industry.¹³⁷ The U.S. countervailing duty law, based on GATT and its Subsidies Code, requires that no countervailing duty shall be imposed upon GATT Subsidies Code Signatories unless the domestic industry petitioner satisfies two requirements.¹³⁸ First, the International Trade Administration ("ITA") must find that a signatory of the Subsidies Code is "providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise

133. For example, the U.S. considers the subsidies that the EC pays to local processors of soybeans, rape seed and sunflower seeds, that work to the detriment of U.S. farmers of the same commodity, to be an unfair trade practice. Keith Bradsher, *supra* note 108, at D1; see Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 552-52 (1987).

134. See JOSEPH E. PATTISON, ANTI-DUMPING AND COUNTERVAILING DUTY LAWS, 1.01, 1.03-1.04 (International Business & Law Series No. 3 1987) (discussing the development of anti-dumping and countervailing duty legislation).

135. The Commerce Department Speaks 1990: The Legal Aspects of International Trade, Vol. 2, at 31 (PLI 1990).

136. 19 U.S.C. §§ 1303, 1671-1671f (1992).

137. Tarullo, *supra* note 133, at 549; Borrus & Goldstein, *supra* note 33, at 345.

138. The government can also start an action under the countervailing duty law. See 19 U.S.C. § 1671 (1992).

imported, or sold for importation into the United States.”¹³⁹ Second, the petitioner must satisfy the International Trade Commission (“ITC”) that an industry in the United States “is materially injured,”¹⁴⁰ or “is threatened with material injury . . .”¹⁴¹ “by reason of imports of that merchandise or by reason of sales of that merchandise for importation.”¹⁴²

If these two requirements are met, the countervailing duty law corrects deviations from free market principles by imposing extra duties that raise the “low” price of imports to what they should be under normal competitive market conditions.¹⁴³ The U.S. countervailing duty imposed for this purpose, ideally is equal to the amount of the subsidy and is levied on that product when it is imported into the U.S.¹⁴⁴ Of equal importance for a U.S. industry in bringing a countervailing duty action is that an importer of foreign manufactured goods may be adversely affected by a countervailing duty.¹⁴⁵ This is an especially important consideration for a U.S. industry facing an EC consortia with a large U.S. market. The consortia will have to conform to U.S. free-market standards or face duties at the border to offset the benefit of the subsidy received.

1. Domestic Subsidy

Unfortunately, the GATT Subsidies Code does not clearly define domestic subsidies nor specifically address their legality. However, GATT allows the member countries of the Subsidies Code to levy countervailing duties against subsidies as defined by member nations.¹⁴⁶ The U.S. law provides a clear definition of countervailable subsidies unlike GATT Panel adjudication. This allows U.S. industry to successfully bring a countervailing duty action against an EC consortia.

U.S. statutorily defined subsidies include any subsidy “if provided . . . to a specific enterprise or industry or group of enterprises or industries and

139. 19 U.S.C. § 1671(a)(1) (1992). See Diane P. Wood, “Unfair” Trade Injury: A Competition-Based Approach, 41 STAN. L. REV. 1153, 1164-65 (1989).

140. 19 U.S.C. § 1671(a)(2)(A)(i) (1992); Alan Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 202 (1989).

141. 19 U.S.C. § 1671(a)(2)(A)(ii) (1992); Republic Steel Corp. v. United States, 591 F. Supp. 640, 649 (Ct. Int’l Trade 1984).

142. 19 U.S.C. § 1671(a)(2) (1992); see Wood, *supra* note 139, at 1164-65.

143. Tarullo, *supra* note 133, at 549; see Zenith Radio Corp. v. United States, 437 U.S. 443, 455-56 (1978) (“The countervailing duty [law] was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from . . . subsidies paid by their governments.”).

144. Borrus & Goldstein, *supra* note 33, at 345 (the rationale behind the countervailing duty law is that a duty will offset any unfair competitive advantage attained by a foreign manufacturer or producer due to a foreign government subsidy).

145. *Id.* One example of a negative effect is that countervailing duties are imposed on a product at the U.S. border, thus acting as a tax on the import and raising its price in the U.S. See Keith Bradsher, *Caught in the Crossfire of Trade War*, N.Y. TIMES, Nov. 2, 1992, at D1.

146. GATT, *supra* note 63, art. 4; Subsidies Code, *supra* note 61, arts. 4, 6 and 11.

whether paid or bestowed directly on the manufacture, production, or export of any class or kind of merchandise.”¹⁴⁷ The ITA has interpreted this language to mean that a government benefit (other than an export subsidy) is not a subsidy unless it is provided to a specific enterprise, industry or group of enterprises or industries¹⁴⁸ in a manner inconsistent with normal commercial considerations.¹⁴⁹ Therefore, to determine if a foreign subsidy is subject to a countervailing duty, the petitioner must satisfy the ITA’s two prong test: 1) the subsidy must be sufficiently targeted “to a specific enterprise or industry, or group of enterprises or industries;”¹⁵⁰ and 2) the subsidy must provide an opportunity or advantage to that industry that would not otherwise be available to them in the marketplace.¹⁵¹ The petitioner must also satisfy the ITC that the U.S. industry in question is threatened with, or has been materially injured or retarded by, reason of the subsidized product.¹⁵²

The first part of the ITA’s test, which is known as the “specificity test” or the “general availability test,”¹⁵³ ensures that common activities of governments are not mislabeled as subsidies.¹⁵⁴ Only a government program conferring benefits on a specific enterprise(s) or industry(ies) is a

147. 19 U.S.C. § 1677(5)(A)(i) (1992). A list of illustrative domestic subsidies follows the definition:

- (i) The provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations.
- (ii) The provision of goods or services at preferential rates.
- (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
- (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

148. *Certain Steel Products from Belgium*, 47 Fed. Reg. 39,304, at 39,328 (Dep’t Comm. 1982) (Commerce reads the statute to apply only to a government benefit given to “one company or industry, a limited group of companies or industries, or companies or industries located within a limited region or regions.”).

Although non-specific benefits are not specifically excluded from the statutory definition, the idea that a foreign government benefit is not a subsidy if it is not specific is now solidly entrenched as a gloss on the statutory language. *See Cabot Corp. v. United States*, 620 F. Supp. 722, 730-32 (Ct. Int’l Trade 1985) *appeal dismissed* 788 F.2d 1539 (Fed. Cir. 1986) *vacated in part* 12 Ct. Int’l Trade 664 (1988).

149. *Id.*; *British Steel Corp. v. United States*, 605 F. Supp. 286, 290 (Ct. Int’l Trade 1985).

150. Although “[n]ominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that a bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.” 19 U.S.C. § 1677(5)(B) (1992); *see also Cabot Corp. v. United States*, 620 F. Supp. 722, 732 (Ct. Int’l Trade 1985).

151. 19 U.S.C. § 1677(5) (1992).

152. 19 U.S.C. § 1671(a)(2) (1992).

153. *See Sykes, supra* note 140, at 205.

154. *Id.* An example is an irrigation project to benefit all farmers in a given locale. 48 Fed. Reg. 21,618, 21,621-22 (1983) (*Fresh Asparagus from Mexico*).

domestic subsidy.¹⁵⁵ The second part of the ITA test serves to “identify and to quantify the subsidy,”¹⁵⁶ and involves an examination of whether the bestowal gave a competitive advantage to the foreign industry or enterprise involved in international trade.¹⁵⁷ Both of these tests are conducted on a case-by-case basis.¹⁵⁸ If member state governments’ subsidies to the EC consortia in question meet the subsidy test of the ITA, the bestowal will be subject to a countervailing duty if the ITC finds that it has caused material injury to a competing U.S. industry.¹⁵⁹

As discussed in Section I(B), there are several types of domestic subsidies that are likely to be bestowed upon high-tech EC consortia by member state governments. Using two examples from the subsidies given to Airbus we can examine how the ITA’s determination of an improper subsidy under the countervailing duty law works to the benefit of U.S. industry. For simplification purposes, the subsidy will be treated as a single composite subsidy. In actual practice, each member state government’s contribution to the consortia would have to be examined by the ITA independently.

First, a large amount of support from member state governments to Airbus includes funding for research and development of aircraft components and equipment. These grants are likely to appear in other EC consortia since high-tech industries need to develop state of the art technology to keep their products competitive in the market place. Government subsidy of Airbus is established by tracing this support from Airbus member state government budgets.¹⁶⁰ The ITA “specificity test” is met because these funds went only to the aircraft industry or programs intended to support the aircraft industry, and were not generally available to the marketplace of the member states involved.¹⁶¹

The second part of the ITA subsidy test would also be met since financial support for research and development gives Airbus a competitive advantage in the international marketplace, by lowering the cost of production and decreasing the amount of capital that Airbus had to expend on new

155. See, e.g., *Cabot Corp. v. United States*, 620 F. Supp. 722, 732 (Ct. Int’l Trade 1985); *PPG Industries, Inc. v. United States*, 662 F. Supp. 258, 264 (Ct. Int’l Trade 1987) (holding that government program is not subject to countervail unless it bestows benefit on a specific class of industry); *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 837-38 (Ct. Int’l Trade 1983) (upholding ITA’s determination that government subsidy program was not a subsidy within the meaning of the countervailing duty law unless conferring a benefit upon a specific enterprise or industry).

156. Sykes, *supra* note 140, at 204.

157. *Id.*; see 19 U.S.C. § 1677(5)(B) (1992); see Christoph Lehman, *The Definition of Domestic Subsidy Under the U.S. Countervailing Duty Law*, 22 TEXAS INT’L L.J. 53, 64 (1986).

158. See *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int’l Trade 1985).

159. See *id.*; see also *Carlisle Tire Co. v. United States*, 4 I.T.R.D. 2017 (Ct. Int’l Trade 1983); see also 19 U.S.C. §§ 1671d(b) & 1677 (1992).

160. See generally Gellman, *supra* note 7, ch. 2.

161. *Id.* See *Comeau Seafoods, Ltd. v. United States*, 724 F. Supp. 1407, 1416 (Ct. Int’l Trade 1989).

product development.¹⁶² Therefore, Airbus may have been able to export its products at a price below that which it would have sold without the subsidy.¹⁶³ Such an occurrence would lead the ITA to determine that Airbus had received an improper subsidy.

Another form of subsidy given by member state governments to Airbus is providing capital in the form of loans at below commercial rates. It has been held that if a government in a "targeted loan program provides funds below the prevailing market rate, a subsidy exists."¹⁶⁴ Once again, by tracing member state government support to Airbus, it appears that the noncommercial rate loans were targeted loans, since they were provided exclusively to the civil aircraft industry.¹⁶⁵

However, "[t]he government provision of equity does not per se confer a subsidy."¹⁶⁶ The ITA will examine if the government investment was commercially sound at the time it was made.¹⁶⁷ If it was, it will not be a subsidy.¹⁶⁸ If it was a commercially unsound investment, an improper subsidy may be found to exist.¹⁶⁹ The test is whether "a reasonable investor could expect a reasonable rate of return on his investment within a reasonable period of time."¹⁷⁰ Therefore, targeted loans and grants to credit worthy companies are improper subsidies. This is only to the extent that the interest rates or guarantees are below the recipient company's borrowing experience, at the "national average commercial interest rate."¹⁷¹ Such loans give the industry a competitive advantage not normally available in the marketplace. By examining the financial history of Airbus, it is reasonable to assume that the ITA would find the loans provided to Airbus were an unsound investment and inconsistent with commercial considerations.¹⁷²

162. Steven F. Benz, Note, *Below-Cost Sales and the Buying of Market Share*, 42 STAN. L. REV. 695, 704 (Feb. 1990).

163. *Id.*

164. *British Steel Corp. v. United States*, 605 F. Supp. 286 (Ct. Int'l Trade 1985) (holding that the infusion of equity into a corporation in the form of loans, capital and forgiveness of debt was subject to countervail); see Sykes, *supra* note 140, at 205 (citations omitted) (the value of the subsidy is calculated on the basis of the differential between the actual rate and the market rate, rather than the cost of the subsidy to the government).

165. See generally Gellman, *supra* note 7, ch. 2; see *Comeau Seafoods, Ltd. v. United States*, 724 F. Supp. 1407, 1416 (Ct. Int'l Trade 1989).

166. *New Steel Rail from Canada*, 12 I.T.R.D. 1412, 1413 (1989).

167. *British Steel Corp. v. United States*, 605 F. Supp. 286 (Ct. Int'l Trade 1985).

168. *Id.*

169. *Id.* The Court of International Trade upheld the ITA finding of a countervailable subsidy using this test in *British Steel Corp. v. United States*, 632 F. Supp. 59 (Ct. Int'l Trade 1986); see also *New Steel Rail from Canada*, 12 I.T.R.D. 1412, 1416 (1989).

170. *Comeau Seafoods, Ltd. v. United States*, 11 I.T.R.D. 2039, 2048 (1989) (citations omitted).

171. Final Affirmative Countervailing Duty Determination: Certain Steel Products from Belgium, 47 Fed. Reg. 39304 (Sept. 7, 1982).

172. See Gellman, *supra* note 7, at 1-12, 4-8.

The U.S. statutory (and case law) definition of domestic subsidies adds an element of certainty to countervailing duty actions. If U.S. high-tech industry can demonstrate that the benefits given an EC consortia meet the ITA's two prong test and the applicable precedent surrounding the specific type of subsidy at issue, it should be found to be an improper domestic subsidy.¹⁷³ Because the bulk of monies provided by member states to any EC consortia will probably mirror those given to Airbus, the affected U.S. industry should be able to meet the unfair domestic subsidy test under U.S. countervailing duty law.

2. Decision-Making

Unlike GATT, whose decision-making is largely influenced by international politics, the governmental agencies administering the U.S. countervailing duty law are given very little discretion to consider political factors. There are two reasons why the U.S. statutory scheme does not permit the type of discretion which would allow the agencies to make determinations based upon foreign policy views.¹⁷⁴ First, there are numerous methodological approaches to determining whether a countervailing duty should be levied against a governmental bestowal.¹⁷⁵ For example, the ITC's "usual methodology for measuring the benefit to a company receiving a preferential loan . . . is to calculate the difference between such a loan and a comparable benchmark, allocate that difference over the full term of the loan, and discount the benefit to the company for a given year to reflect the changing value of money over time."¹⁷⁶ There is also a right of review by the Court of International Trade, which determines whether agency determinations are supported by substantial evidence¹⁷⁷ or are

173. Of course the petitioner will also have to demonstrate that it was materially injured because of the subsidization of the import for the domestic subsidy to be countervailable. See 19 U.S.C. §§ 1671d(b) and 1677 (1992).

174. See Jane A. Restani, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Introductory Comment: Judicial Review in International Trade: Its Role in the Balance Between Delegation by Congress and Limitation of Executive Discretion*, 37 AM. U.L. REV. 1075, 1085 (1988).

175. See, e.g., *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina*, 49 Fed. Reg. 18,006, 18016-20 (1984) (containing "Subsidies Appendix" which describes certain methodologies used by ITA in examining grants, loans, loan guarantees and equity); *Steel Wire from New Zealand*, 51 Fed. Reg. 31,156 (1986); John H. Jackson, *International Law: Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1580 (1984).

176. *Saudi Iron and Steel Co. (Hadeed) v. United States*, 675 F. Supp. 1362, 1370 (Ct. Int'l Trade 1987) (citing *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina*, 51 Fed. Reg. 18,006, 18,016-20 (1984)).

177. 19 U.S.C. § 1516a(b)(1)(B) (1992); see *Comeau Seafoods, Ltd. v. United States*, 724 F. Supp. 1407 (Ct. Int'l Trade 1989); see also *PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197 (Ct. Int'l Trade 1989) (discussing the standard of review in a countervailing duty action).

arbitrary and capricious.¹⁷⁸ This right of review ensures that the decision-making agency is not influenced by political considerations. The U.S. countervailing duty law is a "legalistic system" that gives U.S. industry a chance to make their claims against foreign subsidization of manufacturers without U.S. foreign policy interference.¹⁷⁹

Under U.S. law the member state governments of the EC consortia can appeal an adverse determination, but cannot block a decision for political reasons.¹⁸⁰ In a politically charged countervailing duty action, this aspect of U.S. law can serve to protect U.S. industry's interests much better than GATT where a Panel decision can be rejected by a Party to the action.

3. Time

In contrast to GATT, which has no set time limits, countervailing duty proceedings statutorily must be completed within "tightly compressed time frames."¹⁸¹ The initial finding on the sufficiency of the petition must be completed within twenty days.¹⁸² A reasonable indication of injury must be determined within forty-five days of the petition being filed.¹⁸³

After finding a reasonable indication of injury, the time limits in countervailing duty proceedings are more lenient, but still retard most tactical delay on the part of the parties and the U.S. government. Within seventy-five days after the preliminary determination, the ITA must determine if a subsidy is being granted.¹⁸⁴ Subsequently, the ITC must make its determination as to material injury of the industry by reason of the subsidization of the foreign manufacture within the later of: 1) one hundred and twenty days after the ITA's affirmative preliminary determination; or 2) forty-five days after the ITA makes an affirmative determination as to the existence of a subsidy.¹⁸⁵ Next, if the ITA and the ITC both make affirmative determinations, within six to twelve months after the ITA receives "satisfactory" information upon which the assessment of the countervailing duty shall be

178. Pursuant to 28 U.S.C. § 2640(b) (1992) and 19 U.S.C. § 1516a(b)(1)(B) (1992) most countervailing duty actions are reviewed for substantial evidence. Certain actions, such as an action not to commence an investigation are reviewed on an arbitrary or capricious or abuse of discretion standard. 19 U.S.C. § 1516a(b)(1)(A) (1992). Under 28 U.S.C. § 1295(a)(5) (1992) the U.S. Court of Appeals has jurisdiction to review a final decision of the Court of International Trade.

179. Jackson, *supra* note 175, at 1570 (which the author sees as negative).

180. *Id.*

181. Ronald A. Cass & Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT*, in DOWN IN THE DUMPS 200, 232-33 (Richard Botuck & Robert E. Litan eds., 1991).

182. 19 U.S.C. § 1671a(c) (1992). This includes an initial determination of whether there is a subsidy. 19 C.F.R. 355.13 (1992).

183. 19 U.S.C. § 1671b(a) (1992).

184. 19 U.S.C. § 1671d(a)(1) (1992); 19 C.F.R. 355.20 (1992).

185. 19 U.S.C. § 1671d(b)(2) (1992); 19 C.F.R. 355.21 (1992).

evaluated, custom officials are to assess the duty to be imposed on the import.¹⁸⁶

While this is only a brief overview of the time limits required by countervailing duty law, this demonstrates that U.S. industry will not be subject to the tactical and political delay involved in GATT proceedings. To any U.S. high-tech industry that is threatened by an EC consortia, the lack of delay in granting relief under U.S. law can be an important asset in pursuing a countervailing duty action. This will also assist in limiting the potential injury that can be inflicted on the petitioning industry by competing against a subsidized consortia.

4. Enforcement and Relief

The enforcement and relief provisions of the countervailing duty law also provide an element of certainty to a U.S. industry that is lacking in GATT. This is provided by the International Consortia Provision¹⁸⁷ and the determination and enforcement provisions.¹⁸⁸

a. International Consortium Provision. The 1988 Trade Act introduced an amendment to the countervailing duty law applicable to international consortia.¹⁸⁹ The amendment was specifically "crafted" to cover subsidies paid to Airbus by its member state governments.¹⁹⁰ This provision, "permits Commerce to cumulate all subsidies paid by several governments to consortium members (or to a consortium itself) to produce a single product" which makes the countervailing duty levied on the import at the border based upon the total of government support received by the consortia (minus statutory amounts, as discussed below and in Section (b)).¹⁹¹ This ensures that the countervailing duty law is an effective weapon for U.S. high-tech industries fighting the subsidization of EC consortia.

This provision explicitly authorizes the ITA to investigate subsidies provided during all stages of production by all consortia member state governments and to cumulate the amounts of the subsidies from all such countries in its determination of the countervailing duty to be applied to the imported product.¹⁹² The gross subsidy used in the determination of the final countervailing duty order is the sum total of all member state government support to the EC consortia and its member companies. This method of calculation will benefit U.S. industry by increasing, under the countervail-

186. 19 U.S.C. § 1671e(a)(1) (1992).

187. 19 U.S.C. § 1671(d) (1992).

188. *See* 19 U.S.C. § 1671d, § 1671e (1992).

189. *The Commerce Department Speaks 1990: The Legal Aspects of International Trade*, Vol. 2, at 31 (PLI 1991).

190. *Id.*

191. *Id.*

192. 134 Cong. Rec. H1863, 2031-2032 (1988).

ing duty law, the financial impact of a countervailing duty levied on the consortia's imported product.

b. **Determination and Enforcement.** If the ITC finds that a foreign government or entity is subsidizing the manufacture, production or exportation of goods imported into the U.S., the ITC issues an affirmative injury determination.¹⁹³ After issuing the affirmative injury determination, the ITA must impose countervailing duties on the imported goods equal to the amount of the subsidy.¹⁹⁴ This takes the form of a final countervailing duty order which directs the U.S. Customs Service to collect countervailing duties on the subsidized product at the border.¹⁹⁵ In its final countervailing duty order the ITA will calculate a countervailing duty to offset the subsidy.¹⁹⁶ Under these circumstances, the International Consortia Provision will specifically aid a U.S. industry facing a subsidized EC consortia. For example, all subsidies paid to Airbus by France, Germany, Great Britain and Spain, whether to the consortia or its member companies, would be cumulated to determine the gross subsidy.¹⁹⁷

Under the U.S. law, only the "net" subsidy is subject to countervail.¹⁹⁸ For purposes of determining the net subsidy, the ITA subtracts certain nominal monies from the "gross subsidy" to determine the amount of the net subsidy.¹⁹⁹ Therefore, a countervailing duty is a tax on an import equal to the amount of the net subsidy on that import.²⁰⁰

193. Which is required when a country is a signatory of GATT. See 19 U.S.C. § 1671d(a) and (b) (the ITA must make a determination as to whether a subsidy is being provided with respect to the merchandise and the ITC must determine whether a U.S. industry has been or is threatened with material injury or the establishment of a U.S. industry is materially retarded because of the product's subsidization).

194. 19 U.S.C. § 1671 *et. seq.* (1992).

195. 19 U.S.C. § 1671d(c)(1) (1992). This enforcement mechanism is an asset because it ensures that products do not enter the home market without the benefit of the subsidy set-off.

196. 19 U.S.C. § 1671e(a)(1) (1992); Sykes, *supra* note 140, at 205 (the duty should equal the aggregate amount of all subsidy payments divided by the value or volume of the production that benefited from the subsidy).

197. Without the International Consortia Provision, the ITA would be unable to cumulate all subsidies paid to the consortia and to the member state companies.

198. 19 U.S.C. § 1671(e)(a)(1) (1992).

199. The following shall be subtracted from the gross subsidy:

- (A) any application fee, deposit, or similar product paid in order to qualify for, or to recover, the benefit of the subsidy,
- (B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by government order, and
- (C) export taxes, duties, or other charges levied on the export of merchandise to the United States, specifically intended to offset the subsidy received.

19 U.S.C. § 1677(6) (1992).

200. 19 U.S.C. § 1671(a)(2)(B) (1992); see Note, James D. Southwick, *The Lingering Problem with the Specificity Test in United States Countervailing Duty Law*, 72 MINN. L. REV. 1159 (1988).

Under the U.S. countervailing duty law, U.S. industry is assured, (unlike in GATT) of a set standard of relief when competing against a subsidized EC consortia in its home market. For an EC consortia this amounts to a substantial duty levied on each of its products imported into the U.S. market. This in turn leads to a larger loss for member state governments and the consortia, because under economic principles the higher costs of the product should decrease sales in the U.S.²⁰¹ Therefore, an EC consortia might find it more beneficial to have the member state governments cease subsidizing the organization in order to keep its products commercially viable in the U.S. marketplace.

5. Is the Countervailing Duty Law Truly Effective?

The countervailing duty law is effective because it is a non-political forum in which the U.S. industry can espouse its claims against a foreign subsidized competitor that exports its products to the U.S. The countervailing duty law gives U.S. industry a measure of certainty that is lacking in the GATT dispute settlement procedure. If a U.S. industry is able to succeed in a countervailing duty action they will be protected from the subsidized product in the U.S. market. In a politically charged action (such as Airbus), the countervailing duty law ensures, by its timing provisions and enforcement mechanisms, that the law, not politics is the primary driving force of the action.

The provision in the countervailing duty law that the U.S. government may suspend a countervailing duty investigation if it is against U.S. interests,²⁰² requires, when initiated by industry petition, an agreement with the EC consortia member state governments either to: 1) eliminate or offset the subsidy completely; 2) cease exports of the subsidized merchandise,²⁰³ or 3) to eliminate the injurious effect of the exports.²⁰⁴ This agreement by the foreign government²⁰⁵ must also include that suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented and at least eighty-five percent of the subsidy will be offset.²⁰⁶ Therefore, international political considerations which allow termination of a countervailing duty action in some cases, play only a balancing role which ensures that U.S. industry gains a more level playing field.

201. Telephone conversation with Dr. Maurice R. Manner, Professor of Business and Economics at Marymount College, Tarrytown, New York, on March 1, 1992.

202. 19 U.S.C. § 1671c (1992).

203. 19 U.S.C. § 1671c(b) (1992).

204. 19 U.S.C. § 1671c(c)(1) (1992).

205. Unless the exports cease.

206. 19 U.S.C. § 1671c(c)(2) (1992). It is interesting to note that under the Airbus tentative agreement, support is reduced at most to fifty percent of the former amount.

However, the countervailing duty law fails to adequately address the problem of market share. While countervailing duties in one importing nation give the export government a reason to eliminate the subsidy for that importer, third country markets remain unaffected.²⁰⁷ In other words:

Countervailing duty statutes, by their very nature, cannot completely offset the benefits conferred by foreign subsidies. Since countervailing suits are levied at national borders, foreign industries receiving subsidies could still gain competitive advantage over unsubsidized domestic industry by exporting goods to third countries that lack a rigorous countervailing duty law or an incentive to employ one.²⁰⁸

The use of countervailing duty law to remedy the effect of foreign subsidies is of limited value if foreign markets are flooded with subsidized imports. Despite this limitation in the countervailing duty law, the U.S. will remain a primary sales target for the consortia's high tech products. The member state governments may find it beneficial in the long-run to cease subsidization altogether, rather than face countervailing duties on its products, which could lead to dramatically decreased sales.²⁰⁹

Another limitation in the U.S. countervailing duty law is that it does not prevent retaliation by the EC. For example, when the U.S. threatened to impose countervailing duties on pasta from the EC, the EC threatened unspecified retaliatory measures instead of removing the subsidy.²¹⁰ This demonstrates that in some cases "[r]etaliatio[n]—not acquiescence—is the predictable reaction by other countries when an internal policy is attacked or undermined."²¹¹

While the countervailing duty law is not the perfect solution to the subsidization of an EC consortia, U.S. industry may find countervailing duties particularly useful for assuring commercial viability in the U.S. In addition, the residual effects of the use of the countervailing duty law may, in the long-term, cause the subsidization of the consortia to cease completely. Regardless, the results for U.S. industry are at least more certain than those in GATT adjudication.

207. Benz, *supra* note 162, at 722; see Lay, *supra* note 60, at 1509; see also Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767, 776 (1989).

208. Benz, *supra* note 162, at 722 (citations omitted).

209. For example, in the case of Airbus the U.S. is the world's largest market for civil aircraft. *Industry and Trade Summary: Aircraft, Spacecraft and Related Equipment*, I.T.C. Publication 2430 (ME-1) (Nov. 1991).

210. Wood, *supra* note 139, at 1169-70 (citations omitted).

211. *Id.* at 1170.

B. Section 301

Section 301 of the U.S. Trade Act of 1974 is a unilateral trade provision aimed at foreign restraints that prevent U.S. goods, services and capital from entering and competing effectively in foreign markets because of unfair trade practices.²¹² It was enacted to “pry open foreign markets to U.S. investment and exports of goods and services,”²¹³ and to allow trade retaliation by the U.S., without the influence of international political considerations.²¹⁴ Furthermore, Section 301 provides an impetus for speeding up GATT negotiations.²¹⁵

Under Section 301, U.S. industry can lodge a complaint with the United States Trade Representative (“USTR”) using either the mandatory or discretionary retaliation provisions concerning foreign government practices that affect U.S. exports and trade.²¹⁶ The USTR is then obligated to study the complaint and if it is found meritorious, to negotiate and take other actions in an international context to persuade the foreign government in question to change its practices.²¹⁷ This makes Section 301 unique, for if a high-tech industry is concerned with international considerations, Section 301 gives them the right to have their claims heard in an international arena.²¹⁸ Ultimately, Section 301 gives the USTR power to retaliate using various measures.²¹⁹

Section 301 is particularly useful in situations like Airbus because it can effectively force the U.S. government to act against the subsidization of EC consortia when negotiation or GATT action is stalled. It can also assist in rectifying the problem of access to the markets of the consortia’s member states.

212. John H. Barton & Bart S. Fisher, *Introductory Note to Omnibus Trade and Competitive-ness Act of 1988—Title I*, 28 I.L.M. 15, 23 (1989). Borrus & Goldstein, *supra* note 33, at 347.

213. Fusae Nara, Note, *A Shift Toward Protectionism Under Section 301 of the 1974 Trade Act: Problems of Unilateral Retaliation under International Law*, 19 HOFSTRA L. REV. 229, 241 (1990) (citations omitted).

214. 134 Cong. Rec. H5532 (daily ed. July 13, 1988).

215. See Thomas O. Bayard, *Comment on Alan Sykes’ “Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301”*, 8 B.U. INT’L L.J. 325, 326-27 (1990).

216. Borrus & Goldstein, *supra* note 33, at 348 (actions which Section 301 permit may be taken either on the USTR’s own initiative or in response to a petition filed by a private party with the USTR).

217. See 19 U.S.C. §§ 2413-2415 (1992).

218. 19 U.S.C. § 2412(a) (1992); see Patricia I. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122 (1987).

219. For example, such retaliatory measures include, but are not limited to suspending, withdrawing or preventing the application of benefits of trade agreement concessions to that foreign country or imposing duties or other import restrictions on the goods imported. 19 U.S.C. § 2411(c) (1992).

In certain cases there is another benefit of bringing a Section 301 action instead of action under the countervailing duty law.²²⁰ In mandatory and discretionary actions, under Section 301,²²¹ it is not necessary that the majority of the industry file a petition.²²² All that is required is that an "interested person" to file a petition.²²³ An "interested person" is deemed to be any party who has a significant interest affected by the act, policy or practice complained of.²²⁴ This includes any party who is representing a significant economic interest affected directly by the act, policy or practice complained of in the petition.²²⁵ This is important because high-tech industries in the U.S. often consist of only a few firms. If the market leader refuses to act,²²⁶ the industry will be foreclosed from pursuing an action under the countervailing duty law. The alternative of Section 301 can remedy problems in GATT adjudication and provide an additional cause of action against subsidized EC consortia especially for firms that are not dominant in their industrial marketplace.

1. Mandatory Action

Mandatory retaliatory action is required by the USTR if the it determines that U.S. rights under a trade agreement have been violated²²⁷ or an act,

220. Another benefit obtained for the domestic industry in pursuing an action for discretionary retaliation under Section 301 is there is no requirement of a showing of material injury or threat of material injury as required under the countervailing duty law and a mandatory Section 301 retaliation action concerning subsidization.

221. *See Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l Trade 1984) (ITA must dismiss petitions not proven to be affirmatively supported by the majority of domestic producers in a countervailing duty action). *But see Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1085 (Ct. Int'l Trade 1988) (ITA has discretion to dismiss, but is not required to dismiss, petitions that are not shown to be actively supported by a majority of domestic industry).

222. 15 C.F.R. 2006.0(b) (1992).

223. *Id.*

224. *Id.*

225. *Id.*

226. As it appears that Boeing has in Airbus.

227. 19 U.S.C. § 2411(a)(1) (1992). The law also recognizes the political realities to some degree by providing that the USTR shall make its decision, "subject to the specific direction, if any, of the President." 19 U.S.C. § 2411(a)(1) (1992); *see also* 53 Fed. Reg. 44,970 (1988) (where the USTR determined in the first case filed under Section 301, as amended, that despite the apparent illegality of Japan's refusal to import rice under GATT rules, it would not be effective to initiate a section 301 investigation. The USTR determined the Uruguay Round of multilateral trade negotiations would "provide a more effective way to open Japanese rice markets to U.S. imports.").

Section 301 also provides the USTR with five escape hatches to avoid bringing a mandatory retaliation action:

- 1) a finding by a GATT panel that the United States is not being treated illegally by a foreign country involved;
- 2) a finding by the USTR that the foreign country is taking satisfactory measures to solve the problem;
- 3) action by the foreign country to compensate the United States;
- 4) a finding by the USTR in extraordinary cases that taking action under Section 301 would have an adverse impact on the U.S. economy out of proportion to the

policy or practice of another government denies the U.S. the benefit of a trade agreement.²²⁸ The USTR must then consult with the foreign government about the issues involved in the action.²²⁹ If these consultations fail to remedy the issues involved, then the USTR must ask for the dispute resolution that is in the trade agreement.²³⁰

Therefore, if a Section 301 action is brought against a subsidized EC consortia, pursuant to Section 303, the USTR must refer applicable cases to GATT following consultation with the member state governments.²³¹ If a U.S. government initiated action is already pending over the subsidization, as would have been the case with Airbus, then presumably the actions would be consolidated. In any event there are two benefits for the U.S. industry by proceeding via mandatory retaliation that are unavailable in a U.S. government self-initiated action in GATT: time limits and a statutorily set standard of retaliation.

a. Time Limits. The first benefit of a mandatory Section 301 action is the statutory time limits, which provide specified time periods within which a settlement must be reached and the USTR must take action against the consortia. Section 301 requires that the USTR reach a mutually acceptable resolution to the dispute with the foreign country subject to the action within the earlier of the consultation period in the agreement (including the GATT Subsidies Code) or one hundred and fifty days after the consultation within the trade agreement is commenced.²³² If these time limits are not met, then the USTR must "request proceedings on the matter under the formal dispute settlement procedures provided under the [trade] agreement."²³³ These time limits ensure more expedient negotiating procedures than was involved in the Airbus situation.

Second, Section 301 requires the USTR to make unilateral determinations on the unfair trade issue within twelve months on cases involving trade agreements, and the GATT Subsidies Code, (even if the "involved" trade agreement has not been able to adjudicate the dispute in that time).²³⁴ This limit ensures that relief will be provided to affected U.S. industry within a reasonable time period after the petition is accepted by the USTR under

benefits of such action; and 5) a finding by the USTR that retaliation would cause serious harm to the national security of the United States (taking into account the effect of inaction on the section 301 program).

19 U.S.C. § 2411(a)(2)(B) (1992); see Barton & Fisher, *supra* note 212, at 26.

228. 19 U.S.C. § 2411(a)(1) (1992).

229. 19 U.S.C. § 2413(a) (1992).

230. 19 U.S.C. § 2414(a) (1992).

231. 19 U.S.C. § 2413(a)(2) (1992); see Barton & Fisher, *supra* note 212, at 27.

232. 19 U.S.C. § 2413(a)(2)(B) (1992).

233. *Id.*

234. Barton & Fisher, *supra* note 212, at 27.

Section 301. These limits, to some extent, rectify the inherent delay in GATT.²³⁵

b. Retaliation. The form of retaliation that the USTR may take under Section 301 is discretionary,²³⁶ however, the amount of retaliation levied must be equivalent to the burden or restriction imposed on U.S. commerce.²³⁷ It is the USTR's ability to retaliate, not the type of retaliation, that gives Section 301 its strength to remedy unfair trade practices. The threat of retaliation, more than the actual retaliation itself, make Section 301 an effective weapon for a U.S. industry facing an EC consortia.²³⁸ Merely starting a Section 301 action may lead the EC consortia to cease subsidization to avoid retaliation available to the USTR under Section 301.

If the threat of retaliation is ineffective actual retaliation may be effective in cases where the nation(s) involved rely heavily upon the sale of exports to the U.S. marketplace. For example, in the Japanese Semi-Conductor action, after the Japanese failed to implement a trade agreement with the U.S., President Reagan imposed a one-hundred percent ad valorem duty on certain Japanese products under the mandatory Section 301 provision.²³⁹ This amounted to a virtual ban on the import of these products to the U.S., its primary market, causing the Japanese to quickly comply with the original

235. There is still some delay possible under Section 301. *See, e.g., Monthly Import/Business Review*, 1991 ITC LEXIS 121 (March 1991) available in LEXIS, ITRADE Library (where the U.S. pork industry filed a Section 301 petition with the USTR to retaliate on the EC's ban on U.S. pork, and the USTR after accepting the petition chose to delay action for thirty days during negotiations with the EC); 19 U.S.C. § 2413(b) (1992); 19 U.S.C. § 2414(a)(3)(B) (1992); *see also* Alan Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 310 (1990) [hereinafter Sykes, *Mandatory Retaliation*].

236. 19 U.S.C. § 2411(a) (1992); The USTR as a form of retaliation may in either a mandatory or discretionary investigation:

1) withdraw, suspend or prevent a trade agreement with a foreign country; 2) impose duties or restrict the import of goods; 3) enter into binding agreements with the country that will either a) eliminate the act subject to the action, b) eliminates the burden or restriction on U.S. commerce or c) provide compensation ensuring trade benefits that satisfies the USTR and provides compensation in benefits to the domestic industry.

19 U.S.C. § 2411(c).

The language of Section 301 encourages the USTR to attempt to impose duties before deciding to restrict imports in mandatory retaliation actions. 19 U.S.C. § 2411(c)(5)(A) (1992); *see* Canadian Provincial Practices Affecting Canadian Imports of Beer, 57 Fed. Reg. 308 (1992) (where Canadian actions found to violate GATT and no resolution reached, USTR increased duties on imports of Canadian beer).

237. H.R. Conf. Rep. No. 576, 100th Cong., 2d Session, 558, reprinted in 1988 U.S.C. § C.A.N. 1547, 1591; Sykes, *Mandatory Retaliation*, *supra* note 235, at 320 (retaliation is appropriate to bring a violation in line with legal obligations).

238. *See* Hansen, *supra* note 218, at 1131.

239. Japanese Semi-Conductors, 52 Fed. Reg. 13,419 (1987).

agreement.²⁴⁰ This example demonstrates that actual retaliation can effectively force an EC subsidized consortia, with a large U.S. market, to conform its behavior to U.S. free market principles.

2. Discretionary Retaliation

The USTR is authorized to take discretionary retaliatory action against "unfair" foreign trade practices which are deemed "unjustifiable," "unreasonable" or "discriminatory."²⁴¹ In making its determination, the USTR must consider: 1) whether the unfair trade practices of the foreign government are actionable under Section 301; and 2) whether retaliation is deemed to be appropriate under the circumstances.²⁴² One foreign trade practice that may be "unreasonable" and therefore actionable under Section 301 is export targeting.

Export targeting by a foreign government is defined under Section 301 as "any government plan or scheme consisting of a combination of coordinated actions . . . that are bestowed on a specific enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise."²⁴³ The House Committee Report states that export targeting typically consists of:

[A] combination of practices, such as, but not limited to, directing private capital as well as governmental financial resources to the particular industry on a preferential basis, establishing an industry cartel, providing preferential sourcing of government procurement, closing or restricting the home market to foreign competition or investment in order to provide special protection during the establishment and development of the industry.²⁴⁴

240. Japanese Semi-Conductors, 52 Fed. Reg. 22,693 (1987) (after the Japanese had complied the USTR took the initiative to suspend most of the retaliatory measures).

241. 19 U.S.C. § 2411(b) (1992) provides:

(b) Discretionary action

If the Trade Representative determines under 2414(a)(1) of this title that -

(a) an act, policy or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(b) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.

See Barton & Fisher, *supra* note 212, at 27.

242. See Nara, *supra* note 213, at 242. Judith Hipler Balo & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1, 3 (1988).

243. 19 U.S.C. § 2411(d)(3)(E) (1992).

244. House Comm. on Ways and Means, Report on the International Economic Policy Reform Act of 1987, H.R. Rep. No. 40, 100th Cong. 1st Sess., pt. 1 at 65 (1987).

There are several reasons why export targeting, as defined in Section 301, is likely to occur in the case of a high-tech EC consortia. First, consortia fit into the definition of cartels,²⁴⁵ an important component of the House Committee Report's definition. Cartels are of particular concern because they have substantial market power and can use this power to exclude competitors from their home markets.²⁴⁶ Second, EC consortia are likely to be subsidized. Therefore, product prices may be lower in the foreign consortia's home market to assure their success, to the detriment of U.S. industry. Third, member state governments of EC consortia have political and economic support agreements that may act to exclude U.S. industry from competing in the home markets of the member state governments. This is compounded by the national prestige involved in a high-tech industry which may also lead the member state governments to allow only their own product to succeed in member state markets.

An example of this last point is currently occurring in the Airbus context through political support for the purchase of Airbus aircraft in the EC, which acts to discriminate against aircraft produced by U.S. industry.²⁴⁷ Airbus has recently asked the EC's Competition Commissioner to open an inquiry into British Airways purchase of aircraft.²⁴⁸ The Managing Director of Airbus, Jean Pierson, alleged that over the past fifteen years British Airways has ruled out the purchase of Airbus' civil aircraft in favor of Boeing's.²⁴⁹ This demonstrates that Airbus is seeking preferential market access in Britain, an Airbus member state, to foreclose a private company's purchase of U.S. civil aircraft. This is the first step in closing market access to U.S. civil aircraft manufacturers in Airbus member states. This, combined with subsidization and the cartel status of Airbus, may have been sufficient to allow the U.S. industry to bring a successful action for discretionary retaliation under Section 301.

Similar market access problems will continue for U.S. high-tech industry in the EC, especially if Airbus is successful on its petition to the EC Competition Commissioner. The export targeting provision of Section 301 may assist U.S. industries in fighting market access problems encountered in the subsidized EC consortia's home markets.

a. Retaliation. A party that brings an action for discretionary retaliation will find the same retaliation procedures are available as in a mandatory

245. Webster's Dictionary defines "cartel" as, "a combination of independent commercial or industrial enterprises designed to limit competition or fix prices." WEBSTER'S 9TH COLLEGIATE DICTIONARY 210 (9th ed. 1983). Hence, EC subsidized consortia, such as Airbus, that are formed to limit competition in high-tech industry, fit the classical definition of cartels.

246. Telephone conversation with Dr. Maurice R. Manner, Professor of Business and Business of Marymount College, Tarrytown, New York, on March 4, 1992.

247. The tentative agreement reached on April 1, 1992 over Airbus neglects this issue.

248. *Airbus Seeks Inquiry of British Airways' Method of Selecting New Airplanes*, 8 Int'l Trade Rep. (BNA) 1503 (Oct. 16, 1991).

249. *Id.*

Section 301 action.²⁵⁰ Once again broad choices are available to the USTR to remedy the unfair trade practice of the consortia. Interestingly, a study has found that U.S. retaliatory threats under the discretionary retaliation provision of Section 301 are particularly effective in encouraging U.S. trading partners to open their markets to U.S. exports.²⁵¹ U.S. industry, by filing an action for discretionary retaliation, may cause the opening of markets previously closed to the industry in a consortia's member states.

There is also a provision available under a discretionary retaliation action that allows the USTR to set up a panel to "recommend measures which will promote the competitiveness of the domestic industry effected [sic] by the export targeting."²⁵² Upon receipt of such recommendations, the President may decide if administrative action or legislation is necessary to "restore or improve the international competitiveness of the domestic industry."²⁵³ The Panel's report must also be given to Congress.²⁵⁴ This provision leaves open the possibility that Congress or the President will implement legislative measures on its own accord to assist the affected domestic industry in its plight.

3. Is Section 301 Effective

Section 301 is the only existing trade law with the ability to force the U.S. government to commence negotiations with foreign nations on existing foreign trade barriers against U.S. exports.²⁵⁵ In this respect, it can assist domestic industry in fighting a subsidized EC consortia in an international arena. However, the flexibility provided to the USTR under Section 301, combined with the "escape hatches" on mandatory action, ensures that the Executive Branch has discretion to take "judicious and trade-liberalizing actions in a multilateral context."²⁵⁶ Section 301 is, therefore, only a discretionary instrument of the Executive Branch. Despite its "threat" potential, Section 301 does not require unilateral retaliatory action. As one author expressed it:

Although section 301 may be the best means currently available to "open up" closed markets which result in differential pricing, the granting of relief under Section 301 is in many ways unpredictable. As such, the

250. See *supra* section IV(B)(1).

251. Bayard, *supra* note 215, at 325 ("In the twenty-seven Section 301 actions in which retaliation was threatened or imposed, trade liberalization occurred in about two-thirds of the cases. . . . Retaliatory threats seem to work against large traders such as the European Community and against small countries such as Korea and Taiwan").

252. 19 U.S.C. § 2415(b)(1)(A) (1992).

253. 19 U.S.C. § 2415(b)(1)(B) (1992).

254. 19 U.S.C. § 2415(b) (1992).

255. Borrus & Goldstein, *supra* note 33, at 350.

256. Barton & Fisher, *supra* note 212, at 28.

political nature of section 301 often constrains the granting of relief in certain cases. Given the highly charged nature of U.S. trade relations, it is likely that a section 301 case will become a political bargaining chip for the Executive Branch. Efficient, market-oriented resolutions to section 301 cases may prove to be the exception, rather than the rule.²⁵⁷

Unless the EC is truly fearful of U.S. retaliation being implemented, Section 301 may prove to be virtually useless. However, even a small amount of fear of retaliation could be beneficial because most high-tech EC consortia rely heavily on the U.S. market.

Another problem with a Section 301 action is it does not prevent trade retaliation from the EC. However, because the United States and the EC rely so heavily upon each other as trading partners, it is unlikely that trade retaliation will be the EC's chosen path.²⁵⁸

Like the countervailing duty law, Section 301 is an imperfect weapon for U.S. industry faced with an EC subsidized consortia. While its biggest flaw is its discretionary nature, if an action is accepted for mandatory retaliation, U.S. industry will be all but assured of relatively quick results in GATT over the subsidization issue.²⁵⁹ If an action for discretionary retaliation is accepted for export targeting, it will serve as an additional weapon, in combination with a countervailing duty or a mandatory Section 301 action, to clear the way for market access to the consortia's home markets that have been blocked to U.S. domestic high-tech industry's imports.

CONCLUSION

This Administration has been so tied up in ideological posturing that it has never focused on the hemorrhage of high-tech jobs and industries from the United States. Its trade policies have been totally ineffective in dealing with the blatantly unfair trading policies of Airbus.²⁶⁰ If we had adopted technology, manufacturing and strategic-trade policies that put American competitiveness before ideology, American companies would not face such limited business choices.

*Senator Bingaman*²⁶¹

While some commentators argue that subsidization problems should be handled by the issuance of agreed upon guidelines of organizations such as GATT,²⁶² they fail to consider the fact that certain U.S. industries will

257. Benz, *supra* note 162, at 742; see Hansen, *supra* note 218, at 1122-24.

258. C. Michael Hawthorne & Sandra Masur, *The Right Emphasis for U.S. Trade Policy in the 1990's: Positive Bilateralism*, 8 B.U. INT'L L.J. 207, 218 (1990).

259. Or if this fails to resolve the matter, a set statutory standard of retaliation.

260. Though the same statement can easily be applied to any high-tech EC subsidized consortia.

261. Senator Bingaman, *Perspective on Aerospace*, L.A. TIMES, Nov. 26, 1991, at 1 (discussing the proposed Taiwan-McAir joint venture and finding as the cause, the subsidization of Airbus).

262. See, e.g., Wood, *supra* note 139, at 1170.

cease to exist if no action is taken. This will cause our economy greater harm than if action is taken by U.S. high-tech industry under the U.S. unfair trade laws. Nowhere is this so evident than when domestic high-tech industry is facing a subsidized EC Consortia.

It is not in high-tech U.S. industries' interests to follow the route of textiles in the 1950s, consumer electronics in the 1960s and steel and automobiles in the 1980s.²⁶³ It is important for U.S. industry to attack the subsidization of an EC consortia vigorously before the threat of material injury is manifested. In most cases, these industries should be prepared to use the U.S. unfair trade laws discussed in this article to achieve a quick and enforceable remedy or be prepared to face another Airbus, a scenario in which the U.S. government slowly and ineffectively ran the show in the international arena as the U.S. aircraft industry followed the path to financial ruin.

263. These industries were severely adversely effected economically by virtually unrestrained subsidized imports into the U.S.