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The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System

C. O'Neal Taylor

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The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System

C. O'Neal Taylor*

ABSTRACT

Since World War II, the United States has sought trade liberalization through the use of multilateral and unilateral actions under the General Agreement on Tariffs and Trade (GATT) and Section 301 of the Trade Act of 1974, respectively. Unilateralism by the United States has involved the forceful opening of foreign markets by the threat of sanctions, such as blocking access to the U.S. market. Such unilateral actions led the world trading system into the most recent multilateral negotiations, the Uruguay Round. As a result, the United States conceded to an effort to achieve trade liberalization through the expansion of GATT and the establishment of a more adjudicative settlement system governed by the World Trade Organization Dispute Settlement Understanding (DSU).

This Article addresses two major aspects of these recent developments. First, the author analyzes the limits to economic power exercised as unilateral sanctions. More specifically, she examines Section 301 and its limits by deconstructing this provision and reviewing cases in its second decade that construe its various parts. The author contends that the United States used Section 301, from 1985-1995, for three major purposes—pursuing GATT violations, to set the agenda for the Uruguay Round, and to try to cure a persistent trade deficit with Japan. The author concludes that unilateralism, as exemplified by Section 301, has limitations—primarily its effectiveness and its potential to

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violate GATT law—that prevent it from being a panacea for U.S. trade problems.

Second, the author examines the comprehensiveness and effectiveness of the new multilateral dispute settlement system under the DSU as an alternative to U.S. unilateral activity. This Article includes extensive analysis on how the DSU addresses and fails to address Section 301 concerns. Furthermore, it tracks the creation of the more adjudicative dispute settlement system and examines its consequences for the United States and all international organizations. The author concludes that the United States needs to resume multilateralism as the primary way to pursue trade liberalization and to use the more legitimate and equitable World Trade Organization Dispute Settlement System, established under the Uruguay Round, to address U.S. trade problems.

TABLE OF CONTENTS

I.	INTRODUCTION	211
II.	SECTION 301 AND ITS LIMITS	213
	A. <i>Section 301 Deconstructed</i>	213
	B. <i>The United States and the Lure of Unilateralism</i>	218
	C. <i>A Taxonomy of Section 301 Cases (1985-1996)</i>	225
	1. <i>Ensuring Compliance with International Trade Law: Section 301/International Violation Cases</i>	225
	2. <i>Section 301/Unreasonable Cases</i>	228
	3. <i>Section 301 and the Japan Problem</i>	238
III.	THE WTO DISPUTE SETTLEMENT SYSTEM: ITS PROMISES AND ITS LIMITS.....	242
	A. <i>Completion of the Uruguay Round: Establishment of the WTO and the Adoption of the Dispute Settlement Understanding (DSU)</i>	242
	B. <i>How the DSU Addresses and Fails to Address Section 301 Concerns</i>	250
	1. <i>The Dispute Settlement System of the WTO</i>	250
	2. <i>The United States as a Plaintiff in the WTO: Pursuing Its Section 301 Concerns</i>	260
	a. <i>Section 301/International Violations and Cases and the WTO Dispute</i>	

	Settlement System	260
	b. Section 301/Unreasonable Cases and the GATT Non-Violation Theory.	273
	3. United States as a Defending Country in a DSU Proceeding	292
C.	<i>International Organizations and Dispute Settlement</i>	296
	1. The Creation of an Adjudicative Dispute Settlement System	296
	2. The Consequences of a More Adjudicative Dispute Settlement System	298
	a. Jurisdiction	298
	b. Development of GATT Law: The Creation of Precedent.....	305
	c. Enforcement/Compliance.....	308
	3. Consequences of the Adjudicative System for the United States.....	311
IV.	CONCLUSION.....	314

I. INTRODUCTION

Since the end of World War II, the United States has sought trade liberalization by alternatively pursuing multilateralism and unilateralism. When following the multilateral path, the United States used its economic power to help create a body of law governing international trade and an organization to oversee that law, the General Agreement on Tariffs and Trade (GATT).¹ While leading the multilateral system, the United States worked on expanding and clarifying international trade rules and ensuring compliance by GATT countries with those rules. The United States worked toward expanding the law by serving as the driving force behind a series of rounds of GATT negotiations aimed at significantly lowering worldwide tariffs and dismantling some of the non-tariff barriers to trade.² At the same time, the United States sought to ensure compliance with international trade law by actively using the GATT dispute settlement system.³

The U.S. turn towards unilateralism began when the country experienced a slippage in its position as the dominant economic power. During this period, the United States came to believe that

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

2. See generally JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 9-17, 45-55 (1990).

3. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 295-300 (1993) [hereinafter *ENFORCING INTERNATIONAL TRADE LAW*].

not all of its trading partners were as committed to multilateral trade liberalization as it was. The legislative tool developed for self-help was Section 301 of the Trade Act of 1974, a statute designed to force open other country's markets. The leverage for opening these markets was the threat of depriving trading partners access to the U.S. market.⁴ Aggressive unilateralism under Section 301 forced open some markets and pushed the world trading system into the most recent set of multilateral negotiations, the Uruguay Round. By the end of the Uruguay Round, the United States managed to obtain its major goals of increasing market access through the expansion of GATT law and establishing a more adjudicative dispute settlement system governed by the World Trade Organization Dispute Settlement Understanding (DSU).⁵

The Uruguay Round and its results appear to mark the convergence of the U.S. multilateral and unilateral paths to trade liberalization. However, it is an uneasy convergence. The U.S. turn to unilateralism had its costs. Many countries embraced multilateralism, as exemplified by the World Trade Organization (WTO) largely to constrain and discipline the United States.⁶ Meanwhile, the United States must reconcile its desire to continue leading the multilateral system with its attempt to retain maximum unilateral power. Having obtained its major trade goals in the Uruguay Round, the United States is now faced with operating within a new international trading regime. This Article attempts to address and answer two questions: (1) Are there limits (and if so, what kind of limits) to economic power when exercised as unilateral sanctions?; and (2) Is the new multilateral dispute settlement system under the WTO's dispute settlement

4. See generally Judith Hippler Bello & Alan F. Holmer, *Current Developments: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW 211, 211 (1987).

5. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 33 I.L.M. 1244 [hereinafter Dispute Settlement Understanding].

6. The European Community, for example, was quite concerned about the 1988 revisions to Section 301 that expanded and toughened U.S. response to unfair trade practices. In a meeting held during the DSU negotiations the EC claimed that "it was extremely serious for a country to grant itself the right to take GATT-inconsistent measures to counter GATT-consistent measures taken by third countries." 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 2762 (Terence P. Stewart, ed. 1993) [hereinafter DISPUTE SETTLEMENT NEGOTIATING HISTORY].

understanding a complete and effective alternative to U.S. unilateral activity?⁷

II. SECTION 301 AND ITS LIMITS

A. Section 301 Deconstructed

Before attempting to analyze Section 301, it is important to examine the history and purpose of the statute. "Section 301" takes its name from the section number of the original legislation, Section 301 of the Trade Act of 1974.⁸ The original Section 301 gave the President broad authority to take retaliatory actions against "unjustifiable" as well as "unreasonable" import restrictions by other countries.⁹ Neither term was defined in the statute itself. The legislative history of Section 301, however, indicates that Congress considered "unjustifiable" acts to be those that were illegal under international law or inconsistent with international obligations.¹⁰ "Unreasonable" acts were considered to encompass import restrictions by countries that were not necessarily illegal, but which nullified or impaired benefits under international agreement or otherwise discriminated against or burdened U.S. commerce.¹¹ The remainder of the legislative history of the Trade Act of 1974 contained descriptions of the actions Congress described as unreasonable.¹²

Section 301 was designed to allow the President to take retaliatory action against countries which did not agree to end such unjustifiable or unreasonable practice. Congress contemplated the possibility that some retaliatory actions would

7. To achieve these goals the article relies on international regime theory, a body of international relations theory devoted to the issue of how international regimes operate. International regime theory poses several significant questions. Why does a state cooperate in a multilateral regime? How is an issue handled differently by a country if it does? Is it possible to obtain compliance by countries with regime decisions? See generally Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335 (1989). No examination of the U.S. future within the world trading system can take place without attempting answers to some, if not all, of these questions.

8. Trade Act of 1974, Pub. L. No. 93-618, §§ 301-02, 88 Stat. 1978, 2041-43 (1975) (codified as amended at 19 U.S.C. §§ 2411-18 (1994)) [hereinafter TTA of 1974].

9. *Id.* at § 301(a)(1).

10. S. REP. NO. 93-1298, at 3-4 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7301 [hereinafter 1974 Act History].

11. *Id.*

12. *Id.* at 1974 U.S.C.C.A.N. at 7302.

not be consistent with U.S. obligations under GATT.¹³ Congress, however, also stated that GATT obligations were being "observed more often in the breach"¹⁴ than in reality and that the decision-making process of GATT frustrated the ability of the United States to protect its rights and benefits under GATT.¹⁵ The entire legislative history of Section 301 is replete with Congressional expressions of dissatisfaction with GATT and GATT system. In its final comment on retaliation under the statute, the Committee report states:

The Committee is not urging that the United States undertake wanton or reckless retaliatory action under Section 301 in total disdain of applicable international agreements. However, the Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by the Congress.¹⁶

Section 301 was amended in 1979, 1984, 1988,¹⁷ and most recently in 1994 in the Uruguay Round implementing legislation.¹⁸ The early legislative revisions focused on the time limits for Section 301 cases and procedures for initiation of such cases (through private industry petition or self-initiation by the Administration).¹⁹ The major 1988 revisions in the Omnibus Trade and Competitiveness Act did not alter the scope of Section 301, but did create two new forms of Section 301 cases—Special 301, which required the United States Trade Representative (USTR) to identify and initiate investigations of countries that failed to offer adequate protection for intellectual property

13. TTA of 1974, *supra* note 8, at § 301(a)(4)(a) & (b). According to the legislative history, "The authority in this section should not be used frivolously or without justification. The Committee feels, however, that there must be a credible threat of retaliation whenever a foreign nation treats the commerce of the United States unfairly." 1974 Act History, *supra* note 10, 1974 U.S.C.C.A.N. at 7302-03.

14. 1974 Act History, *supra* note 10, 1974 U.S.C.C.A.N. at 7304.

15. *Id.*

16. *Id.*

17. Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 301-04, 93 Stat. 144-317 (codified as amended at 19 U.S.C. §§ 2501-82 (1994)) (amending the TTA of 1974, *supra* note 8); Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 2948, 3002 (codified at 19 U.S.C. § 2411 (1994)) (amending the TTA of 1974, *supra* note 8) [hereinafter TTA of 1984]; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1301-04, 102 Stat. 1107-1574 (codified as amended at 19 U.S.C. § 2411-14 (1994)) [hereinafter OTCA].

18. Uruguay Round Agreement Act, Pub. L. No. 103-465, § 314, 108 Stat. 4809 (codified as amended at 19 U.S.C. § 2411-14 (1994 & Supp. VII 1995)) [hereinafter URAA].

19. THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 27 (1994) [hereinafter RECIPROCITY AND RETALIATION].

rights,²⁰ and Super 301, which required USTR to identify and pursue the countries with the most significant trade barriers.²¹

The 1988 revision of Section 301 was also significant because it broke Section 301 cases into two categories: (1) those in which it was mandatory for the United States to take action against a target country which violated the terms of the statute; and (2) those in which retaliation was discretionary. Mandatory action was to be taken, unless a settlement was reached or the GATT dispute settlement system ruled against the United States, in all cases where the foreign act, policy, or practices violated an international agreement.²² If the foreign act, policy, or practice unreasonably burdened or restricted U.S. Commerce, USTR was not required to act by engaging in trade sanctions. Instead it was to take "all appropriate and feasible action" to obtain elimination of the act.²³ The 1994 revision to Section 301 retained this 1988 redesign of the statute.

Each of the Congressional revisions of Section 301 has confronted the issue of clarifying the meanings of "unjustifiable" and "unreasonable" means.²⁴ Unjustifiable acts are now considered to be those that violate international trade agreements or otherwise nullify or impair U.S. benefits under international agreements.²⁵ "Unreasonable" has been defined as covering

20. OTCA, *supra* note 17, at §§ 1301 & 1303. Special 301 required USTR to annually: 1. identify countries that deny adequate and effective protection of intellectual property rights; 2. identify "priority" countries that are the most egregious intellectual property violators and that fail to undertake or make progress concerning such negotiations with USTR; and 3. initiate accelerated Section 301 investigations with regard to priority country practices.

21. *Id.* at § 1302. Super 301 was supposed to be used by USTR for two years to: 1. identify priority practices likely to have the most significant potential to increase U.S. exports; and 2. identify priority countries taking into account the number one persuasiveness of practices; *see also* 6 INT'L TRADE REP. (BNA) 715-21 (May 25, 1989) (USTR Fact Sheets on the implementation of Super 301 and Special 301); *see generally* Geza Feketekuty, *U.S. Policy on 301 and Super 301*, in AGGRESSIVE UNILATERALISM 91-103 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). Super 301 lapsed after two years as provided in the original legislation. President Clinton extended Super 301 by Executive Order 12901 in 1994. This form of Section 301 was reenacted into law in the implementing legislation for the Uruguay Round. URAA, *supra* note 18, at § 314(f).

22. OTCA, *supra* note 17, at § 1301. For an explanation of these provisions, see Judith H. Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in AGGRESSIVE UNILATERALISM 49-50 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

23. OTCA, *supra* note 17, at § 1301.

24. RECIPROCITY AND RETALIATION, *supra* note 19, at 27-28.

25. TTA of 1984, *supra* note 17, at § 304. Unjustifiable acts are defined in § 2411(d):

practices that are "not necessarily in violation of or inconsistent with U.S. legal rights," but which are "deemed to be unfair and inequitable."²⁶ Neither the Executive nor Congress has ever proposed a formal definition for "unreasonable" or suggested a standard against which such a determination could be made. This failure to give absolute meaning to the term means that USTR's characterization of foreign government actions cannot always be predicted. The absence of predictability, however, leaves USTR with the maximum amount of flexibility when it investigates and determines whether there is a basis for U.S. action under Section 301.

In the various revisions of the statute, Congress has provided some guidance to USTR by offering a non-exhaustive list of illustrative practices.²⁷ This illustrative list of "unreasonable" acts or practices has grown with each revision of the statute, going from the denial of intellectual property rights and opportunities for the establishment of an enterprise (1984 Act) to government toleration of systematic anti-competitive activities by private firms, export targeting, and the denial of labor rights (1988 Act).²⁸ In the 1994 revisions to Section 301 following the Uruguay Round, Congress clarified the definitions for what constitutes unreasonable practices as they relate to intellectual property protection and anti-competitive activities.²⁹ For example, a country may still be found to be denying adequate intellectual property protection even if it is in compliance³⁰ with the TRIPS Agreement,³¹ which is the new GATT Agreement requiring all WTO members to offer certain minimum standards for the protection of intellectual property rights. With respect to

(4)(A) An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States.

(B) Acts, policies, and practices that are unjustifiable include, but are not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment or the right of establishment or protection of intellectual property rights.

19 U.S.C. § 2411(d).

26. 19 U.S.C. § 2411(d)(3)(A)-(B) (defining unreasonable).

27. RECIPROCITY AND RETALIATION, *supra* note 19, at 27-28.

28. *Id.* at 31.

29. URAA, *supra* note 18, at § 314(c)(1).

30. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, Statement of Administrative Action and Required Supporting Statements, H.R. DOC. NO. 103-316, 103d Cong., 2d Sess., at 1028 (1994) [hereinafter Statement of Administrative Action].

31. Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization [hereinafter TRIPs Agreement].

anti-competitive practices (antitrust issues) a foreign government may be found to be acting unreasonably if it: (1) tolerates systematic anti-competitive activities by state-owned enterprises as well as private firms; (2) denies market access for U.S. services as well as goods; or (3) restricts the sales of U.S. goods or services to a foreign market.³² The current list of practices defined as "unreasonable" in the 1994 amendments to Section 301 include the following: unfair or inequitable practices; activity which denies fair and equitable "opportunities for the establishment of enterprise;" intellectual property rights not covered by the TRIPs agreement; nondiscriminatory market access opportunities; toleration of "systematic anticompetitive" activities; export targeting; and inadequate labor rights.³³

The cumulative effect of the Section 301 legislative revisions has been to produce a different pathway for the two types of Section 301 cases. As of 1994, if USTR initiates a "Section 301/International violation" case or a complaint about a GATT violative practice, it must take the case through the WTO dispute settlement system.³⁴ The USTR investigation in a Section 301/International violation case is supposed to proceed in parallel with the WTO dispute settlement process with the aim of seeking a mutually satisfactory resolution of the issues raised in the case.³⁵ If the United States and the Section 301 target cannot end the case at the WTO consultations stage, the United States must request a panel and delay any determination of GATT illegality or what an appropriate U.S. response would be until after the conclusion of the dispute resolution process.³⁶ The adoption of the Dispute Settlement Understanding (DSU) by the United States did not alter the way this category of Section 301 cases were pursued.³⁷ Under the 1988 Act, all international violation claims were also supposed to be pursued through the appropriate dispute resolution system.³⁸ The adoption of the DSU, however, simplifies the process because it provides one integrated dispute settlement system for all GATT-based complaints.³⁹ The end result of a Section 301/International violation case and what action the United States will take turn on whether or not the WTO ruling is favorable. The Section 301

32. Statement of Administrative Action, *supra* note 30, at 1028.

33. 19 U.S.C. § 2411(d)(3)(A)-(B).

34. URAA, *supra* note 18, at § 314(c).

35. *Id.* at § 314(a).

36. Statement of Administrative Action, *supra* note 30, at 1018.

37. H.R. REP. NO. 103-826, pt. 1, 103d Cong., 2d. Sess., *reprinted in* 1994 U.S.C.C.A.N. 3773, 3906-07 [hereinafter URAA Legislative History].

38. *Id.*

39. *See infra* notes 183-84 and accompanying text.

target is expected to follow the DSU provisions for implementation of the panel recommendations.⁴⁰ Only if the target Section 301 country fails to implement a WTO recommendation satisfactorily within the appropriate time⁴¹ will USTR be forced to decide what action the United States should take.

The pathway for a "Section 301/Unreasonable" case is significantly shorter. USTR determines whether to initiate the case and then pursues the ensuing investigation and negotiations regarding the unreasonable practice on a unilateral basis. Nothing in the Section 301 statute, its revisions, or the legislative histories suggests a linkage between Section 301/Unreasonable cases and the GATT or WTO dispute settlement system.⁴²

B. *The United States and the Lure of Unilateralism*

There is a large body of economic and legal literature on Section 301 its GATT legality⁴³ and its effectiveness in actually opening foreign markets and thus increasing U.S. exports.⁴⁴ Different analytical methods have been used for these studies, including the application of game theory,⁴⁵ economics, case studies,⁴⁶ and comparative analyses of Section 301 unilateralism

40. Dispute Settlement Understanding, *supra* note 5, at art. 21.1.

41. *Id.* at art. 21.3.

42. Statement of Administrative Action, *supra* note 30, at 4308.

Finally, neither Article XXIII nor Section 301 requires the United States to use DSU procedures when the trade representative considers that an investigation does not involve a Uruguay Round Agreement.

43. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 203-41.

44. See, e.g., Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL. INT'L BUS. 263, 269-89 (1991-92); RECIPROCITY AND RETALIATION, *supra* note 18; ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) [hereinafter THE NEW SOVEREIGNTY]; PATRICK LOW, TRADING FREE: THE GATT AND U.S. TRADE POLICY (1993); GREG MASEL & RACHEL HINES, SECTION 301: A CATALYST FOR FREE TRADE (Economic Strategy Inst. 1995) [hereinafter ESI study].

45. See Sykes, *supra* note 44, at 269-89; John McMillan, *Strategic Bargaining and Section 301*, in AGGRESSIVE UNILATERALISM 203, 213 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990); see generally Alan O. 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 (1990); WILLIAM R. CLINE, "RECIPROCITY": A NEW APPROACH TO WORLD TRADE POLICY? (1982); Richard Diamond, *Changes in the Game: Understanding the Relationship Between Section 301 and U.S. Trade Strategies*, 8 B.U. INT'L L. J. 351 (1990).

46. See generally, in no ranking of time or importance, the following examples of "case studies": Jean Heilman Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms*, 17 N.C. J. INT'L L. & COM. REG. 1 (1992); Alex Y. Seita, *The Intractable State of United States-Japan Relations*, 32 COLUM. J. TRANSNAT'L L. 467 (1995); Paula Stern, *Reaping the Wind and Sowing the Whirlwind: Section 301 as a Metaphor for Congressional Assertiveness in U.S.*

with the multilateralism of GATT negotiations and dispute settlement.⁴⁷ Almost all of the literature on and all of the analytical approaches to Section 301 provided some insight into how the United States confronts what it considers to be the illegal or unfair trade practices of its trading partners.

Rather than attempt to describe and critique these approaches to Section 301, however, this Article will attempt yet another approach. It will attempt to analyze what the United States set out to do and what it did accomplish with the second decade of Section 301 cases and what the experience of that time frame tells us about how the United States should approach the post-Uruguay Round trading system.⁴⁸ The second decade of Section 301 cases, from 1985 to the 1995, has caused the most controversy within the world trading system.⁴⁹ U.S. actions during this time period have been attacked as one of the largest threats to the world trading system that developed following World War II.⁵⁰ Consequently, it is this decade of Section 301 cases that will be examined in order to diagnose what the United

Trade Policy, 8 B.U. INT'L L.J. 1 (1990); Ted L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90 (1992); Suthiphon Thaveechaiyagarn, *Current Developments: The Section 301 Cigarette Case Against Thailand—A Thai Perspective*, 21 LAW & POL'Y INT'L BUS. 367 (1990); Patrick H. Hu, *The China 301 on Market Access: A Prelude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131 (1994); Qiao Dexi, *A Survey of Intellectual Property Issues in China-U.S. Trade Negotiations Under the Special 301 Provisions*, 2 PAC. RIM L. & POL'Y J. 259 (1993).

47. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3; Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993) [hereinafter *On Compliance*].

48. The second true decade of Section 301 cases (1985-1994) ends in 1994 because that is the year before the WTO Agreement, which established the organization and gave effect to the DSU, entered into force.

The appendix to this article contains a chart which lists and describes all the Section 301 cases of the second decade, as well as the cases filed in 1995 and 1996 since the creation of the WTO and the adoption of the Understanding on Dispute Settlement. The chart does not purport to be a complete listing of Section 301 cases. USTR maintains such a current list which offers the government's views of its actions. Other scholarship by Sykes and by Bayard and Elliott focus on Section 301 cases as of 1992 (Sykes) and 1994 (Bayard and Elliott). The chart in the appendix was designed as an update, dealing only with the second decade of Section 301.

A review of this chart illustrates that the United States used Section 301 to pursue particular goals from 1985-1995 continuing to the present. Since the shift to the new WTO system, the United States appears to have altered the types of Section 301 cases it will pursue. The reasons why certain cases were undertaken from 1985-1995, why different types are now being brought, and what kinds of cases should be brought (because they would be successful and not undercut the multilateral system) are analyzed *infra* at IIC and IIIB.

49. JAGDISH BHAGWATI, *WORLD TRADING SYSTEM AT RISK* 54-56 (1992).

50. See generally Biswajit Dhar, *The Decline of Free Trade and U.S. Trade Policy Today*, 26 J. WORLD TRADE, Dec. 1992, at 133, 139.

States was trying to achieve through unilateralism and whether utilizing economic power in this fashion actually satisfied U.S. goals.

A review of U.S. unilateralism under Section 301 from 1985 to the creation of the WTO in 1995 reveals the United States using its economic power in an attempt to hold on to its position as the world's leading trading nation. In the early years of the world trading system, immediately after World War II, the United States clearly had such hegemonic power, and it used that power to establish and support the international organization devoted to trade, GATT, and the development of international trade law. By the mid-1970s, when it first enacted Section 301, the United States began to view the world trading system as one which created rather than solved U.S. trade problems.⁵¹ By the mid-1980s, this dissatisfaction with multilateralism reached new heights, and the United States began to make aggressive use of the economic weapon it had created decades earlier.⁵²

During the second decade of Section 301, the United States followed three different goals in bringing Section 301 cases. None of these goals were pursued in preference to or apart from the others; the United States followed each goal more or less simultaneously in the belief that bringing all three types of Section 301 cases would sustain U.S. hegemony. First, the United States sought to ensure the compliance by its trading partners with international trade rules.⁵³ Second, the United States attempted to "set the agenda" for the Uruguay Round of trade negotiations so that the negotiations would encompass and the agreements would reflect areas of particular U.S. interest.⁵⁴ Third, the United States attempted to cure, or at least lessen, its overall trade deficit.⁵⁵ To reach each goal, the United States used different forms of Section 301 actions in slightly different ways.

51. 1974 Act History, *supra* note 10, 1974 U.S.C.C.A.N. at 7301-04.

52. I.M. DESTLER, *AMERICAN TRADE POLITICS* 124-26 (2nd ed. 1992) [hereinafter *AMERICAN TRADE POLITICS*].

53. "The U.S. deployment of [Section 301] against violators of GATT obligations reflects a unilateral political decision (1) that existing levels of compliance were not acceptable and (2) to pay the costs of additional enforcement." *On Compliance*, *supra* note 47, at 203.

54. See *ENFORCING INTERNATIONAL TRADE LAW*, *supra* note 3, at 199-233.

55. The largest impact on the U.S. trade deficit in the 1980s actually came from a sharp appreciation of the dollar. See generally, C. FRED BERGSTEIN, *AMERICA IN THE WORLD ECONOMY* (1988); see also Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM* 6-10 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). Nevertheless, there was a pattern of increasing imports and recessions in 1979-80 and 1982 which heavily impacted some key U.S. manufacturing sectors such as autos and steel. *RECIPROCITY AND RETALIATION*, *supra* note 19, at 14. Congress came to see unfair foreign trade practices as the source of U.S. difficulties. *Id.* Japan was widely regarded as the

From its enactment in 1974 to the present, Section 301 has been employed in 110 cases.⁵⁶ During the first decade of Section 301 (1978-1984), the United States brought 47 cases, but failed to bring many of them to a conclusion.⁵⁷ Several long standing trade disputes pursued under Section 301 were not resolved until its second decade.⁵⁸ More than half of the Section 301 cases up until 1995 were filed, pursued, and concluded in the second decade. In addition, during the first year of the second decade, 1985, that the United States began making aggressive use of the statute.⁵⁹ Since then, Section 301 has become the preeminent U.S. trade statute in the eyes of U.S. trading partners as well as their largest worry.⁶⁰ This period has witnessed both a quickening in the pace of Section 301 filings and an increase in the actions actually taken against other countries under the statute. The reasons for this stepped up use of Section 301 were

main perpetrator of unfair trade practices and large trade deficits. Although the U.S. trade deficit actually dropped significantly over the late 1980s the United States was not satisfied. Japanese exports to the United States were almost three times as large as imports from the United States in the mid-1980s. C. FRED BERGSTEN & MARCUS NOLAND, RECONCILABLE DIFFERENCES? UNITED STATES-JAPAN ECONOMIC CONFLICT 33 (1993).

56. See Sykes, *supra* note 44, at 318-24 for a listing of the first 47 Section 301 cases; see Appendix A at the end of this article for a listing of the Section 301 cases from 1985 to the present. All statistics about the use of Section 301 will be drawn from this chart. Other scholarship on Section 301 may lead to different numbers as the time frames of all literature on Section 301 have not been the same.

57. In the first five years of Section 301 (1975-79) 21 complaints were filed but the President issued a determination in only one. Fourteen cases were still outstanding in 1979. RECIPROCITY AND RETALIATION, *supra* note 19, at 27. Despite the legislative changes to Section 301, many cases remained unresolved in the next five years (1979-85). As of 1984, the President had taken action in only three cases. AMERICAN TRADE POLITICS, *supra* note 52, at 126. Section 301 was actually perceived as a dead end for U.S. industry petitioners seeking action to open closed foreign markets. See generally Judith H. Bello & Alan F. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197, 1197 (1988) [hereinafter *Unilateral Action*].

58. *Unilateral Action*, *supra* note 57, at 1198-99.

59. *Id.*; see also AMERICAN TRADE POLITICS, *supra* note 52, at 126.

60. The use of Section 301 created a great deal of anxiety throughout the Uruguay Round negotiations. In June, 1989, the GATT held a special General Council meeting during which it considered many delegate complaints about the Super 301 provisions of the Omnibus Trade and Competitiveness Act of 1988. GATT Focus, No. 63, June 1989, at 7. The GATT Secretariat also issued a report on U.S. trade policy as part of its trade policy review mechanism in which it noted that U.S. trading partners viewed its retaliatory action under Section 301 "as a lack of commitment on the part of the United States to multilateral rules and procedures." GATT Doc. 1468 (Dec. 14, 1989), reprinted in 2 WORLD TRADE MATERIALS 124, 137 (1990). U.S. trading partners insisted upon the inclusion of a provision in the Dispute Settlement Understanding aimed at limiting U.S. use of unilateral power. See text *infra* at pp. 64-65, 87-88 for a discussion of Article XXIII of the DSU.

rooted in U.S. concerns over lost hegemony in the world trading system. The 1980s had seen a sharp increase in U.S. trade deficits with major trading partners.⁶¹ The United States had also been seeking to address some of its long held concerns about the legal deficiencies of the world trading system and its dispute settlement process by pushing for a new round of multilateral negotiations. When the United States was rebuffed regarding this effort in the early 1980s, the unilateral approach to trade dissatisfactions began to appear more satisfactory.⁶² In fact, the United States took action in the form of imposing sanctions in several cases filed in 1985, and emboldened by its success in these cases,⁶³ saw little reason to curtail its use. Instead, the United States continued to file Section 301 cases, particularly against Japan, with which it had its largest trade deficit,⁶⁴ and against a host of developing countries which did not allow the United States access to their service markets or protect the intellectual property rights of foreigners.⁶⁵ One of the reasons the United States considered itself justified in using unilateral economic power to coerce "appropriate" trade behavior from other countries was because the multilateral system was not addressing its concerns.⁶⁶

A review of the second decade of Section 301, however, reveals that the United States not only brought more cases and retaliated more frequently, but also that the focus of the statute had shifted. From 1974 to 1984, the United States used Section 301 primarily to press its complaints about GATT violations committed by its GATT trading partners. Of the forty-seven Section 301 actions filed, thirty-five (seventy-seven percent)

61. RECIPROCITY AND RETALIATION, *supra* note 19, at 12-19.

62. The United States tried to launch a new round of GATT multilateral trade negotiations in 1982 but was frustrated in its efforts to get new rules on services, investment and intellectual property by the European Community. See ALAN OXLEY, *THE CHALLENGE OF FREE TRADE* (1990); Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM* 113, 130 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter Hudec, *Good and Evil*].

63. See *Unilateral Action*, *supra* note 57, at 1199-1200.

64. RECIPROCITY AND RETALIATION, *supra* note 19, at 53.

65. See Appendix A at end of this Article for a description of all Section 301 cases aimed at intellectual property rights. See *infra* note 108, for a listing of those Section 301 cases.

66. According to then Deputy U.S. Trade Representative Williams, U.S. trade policy was "very much a market-opening trade policy Our preference for doing that [opening markets] is multilateral. We take second place to no country in our support of GATT. But GATT doesn't do the job in a lot of areas." Clyde Farnsworth, *Washington's Hard Line on Trade*, N.Y. TIMES, May 2, 1990, at 4.

involved claims of a GATT violation.⁶⁷ Only twelve cases (twenty-three percent) involved U.S. claims that a trading partner was engaged in some unreasonable, although not necessarily GATT-illegal, practices that hurt the United States.⁶⁸

The statistical breakdown of cases filed after 1985 illustrates a different pattern. Of the fifty-four Section 301 cases filed from 1985 to 1995, only nineteen were based solely on claims of a GATT violation.⁶⁹ Seven cases were based on a combination of GATT-violation and unreasonable practices.⁷⁰ The remaining twenty-eight Section 301 cases filed during this period have been based solely on claims that a trading partner was acting unreasonably.⁷¹ As the type of Section 301 cases shifted, so too did its targets. Over half of the pre-1985 Section 301 cases were filed against developed countries, most of them against the European Community, Japan, and Canada.⁷² In the second generation of Section 301 cases, almost sixty-percent of them were filed against developing countries.⁷³

67. See Sykes, *supra* note 44, at 318-24 for his listing of the first generation of Section 301 cases (1975-85) and the type of claim involved in each case.

68. *Id.*

69. See Appendix A following this Article for a detailed description of Section 301 cases from 1985 to 1996 and the type of claim involved in each case. What follows is a listing of all the cases involving a GATT claim during this period.

70. *Id.*

71. *Id.*

72. See Sykes, *supra* note 44, at 318-24 for his listing of the early Section 301 cases.

73. The developing country targets were:

China	306-86	[56 Fed. Reg. 24,878 (initiation); 57 Fed. Reg. 3084 (termination)]
	301-88	[57 Fed. Reg. 47,889 (initiation); 56 Fed. Reg. 51943 (termination)]
	301-92	[59 Fed. Reg. 35,558 (initiation); 60 Fed. Reg. 12,582 (termination)]
Taiwan	301-56	[51 Fed. Reg. 28,219 (initiation); 51 Fed. Reg. 37,527 (termination)]
	301-89	[57 Fed. Reg. 23,605 (initiation); 57 Fed. Reg. 25,091 (termination)]
Thailand	301-72	[54 Fed. Reg. 23,724 (initiation); 55 Fed. Reg. 49,724 (termination)]
	301-82	[56 Fed. Reg. 292 (initiation); 56 Fed. Reg. 67,114 (termination)]
Thailand	301-72	[54 Fed. Reg. 23,724 (initiation); 55 Fed. Reg. 49,724 (termination)]
	301-82	[56 Fed. Reg. 292 (initiation); 56 Fed. Reg. 67,114 (termination)]
India	301-59	[52 Fed. Reg. 6412 (initiation); 53 Fed. Reg. 21,757 (termination)]

The shift in the use of Section 301 to the bringing of more unreasonable practice cases against developing countries reflected a shift in U.S. trade goals. Although anxious about other countries' violations of GATT obligations and the ability of the system to deter such conduct, the United States was even more concerned about areas of U.S. trade advantage left completely outside the GATT. During the 1980s and early 1990s, one of the major interests of the United States was obtaining multilateral discipline over trade in services and over the

	301-77	[54 Fed. Reg. 26,136 (initiation); 55 Fed. Reg. 25,765 (termination)]
	301-78	[54 Fed. Reg. 26,135 (initiation); 55 Fed. Reg. 25,766 (termination)]
	301-85	56 Fed. Reg. 24,877 (initiation); 57 Fed. Reg. 9763 (termination)]
Brazil	301-49	[50 Fed. Reg. 37,608 (initiation); 54 Fed. Reg. 43,880 (termination)]
	301-61	[52 Fed. Reg. 28,223 (initiation); 55 Fed. Reg. 27,324 (termination)]
	301-73	[54 Fed. Reg. 26,135 (initiation); 55 Fed. Reg. 22,876 (termination)]
	301-91	[58 Fed. Reg. 31788 (initiation); 59 Fed. Reg. 10,224 (termination)]
Korea	301-51	[50 Fed. Reg. 37,609 (initiation); 51 Fed. Reg. 29,443 (termination)]
	301-52	[50 Fed. Reg. 45,883 (initiation); 51 Fed. Reg. 29,445 (termination)]
	301-64	[53 Fed. Reg. 4926 (initiation); 53 Fed. Reg. 20,406 (termination)]
	301-65	[53 Fed. Reg. 10,996 (initiation); 55 Fed. Reg. 20,376 (termination)]
	301-67	[53 Fed. Reg. 22,607 (initiation); 54 Fed. Reg. 4099 (termination)]
Argentina	301-68	[53 Fed. Reg. 37,668 (initiation); 55 Fed. Reg. 18,693 (termination)]
Indonesia	301-90	[57 Fed. Reg. 46,609 (initiation); 58 Fed. Reg. 610 (termination)]

See Appendix A following this Article. The developed country targets have still been hit but less frequently. With regard to the European Union, the United States has filed 29 cases against it since it began using Section 301. *More U.S. Barriers to Trade with the EU Arose in the Past Year, EU Report Says*, 13 INT'L TRADE REP. (BNA) 1244 (July 31, 1996). In the second decade of Section 301 cases the vast majority of cases against the EU have involved claims of a GATT violation. See Appendix A for a description of the case against the EU—301-54, 301, 60, 301-62, 301-63, 301-70, 301-71, 301-81, 301-83, 301-94, 301-100, 301-101. With regard to Canada, most all of the cases in the second decade of Section 301 actions have involved GATT claims. See Appendix A for a description of the cases against Canada—301-55, 301-58, 301-80, 301-87, 301-98, 301-102. For a discussion of the U.S. use of Section 301 against Japan see text *infra* at 30-34 and accompanying notes.

protection of intellectual property.⁷⁴ Sixteen of the twenty-seven Section 301 cases brought under the unreasonable theory were aimed at limitations developing countries placed on trade in services and protection of intellectual property rights.⁷⁵ The United States aggressively pursued such cases for two reasons: (1) to obtain bilateral trade liberalization agreements with the target country; and (2) to force these areas onto the agenda for the Uruguay Round negotiations.

C. A Taxonomy of Section 301 Cases (1985-1996)

1. Ensuring Compliance with International Trade Law: Section 301/International Violation Cases

From its inception, the United States has employed Section 301 as a device for confronting trade partners which failed to follow their GATT obligations.⁷⁶ GATT provided any Contracting Party with the right to seek dispute settlement if it believed that another party was violating the terms of GATT, and thereby depriving it of the benefits it expected from the agreement.⁷⁷ Section 301 was, therefore, designed in part to allow the President to take action if he found that a trading partner was violating its international trading obligations, and thereby harming the United States. Thus, Section 301/International violation cases are consistent with U.S. obligations under GATT. The United States has every right to enact a statute that allows it to investigate and determine whether or not its trading partners are following GATT

74. See *supra* text accompanying notes 3-5.

75. See *supra* note 73 for a listing of these cases.

76. Kenneth W. Abbott, *Defensive Unfairness: The Normative Structure of Section 301*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE 420-21 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996) [hereinafter *Defensive Unfairness*].

77. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

GATT, *supra* note 1, 61 Stat. at A64, 55 U.N.T.S. at 266-69.

law.⁷⁸ GATT was of the view that any U.S. determination of a GATT violation should rest on a finding by a GATT dispute settlement panel that there was an infringement. In the first decade of Section 301, the United States routinely went to the GATT dispute settlement system in order to pursue its Section 301/International violation complaints.⁷⁹

The results for U.S. economic interests were mixed. In some cases the GATT panel reports prompted the Section 301 target to withdraw or modify the offending practice.⁸⁰ In other cases, the United States encountered problems reaching its goals because of the limitations of the GATT dispute settlement system. The GATT system allowed a defending party to dispute the potential power to block the establishment of a panel, the adoption of any report the panel might issue, and ultimately the implementation of any panel report.⁸¹ As a result, the United States failed to achieve what it considered to be appropriate relief in many instances.⁸² U.S. frustration over the limitations of the GATT system ultimately led it to take unilateral action on several Section 301/International violation cases beginning in the 1980s. In half of the Section 301/International violation cases in which GATT panels were established from 1985 to 1995, the United States took some form of unilateral action by declaring the target country practice to be GATT-illegal, threatening to retaliate for the violation, or actually taking retaliatory action. The United States took retaliatory action in six cases that the GATT panel considered to involve GATT violations.⁸³ In those six cases, and in three others in which the GATT dispute settlement system

78. As Abbott points out:

[C]laims based on violations of international commitments are highly legitimate. . . . Under general international law, violations of agreements or general legal standards give affected states the right to take responsive actions, under the agreement itself or by way of reprisal even when those actions would be unlawful in the absence of the violation.

Defensive Unfairness, *supra* note 76, at 421-22. "Traditional international legal doctrine seems to confirm their [unilateral sanctions] utility. The right of retaliation is built into the law of treaties." *THE NEW SOVEREIGNTY*, *supra* note 44, at 88.

79. See Sykes, *supra* note 44, at 318-24 for a listing of the cases in which the United States sought a GATT panel.

80. L. LEE TUTHILL ET AL., U.S. INT'L TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER GATT AND THE TOKYO ROUND AGREEMENTS 15-18, 167-81, Pub. No. 1793 (1995) [hereinafter ITC 1985 REPORT].

81. *Id.* at 18-19, 167-81.

82. *Id.* at 18-20.

83. RECIPROCITY AND RETALIATION, *supra* note 19, at 69.

"broke down"⁸⁴ and was unable to adopt a report favorable to the United States, retaliation was in keeping with GATT rules. The United States, however, also took retaliation against countries under the Section 301/International violation theory in the absence of any GATT dispute settlement procedures.⁸⁵ Such unauthorized retaliation is GATT-illegal, but the Section 301 targets in those cases never took the United States to the GATT panel over the issue. Almost all countries accepted the view that such self-help by nations is permissible in international law when the international organization that is supposed to police violations cannot do so.⁸⁶ The GATT dispute settlement system was widely viewed as increasingly ineffectual.

The use of self-help in such cases by the United States undoubtedly spurred the targets of U.S. retaliation to seriously consider reforming the GATT dispute settlement system.⁸⁷ The United States had always been a proponent of a more legalistic and adjudicative dispute settlement system,⁸⁸ even when its own behavior in accepting unfavorable GATT reports was less than creditable.⁸⁹ The economic power represented by U.S. retaliation

84. *Id.* at 70. According to Hudec, U.S. retaliation in three cases which had actually started in the first decade of Section 301—subsidized EC wheat flour (301-06) paste exports (301-25) and the EC tariff preferences on citrus (301-11) — were instances of justified retaliation since the EC blocked the GATT panel process (in 301-11 and 301-25) or the GATT panel was unable to reach a decision (301-06). Hudec, *Good and Evil*, *supra* note 62, at 121.

85. RECIPROCITY AND RETALIATION, *supra* note 19, at 70.

86. The "self-help" theory was posited by Hudec and has been accepted by the United States to justify Section 301 actions. According to Hudec:

The obligation not to retaliate without GATT authority presumes that GATT will be able to rule on the disputed legal claim, and later, on the request to retaliate. If GATT is, in fact, unable to rule, the complainant may be free to resort to 'self-help' in some circumstances.

Hudec, *Good and Evil*, *supra* note 62, at 121.

87. U.S. trading partners were so concerned about U.S. unilateralism that they became much more interested in reforming the GATT system. Former Director General of the GATT Arthur Dunkel is reported to have said that "[T]he best thing that the United States did for the GATT was to start down the 301 and Super 301 road, thus unifying an outraged and alarmed world behind the trading regime." Jagdish Bhagwati, *The Diminished Giant Syndrome*, 72 FOREIGN AFF. (No. 1) Spring 1993, at 22, 25.

88. Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 12-19 (Michael M. Hart & Debra P. Stegar eds., 1992) [hereinafter Hudec, *Judicialization*]; Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. LAW 38, 41, 67-75 (1990).

89. The United States was actually tied with the European Community in blocking activities — the establishment of panels and the adoption of reports. Hudec, *Judicialization*, *supra* note 88, at 33. In addition, "the United States also

was such that other trading partners were willing to pursue dispute settlement reform to constrain the United States. Aggressive unilateralism by the United States therefore greatly contributed both to the dispute settlement reform undertaken in the Uruguay Round negotiations and to the actual contents of the WTO's Dispute Settlement Understanding.⁹⁰

2. Section 301/Unreasonable Cases

Section 301(b) allows the United States to pursue another country, even if it is not violating the GATT or any other trade agreement, as long as the foreign practice is unreasonable and burdens or restrains U.S. commerce. The crux of a Section 301/Unreasonable case is that the United States unilaterally determines whether a foreign practice is "unfair," and then takes unilateral action by threatening, or following through with, retaliation against a government which refuses to curb the practice.⁹¹ Section 301 was originally designed to allow the bringing of unreasonable cases, but such cases did not make up the bulk of early U.S. action under the Section 301 statute. During the second decade of Section 301, however, the United States began to intensify its use of Section 301(b). The most notable use made of Section 301/Unreasonable cases was their deployment to force the issues of intellectual property rights and trade in services onto the GATT agenda.⁹²

The U.S. experience in pursuing increased protection for intellectual property through its use of Section 301/Unreasonable cases offers a good illustration of what the United States hoped to achieve and what it actually accomplished. In the 1980s, the United States government began to view the protection of intellectual property rights as an international trade problem. This new perception resulted from the pressure of U.S. industries⁹³ to link the two issues. Three factors pushed U.S.

retaliated under Section 301 without GATT authorization. In the 1980s the United States responded negatively to fully half (9 of 18) of the valid complaints thought against it." RECIPROCITY AND RETALIATION, *supra* note 19, at 72.

90. See text *infra* pp. 64-65, 87-88 and accompanying notes on Article XXIII of the DSU.

91. See RECIPROCITY AND RETALIATION, *supra* note 19, at 19.

92. See *supra* note 74 and accompanying text.

93. U.S. industries were joined by an industrialized nation coalition of intellectual property owners from the European Community and Japan in pushing for action on the intellectual property rights problem. The Intellectual Property Committee (IPC), a group of 13 U.S. companies, has been joined by the UNICE, a European union of industrial employers confederations, and the Keidanren, the Japan Federation of Economic Organizations, in pushing for the inclusion of intellectual property rights in the agenda of the Uruguay Round. See,

industry to seek assistance from the government: (1) the increased role of intellectual property-based products in U.S. international trade; (2) the growing levels of piracy of intellectual property rights (IPR) as a result of the creation of new technologies for copying products; and (3) the growth in research and development costs.⁹⁴ The U.S. government began to respond to industry complaints by taking legislative action in 1984.⁹⁵ The 98th Congress passed the Trade and Tariff Act of 1984 which included several provisions to address the intellectual property problem, the most important of which made the infringement of intellectual property rights a cause of action under Section 301.⁹⁶ During this period, the United States sought changes in worldwide intellectual property protection through bilateral negotiations and use of the provisions of the 1984 Act.⁹⁷ The legislative action and bilateral negotiations approach, however,

e.g., INTELLECTUAL PROPERTY COMMITTEE, KEIDANREN, UNICE, BASIC FRAMEWORK OF GATT PROVISIONS ON INTELLECTUAL PROPERTY: STATEMENT OF VIEWS OF EUROPEAN, JAPANESE AND UNITED STATES BUSINESS COMMUNITIES (1988). The U.S. members of the IPC include Bristol-Myers, E.I. DuPont, FMC Corp., General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications. *Id.* at 5.

94. See INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 3-5 (Michael Gadbar & Timothy Richards eds., 1988) [hereinafter GLOBAL CONSENSUS].

95. 32 PAT., TRADEMARK & COPYRIGHT J. (BNA) 473 (Aug. 28, 1986) (according to Emory Simon, former director for intellectual property at USTR, there was a merger of trade and intellectual property in 1984).

96. TTA of 1984, *supra* note 17, at § 304(f)(2). This provision was ultimately the one used by the United States as the basis for its 1988 action against Brazil for its failure to offer process and product protection for pharmaceuticals. In another provision of the 1984 Act, USTR was authorized to prepare a report for Congress on the foreign trade barriers affecting intellectual property rights. *Id.* § 303(a), 19 U.S.C. § 2241(a)(1)(A)(i) *as amended in OTCA*, *supra* note 17. The report to be produced by USTR, the National Trade Estimate Report, was supposed to examine the "adequacy and effectiveness" of the intellectual property laws of foreign nations. USTR continues to produce the National Trade Estimate Report annually. Information in the report is used to assist USTR in choosing targets for action under Section 301. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1992).

Through the Generalized System of Preferences Renewal Act of 1984, Congress added intellectual property protection as one of the eligibility requirements for developing countries seeking duty-free treatment for their products in the U.S. market. TTA of 1984, *supra* note 17, § 505, 19 U.S.C. § 2464(c)(3)(B)(ii). In 1989, Thailand was refused its request for additional GSP treatment as a result of its inadequate copyright protection. 37 PAT., TRADEMARK & COPYRIGHT J. (BNA) 279 (1989).

97. The United States successfully negotiated with some countries over various intellectual property rights – Singapore (copyrights), Korea and Taiwan (extension of patent laws to cover pharmaceuticals). See GLOBAL CONSENSUS, *supra* note 94, at 272-377.

had only limited success in addressing U.S. concerns about IPR protection.⁹⁸

While Congress was taking legislative action, the Executive Branch was pursuing the idea of greater protection for intellectual property rights through multilateral trade negotiations.⁹⁹ In 1984, during the 40th Session of GATT, the United States called for a meeting of senior officials to explore the possibility of launching a new round. By late 1985, the GATT had established a Preparatory Committee to determine the objectives and subject matter for multilateral trade negotiations which were to begin in September 1986 in Punta del Este, Uruguay.¹⁰⁰ The United States pushed strongly for the inclusion of trade-related aspects of IPRs in the Uruguay Round, threatening to turn to bilateral and regional arrangements by means of Section 301, if IPRs were not taken into consideration.¹⁰¹ The U.S. pressure ultimately resulted in a Ministerial Declaration for the Uruguay Round which included trade-related aspects of intellectual property rights as one of the areas to be negotiated.

The United States was so insistent about the need for an intellectual property agreement under GATT because a great deal of U.S. trade was no longer covered by the GATT rules. Industrialized countries, like the United States, had shifted away from traditional trade sectors into areas where they have a greater comparative advantage—particularly in high technology

98. See Robert W. Kastenmeier & David Beter, *International Trade and Intellectual Property: Promise, Risks and Reality*, 22 VAND. J. TRANSNAT'L L. 285, 289, 290 & 290 n.12 (1989).

99. The United States had actually begun working on a multilateral agreement concerning some aspects of intellectual property—counterfeit goods—in the Tokyo Round. During the Tokyo Round, U.S. negotiators worked on a draft anti-counterfeiting code and reached agreement in principle with EC negotiators. Although the Tokyo Round did not produce an agreement, the United States and European Community continued to negotiate. In the year preceding the Uruguay Round, the question of counterfeit goods was considered a major issue for the new round. By the time the Uruguay Round was launched, however, the United States was more interested in intellectual property protection for patents, copyrights, trademarks and newer forms of intellectual property such as mask works. GATT FOCUS No. 48, July/Aug. 1987, at 3. GATT, GATT ACTIVITIES 1988, at 49 (1989) [hereinafter GATT ACTIVITIES 1988].

100. Decision of 28 November 1985 on Establishment of the Preparatory Committee, in 32 BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD) 10 (1986).

101. See A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57, 84-85 (1987). In addition to seeking a mandate to negotiate concerning trade-related aspects of intellectual property rights, the United States managed to get trade in services and trade-related investment measures included in the Uruguay Round. *Id.* at 85.

products—and that are “intellectual property intensive.”¹⁰² The system of IPR protection, with its low substantive standards¹⁰³ and lax enforcement, was regarded as creating in the mid-1980s a transfer of wealth from the industrialized countries to the developing countries.¹⁰⁴ The United States was one of the few countries to attempt to quantify the costs which can be attributed to the system of IPR protection. This analysis of costs came in a 1987 report by the International Trade Commission (ITC) request by USTR.

The most influential and heavily quoted figure in the 1987 ITC report was the estimate of \$43 to \$61 billion in worldwide losses to U.S. industries from piracy or counterfeiting of IPRs.¹⁰⁵ Most of the estimated losses were attributed to countries which are considered to be developing or newly-industrialized countries.¹⁰⁶ Believing that their failure to protect the intellectual

102. David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 895 (1989); see also HELENA STALSON, *INTELLECTUAL PROPERTY RIGHTS AND U.S. COMPETITIVENESS IN TRADE* 41-44 (1987); ROBERT P. BENKO, *PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES* 36-44 (1987).

103. There were two basic types of IPR protection deficiencies according to the United States: “inadequacies in the protection provisions for certain types of intellectual property (regime deficiencies), and general enforcement inadequacies.” U.S. INT'L TRADE COMM., *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. No. 2065, Inv. No. 332-245 at 1-6 [hereinafter *ITC/IPR Report*]. The regime deficiencies noted by the ITC Report consist of: 1. a lack of statutory protection for certain types of intellectual property rights (copyrights, mask works, patents for pharmaceuticals); 2. severely limited terms of protection (patents, copyrights, trade secrets); 3. compulsory licensing laws (patents, trademarks); and 4. broad exceptions to IPR protection (all types of IPRs except mask works). *Id.* at 1-6, 1-7, 1-8.

104. The industrialized countries not only lose market shares from the piracy of products which should be sold in foreign markets but also in their internal competitiveness. The owners of IPRs in industrialized countries will lose the incentive to invest in research and development unless they reap the financial benefits. See Michael Reiterer, *Trade-Related Intellectual Property Rights*, in *THE NEW WORLD TRADING SYSTEM: READINGS* 199 (OECD ed., 1994).

105. The ITC was requested to prepare a study of the “distortions in U.S. worldwide trade associated with deficiencies in the protection provided by foreign countries to U.S. intellectual property rights.” Letter from Clayton Yeutter, United States Trade Representative, to ITC Chairman, Susan Liebeler (Jan. 12, 1987), reprinted in *ITC/IPR Report*, *supra* note 103, at A-2. The study was requested to help with the Administration's development of U.S. negotiating objectives and strategies in the Uruguay Round. *Id.*

106. The ITC derived the estimated range of aggregate losses by extrapolating the data it had received for 1986 aggregate worldwide losses to the 736 companies which responded to an ITC questionnaire. *ITC/IPR Report*, *supra* note 103, at 1-1, H-3 (In Appendix H, the ITC explains the assumptions it made concerning responding and not responding companies.)

The main violators cited in the ITC Report were Brazil, China, Hong Kong, Mexico, Korea, Taiwan, Canada, Japan, Nigeria and India. *Id.* at 4-15-4-18. The International Intellectual Property Alliance (IIPA) and the Pharmaceutical

property rights of industrialized countries lowered the costs of technology and innovation,¹⁰⁷ developing countries saw no need to improve or alter their intellectual property rights systems.

The United States responded to the developing countries' lack of interest by threatening retaliation against countries with "inadequate" intellectual property protection, *i.e.*, protection that did not rise to U.S. levels. Ultimately, the United States brought eleven Section 301/Unreasonable cases between 1985 and 1995¹⁰⁸ and put many other countries on "priority watch" and "watch" lists as potential targets under Special 301 cases.¹⁰⁹ The

Manufacturing Association (PMA) actively petitioned USTR to follow through with Section 301 cases against countries violating U.S. intellectual property rights. For example, the IIPA has always suggested countries to be placed on the Priority, Priority Watch and Watch lists. The IIPA in one of its earlier reports had estimated that the 1991 piracy of U.S. copyrighted materials – books, computer programs, movies and records – in those three countries cost U.S. producers \$616 million. IIPA and PMA filed most of the other Section 301 petitions initiating the cases against Taiwan, Thailand, India and China.

107. See Jerome H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 755-56 (1989); GLOBAL CONSENSUS, *supra* note 94, at 2-3.

108. Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (USTR 1985) (initiation); 54 Fed. Reg. 43,880 (USTR 1989) (termination); Korean Laws for the Protection of IPR, 50 Fed. Reg. 45,883 (USTR 1985) (initiation); 51 Fed. Reg. 29,445 (USTR 1986) (termination); Brazil's Patent Protection of Pharmaceuticals, 52 Fed. Reg. 28,223 (USTR 1987) (initiation); 55 Fed. Reg. 27,324 (USTR 1990) (revocation of retaliation); Argentina's Failure to Provide Protection for Pharmaceuticals, 53 Fed. Reg. 37,668 (USTR 1988) (initiation); 55 Fed. Reg. 18,693, 18,694-95 (USTR 1990) (termination); Thailand Patent Protection, 56 Fed. Reg. 11,815 (initiation); Thailand's Copyright Enforcement, 56 Fed. Reg. 292 (USTR 1991) (initiation); 56 Fed. Reg. 67,114 (USTR 1991) (termination); Intellectual Property Practices of India, 56 Fed. Reg. 24,877 (USTR 1991) (initiation); Intellectual Property Laws and Practices of China, 56 Fed. Reg. 24,878 (USTR 1991) (initiation); 57 Fed. Reg. 3084 (USTR 1992) (termination); Intellectual Property Acts, Policies and Practices of Taiwan, 57 Fed. Reg. 23,605 (USTR 1992) (initiation); 57 Fed. Reg. 25,091 (USTR 1992) (termination); Intellectual Property Laws and Practices of Brazil, 58 Fed. Reg. 31,788 (USTR 1993) (initiation); 59 Fed. Reg. 10,224 (USTR 1994) (termination); Identification of China as a Priority Foreign Country, 59 Fed. Reg. 35,558 (USTR 1994) (initiation); 60 Fed. Reg. 12,582 (USTR 1995) (termination).

109. The review process for Special 301 cases begins when USTR completes the National Trade Estimates report and identifies countries that have denied adequate intellectual property protection. After the NTE report is complete USTR issues the Special 301 list. The countries on the first Watch List included Argentina, Egypt, Canada, Chile, Colombia, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, the Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. See 6 INT'L TRADE REP. (BNA) 715-21 (May 31, 1989) (USTR Fact Sheets on the implementation of Super 301 and Special 301 list all of the countries that the United States views as IPR violators and their inadequate practices). USTR established an "action plan" for each country on its lists. For each country the negotiating plan or objectives is different – for one country more effective enforcement, for another passing a patent law. 7 INT'L TRADE REP. (BNA)

approach taken by USTR in the Section 301 cases involving IPRs and the later Special 301 cases was to threaten¹¹⁰ action against a target country unless it took suitable action, usually in the form of new or improved legislation. All of the Section 301 cases devoted to obtaining better protection for intellectual property rights appeared to be successful at the time USTR agreed to remove threats of retaliation.¹¹¹ In reality, using Section 301 to improve intellectual property protection worldwide proved somewhat illusory.

Although each Section 301 target country made promises to enact new intellectual property legislation and some did so, there was often little concomitant increase in actual protection. The United States achieved success at the *de jure* level of obtaining new laws.¹¹² However, at the *de facto* level of improving actual patent and copyright protection in the target countries, Section 301 proved unsatisfactory. Every Section 301 target country encountered significant political pressure domestically to resist U.S. demands. As a result, some of the promised legislation took years to appear, and even when it did, it was not enforced.¹¹³ The

85 (Jan. 17, 1990) (Interview with U.S. Trade Representative Carla Hills). Special 301 reviews have been undertaken every year since 1989.

110. As the changes have pointed out, it is important to distinguish between a threat strategy and a retaliation strategy. In a threat strategy USTR is still working on a negotiated solution. "What is a satisfactory negotiated outcome remains ultimately up to USTR, who is responsible to the president. Instead of a punishment for a violation, the threat is a forceful move in a continuing bargaining process." *THE NEW SOVEREIGNTY*, *supra* note 44, at 94.

111. The standard reason the United States terminated Section 301/Unreasonable cases based on intellectual property rights was that the target country agreed to pass new legislation. See Appendix A for a listing of the promises in the following cases: 301-61 (55 Fed. Reg. 27,324); 301-68 (55 Fed. Reg. 18,693), 301-85; 301-86 (57 Fed. Reg. 3084); and 301-89 (57 Fed. Reg. 25,091).

112. Taiwan passed seven laws to protect trade secrets and other forms of intellectual property in response to the Special 301 cases against it. Thailand and Brazil also enacted new legislation. ESI study, *supra* note 44, at 62; Michael P. Ryan, *Strategy and Compliance with Bilateral Trade Dispute Settlement Agreements: USTR's Section 301 Experience in the Pacific Basin*, 12 MICH. J. INT'L L. 799, 823-24 (1991); Myles Getman, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 190-91, 198-99 (1995).

113. Brazil, for example, got the United States to lift retaliatory sanctions in 1990 by promising to offer protection for pharmaceutical products and processes "when it was politically possible." *USTR Hills, Trip to Brazil, Presses Government to Continue Opening Economy*, 7 INT'L TRADE REP. (BNA) 855, 856 (June 13, 1990). Brazil introduced amendments to its intellectual property legislation in 1994 only after it had been hit with a second 301 case. *USTR Announces Termination of Brazil Special 301 Investigation*, 11 INT'L TRADE REP. (BNA) 344 (Mar. 2, 1994). A similar delaying pattern was exhibited by Thailand when it was approached under Section 301. Despite its enactment of new legislation in 1992, the United States

ultimate proof of Section 301's limitations came from how the United States responded to this problem. Two of the eleven Section 301 actions actually brought were second generation cases—Section 301 cases launched at previous targets—because the countries had failed to enforce their new or improved intellectual property protection legislation.¹¹⁴

The United States continued to press Section 301 cases despite this lack of tangible success (or because the lack was not apparent for some time) even after intellectual property rights were put on the agenda for the Uruguay Round negotiations. During the early years of the TRIPs negotiations, the United States, Europe, and Japan were unable to persuade developing countries that GATT was the proper forum for negotiations on this issue.¹¹⁵ During the Uruguay Round Mid-Term Review held in 1988, the TRIPs negotiating group was one of the negotiating groups unable to develop a framework text that would serve as the basis for future negotiations. It would take another three years before there was a draft TRIPs Agreement. During this time, U.S. industry pushed an increasingly protectionist Congress to enact Special 301. Special 301 was designed to require USTR to identify each year the most egregious violators of intellectual property rights and begin accelerated negotiations.¹¹⁶ The United States began use of Special 301 in 1989 and continued to use the process throughout the Uruguay Round as a way of keeping up the pressure to reach a TRIPs Agreement. By the end of the Uruguay Round, the U.S. effort was rewarded with a comprehensive agreement which largely adopted U.S. standards as the standards for intellectual property protection.¹¹⁷ Over the course of the Uruguay Round negotiations, it became clear that the developing countries ultimately accepted a U.S.-style TRIPs Agreement as a method for limiting Section 301 threats and

found its efforts inadequate. 57 Fed. Reg. 9762, 9763 (1992). The United States delayed retaliatory action against Thailand due to government instability but later in 1993 still found Thailand falling to adequately enforce its 1992 legislation. Finally the United States lifted its pressure on Thailand when it received yet another pledge to improve regulations implementing its patent laws and to provide "pipeline protection" for pharmaceuticals. 57 Fed. Reg. 40,090 (1993).

114. See Appendix A following this Article. The "generation 2" cases on inadequate intellectual property rights enforcement involved Brazil (301-91; 58 Fed. Reg. 31,788) and China (301-92; 60 Fed. Reg. 12,582). Although the United States has not yet filed a "second generation" case against Argentina, it remains unhappy with the proposed patent legislation offered by that country.

115. See generally GATT ACTIVITIES 1988, *supra* note 99, at 49-51.

116. See generally Judith H. Bello & Alan F. Holmer, "Special 301": *Its Requirements, Implementation, and Significance*, 13 *FORDHAM INT'L L.J.* 259 (1989-90).

117. See generally Lars-Henrik Knutrud, *TRIPs in the Uruguay Round, in THE NEW WORLD TRADING SYSTEM: READINGS 193-95* (OECD 1994).

sanctions. This does not mean that the United States has abandoned the Special 301 review process. The United States continues to conduct a Special 301 review each year to identify countries that are failing to meet TRIPs obligations or otherwise failing to protect adequately intellectual property rights.¹¹⁸

The U.S. experience with Special 301 suggests that a strategy developed around coercing negotiations under threats of retaliatory trade sanctions is more effective for obtaining multilateral negotiations and agreements than for producing concrete enforcement results. In order to obtain acceptable levels of worldwide enforcement for IPRs through unilateralism, the United States would probably have had to commit to years of bringing many second generation Section 301 actions. Instead, the adoption of the TRIPs Agreement and the WTO dispute settlement system means that most¹¹⁹ U.S. efforts to supervise this issue will take place in the multilateral arena. Under the TRIPs Agreement standards, WTO Member States have obligations regarding enforcement of intellectual property standards.¹²⁰ The United States has already begun to pursue WTO countries that are not following TRIPs obligations. In 1996, the United States filed three Section 301 cases based on TRIPs claims.¹²¹ Nevertheless, the United States still faces a long period of WTO litigation regarding *de facto* protection of IPRs as some developing

118. USTR has issued eight Special 301 lists since it was first enacted. In the last two years (1995 and 1996) USTR has taken the following actions:

1. identified 37 countries as denying adequate intellectual property protection in 1995 and 34 in 1996;
2. placed eight countries on the priority watch list in 1995 and in 1996. China was also identified in 1996 as a "priority foreign country" (a country with the most egregious practices that has not made progress in negotiating about them with the United States); and
3. carefully reviewed TRIPs Agreement implementation in 1995 and began bringing cases to the WTO dispute settlement system in 1996.

UNITED STATES TRADE REPRESENTATIVE, 1995 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROBLEM (1996); Identification of Countries That Deny Adequate Protection, or Market Access for Intellectual Property Rights Under Section 182 of the Trade Act of 1974, 61 Fed. Reg. 19,969 (1996).

119. The United States did pass implementing legislation that left open the prospect of bringing Section 301 cases on intellectual property rights even if a country was in compliance with TRIPs obligations. URAA Legislative History, *supra* note 37, at 3908.

120. TRIPs Agreement, *supra* note 31, at arts. 41-61.

121. See Appendix A for a description of these three cases: 301-103 (Portugal); 301-104 (Pakistan); 301-106 (India).

countries have inevitable trouble adjusting to the new international regime.

Section 301/Unreasonable cases pose an additional problem that goes beyond their inability to guarantee concrete results. If the United States takes retaliatory action under Section 301 based on such a case, it must often violate GATT obligations to do so. This potential for illegal activity occurs if the United States imposes sanctions against the other country that require the raising of GATT bound tariffs. If when responding to a reluctant Section 301 target, the United States raises bound tariffs selectively against only that country, it is committing a clear violation of Article II and of the Article I Most Favored Nation (MFN) rule.¹²² The United States has acted this way in Section 301 cases. In the *Brazilian Pharmaceuticals*, Section 301-61, for example, the United States took retaliations of just this type against Brazil when it refused to extend patent protection to pharmaceuticals.¹²³ All of the products chosen for retaliatory tariffs were contained in the U.S. GATT Schedule of Concessions (the listing of U.S. Article II commitments).¹²⁴ In response to the sanctions, Brazil requested and ultimately obtained, following U.S. delaying tactics, the establishment of a GATT panel on the use of Section 301.¹²⁵ The United States kept the GATT panel from ever reaching the merits of the case—for which it had no real GATT-recognized defense—by arguing over the terms of reference for the panel.¹²⁶ Ultimately, the threat of an unfavorable GATT panel report was lifted when Brazil settled the dispute with the United States by promising to enact patent legislation.¹²⁷ By avoiding a panel report in the Brazilian case, the United States

122. See *infra* note 391 and accompanying text concerning bound tariffs.

123. 5 INT'L TRADE REP. (BNA) 1415 (Oct. 26, 1988) (Tariffs were imposed at 100% *ad valorem* for \$39 million worth of Brazilian non-Benzenoid drugs, paper products, and consumer electronics.).

124. The products chosen for the retaliatory sanctions call had bound U.S. tariffs ranging from 0 to 5%. See GATT ACTIVITIES 1988, *supra* note 99, at 90.

125. 6 INT'L TRADE REP. (BNA) 238 (Feb. 22, 1989). In his statement to the GATT Council when the United States withdrew its objection to the formulation of a panel to investigate the dispute, U.S. GATT Ambassador Samuels stated:

What's at issue here is an imbalance in right and obligations that affords Brazil an opportunity in the GATT to address a trade dispute affecting Brazilian exporters and denies the United States the right to address a practice by Brazil affecting the same amount of U.S. trade.

Samuels also stated that "the international trading system will not have been served by placing the GATT in the position of potentially condoning the theft of intellectual property." *Id.*; see also 3 WORLD INTELL. PROP. REP. (BNA) 179 (Aug. 1989).

126. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 571.

127. *Id.* at 228-31.

kept a crucial issue out of the hands of the multilateral organization: whether unilateral trade sanctions can ever be employed against areas that are not covered by GATT without violating some GATT obligation. If the United States continues to use Section 301/Unreasonable cases for issues not covered by GATT rules—as the Uruguay Round implementing legislation and the *Auto and Auto Parts* case against Japan¹²⁸ suggest—then it may become the subject of a WTO dispute settlement panel. Japan filed such a complaint in 1995 when the United States threatened sanctions in an auto parts dispute.¹²⁹ The Japanese complaint never reached a panel because the United States and Japan settled the dispute.¹³⁰ It is not clear whether the Japanese case against the U.S. threat of sanctions would have resulted in a WTO panel report against Section 301. The United States did not actually impose sanctions in the *Auto and Auto Parts* case as it did in the *Brazil Pharmaceuticals* case.¹³¹ Whether the United States can avoid WTO review of Section 301 indefinitely, however, seems doubtful. Given its belief that Section 301/Unreasonable cases are not limited because they address issues outside the GATT rules, the United States will probably not use restraint in threatening what could be GATT-illegal sanctions. Whether the United States would again impose such sanctions and risk a WTO dispute is less clear.

128. See Appendix A following this Article for a description of the two recent cases against Japan.

129. Japan filed the case in the WTO on the same day that the United States threatened the sanctions. Andrew Pollack, *Japan Plans to Appeal to New Trade Group*, N.Y. TIMES, May 17, 1995, at D4.

130. *Japan, U.S. Report on Auto Accord, Say Dispute is Now Removed from WTO*, 12 INT'L TRADE REP. (BNA) 1176 (July 12, 1995).

131. The gravamen of Japan's complaint in the *Auto and Auto Parts* case would have had to rely on the argument that a threat of sanctions—a unilateral determination by the United States—was a violation of Article XXIII.1 of the DSU. The United States has already indicated that it does not believe Article XXIII applies to Section 301 cases not based on Uruguay Round Agreements. See *supra* note 42 and accompanying text. Although he strongly objects to U.S. policy regarding Section 301 and Japan, Professor Bhagwati stated that:

[t]he assertion that no action illegal under the WTO actually took place, because the threat of punitive sanctions was not actually translated into their imposition on 28 June, is strictly correct. But this is a technicality; and the assertion that the United States would in fact go ahead and undertake such illegal action unless its demands were met is certainly an indication of the U.S. willingness to flout WTO rules to its advantage.

Jagdish Bhagwati, *The U.S.-Japan Car Dispute: A Monumental Mistake*, 72 INT'L AFFAIRS 261, 277 (1996).

3. Section 301 and the Japan Problem

The final use that the United States has made of Section 301 from 1985 to the present has been an attempt to cure or at least curb the large U.S. trade deficit with certain countries.¹³² The primary target of Section 301 cases under the Super 301 category has been Japan. A large part of U.S. frustration with Japan comes from the belief that the Japanese economy, including the Japanese way of conducting business, does not act like that of other industrialized states and that it is much more closed to trade as a result.¹³³ Rather than pursue the strategy it used against developing countries of bringing Section 301 cases to push U.S. concerns into the GATT/WTO, the United States has treated Japan differently. The United States has tended to bring Section 301 cases with a goal of achieving bilateral agreements with Japan. Why Japan is treated differently both with respect to the filing and the resolution of Section 301 cases remains an open question. One view is that the "multidimensional and structural nature of Japanese trade obstacles"¹³⁴ make Japan unlikely to

132. RECIPROCITY AND RETALIATION, *supra* note 19, at 33. The Clinton Administration has disavowed the use of bilateral negotiations with Japan on structural impediments to trade as a way of curing the U.S.-Japan trade imbalance. "[T]he *bilateral* imbalance between the U.S. and Japan is *not* what the talks seek to remedy. Rather, they are designed to address Japan's *multilateral* current-account surplus and structural barriers to Japan's markets, both of which matter very much to Japan's trading partners." Laura D. Tyson, *Japan's Trade Surplus Matters*, WALL ST. J., Mar. 1, 1994, at A14 (Ms. Tyson was the Chair of the President's Council of Economic Advisors.).

133. RECIPROCITY AND RETALIATION, *supra* note 19, at 38-43; *see also* I. M. DESTLER, *AMERICAN TRADE POLITICS* 297 (3d ed. 1995). Destler states:

In industry after industry, Japanese firms are American firms' toughest rivals. The enormous impact of Japan on the world trading order, the combination of formidable competitiveness on exports and embedded resistance to imports, has drained the patience of team after team of U.S. trade negotiators. It has also led some veteran trade practitioners to conclude . . . that the United States should respond to this challenge by pursuing a split-level or two-track trade policy: managed trade or tit-for-tat reciprocity with the Japanese, and multilateral liberalism with everyone else.

Id. at 297.

134. RECIPROCITY AND RETALIATION, *supra* note 19, at 33. There is the question of whether some U.S. concerns about Japan are trade barriers that the WTO could deal with. Professor Jackson, for example, describes some of these issues as "problems which arise due to the economic structure of the importing country" and offers such illustrations as government allocation of credit, government industrial policy and some forms of administrative guidance. According to Jackson these problems "are almost totally untouched by the GATT system" and raise "some of the most difficult questions of how far should the international system go in asking nations to change their economic and social

respond to demands to develop new multilateral rules on issues of U.S. concern. Another view is that Japan is too powerful an economy to threaten into the GATT/WTO or into strict compliance with U.S. views. Nevertheless, the United States has pursued Section 301 cases against Japan, threatened retaliation in many cases,¹³⁵ and actually imposed retaliation once.¹³⁶ The Reagan Administration agreed to the creation of Super 301 in 1988 and the targeting of Japan in order to avoid even more protectionist legislation that had been passed in the House.¹³⁷ Although Super 301 authority to pursue negotiations and retaliate was purely discretionary and designed to expire in two years,¹³⁸ it was met with a great deal of hostility by a world trading system that had already seen an increase in normal Section 301 filings and threats.

In the first round of Super 301 cases pursued by the Bush Administration, the United States identified six practices in three countries—Japan, Brazil, and India. Of the six practices cited as instances deserving of U.S. investigations, three involved Japan for alleged exclusionary government procurement in supercomputers and satellites and the alleged erection of technical barriers to trade in forest products.¹³⁹ The United States ended each Section 301 case with a settlement negotiated under a threat of retaliatory sanctions.¹⁴⁰ Despite the negotiated settlements, there were later disputes between the two over how to implement the agreements.¹⁴¹ As the Super 301 cases were progressing, USTR announced that it would pursue a separate Structural Impediments Initiative (SII)¹⁴² to address issues such as Japan's heavily regulated distribution system and relatively weak antitrust system. The SII was undertaken outside the Super 301 cases. While some issues, like the distribution

structures." JOHN H. JACKSON ET AL., *INTERNATIONAL ECONOMIC RELATIONS* 1208 (3d ed. 1995).

135. *Id.*

136. See Appendix A following the article for the cases against Japan. The United States retaliated against Japan in 301-48, the semiconductor case, when it failed to follow through with the agreement it had negotiated to end the dispute.

137. *RECIPROCITY AND RETALIATION*, *supra* note 19, at 36.

138. See *supra* note 21.

139. *RECIPROCITY AND RETALIATION*, *supra* note 19, at 39. All Super 301 cases filed have been self-initiated by USTR. Although USTR has this authority for other Section 301 cases it usually takes cases based on petitions submitted by domestic industries.

140. See Appendix A following the article for the results of Section 301-74 (55 Fed. Reg. 25,761); 301-75 (55 Fed. Reg. 25,764); and 301-76 (55 Fed. Reg. 25,763).

141. *Id.*

142. Announcement of Structural Impediments Initiative, DEP'T ST. BULL., Sept. 1989, at 78.

problem, appeared largely resolved in the 1989-90 year of negotiation, others, like the antitrust issue, were never completely addressed to U.S. satisfaction.¹⁴³ After resisting efforts by Congress to reenact Super 301 early in his administration, President Clinton ultimately renewed a softened version of the statute¹⁴⁴ by Executive Order in 1994,¹⁴⁵ following the collapse of yet another set of protracted negotiations over various structural impediments to trade with Japan.¹⁴⁶ Both the distribution system issue and the lack of effective antitrust laws issue were raised again in the two most recent Section 301/Unreasonable cases filed against Japan involving auto parts¹⁴⁷ and photographic film.¹⁴⁸ The United States resolved the *Auto Parts* case with a negotiated settlement only after threatening to hit Japan with a 100% tariff increase on luxury automobiles.¹⁴⁹ As in past negotiated settlements, the United States failed to receive commitments it claimed to desire¹⁵⁰ for a particular share of the Japanese market. Instead, the United States received significant pledges of liberalization as part of a settlement which requires the

143. RECIPROCITY AND RETALIATION, *supra* note 19, at 41.

144. *Id.* at 44.

145. *Clinton Renews Super 301 Measure; Provison Seeks Market Opening*, 11 INT'L TRADE REP. (BNA) 367 (Mar. 9, 1994) (stating that the renewed Super 301 was different from the 1988 version because it contained an "early warning system" designed to allow negotiations with a country before it was labeled as an unfair trader. The Executive Order also made use of Super 301 discretionary by the President.).

146. *Id.*

147. See Appendix A following this Article for a description of the *Auto Parts* dispute (301-93; 60 Fed. Reg. 35,253). The United States raised three claims in the *Auto Parts* case. First, the United States argued that Japanese bureaucracy kept U.S. auto parts out of the Japanese market. Second, the United States contended that Japan tolerated the *kieretsu*, the interlocking business relationship of Japanese firms and thus contributed to the limiting of U.S. sales. Third, the United States argued that the Japanese government allowed the formation of an auto dealership network which limited U.S. sales. *USTR Fact Sheet on the U.S.-Japan Auto and Auto Parts Agreement*, Released June 28, 1995, 12 INT'L TRADE REP. (BNA) (July 5, 1995).

148. 301-99; 60 Fed. Reg. 35,447; see also Andrew Pollack, *Japan's Tack on Trade: No More I-on-1*, N.Y. TIMES, July 30, 1996, at D1.

149. *U.S. Threatens Duties on Luxury Cars Worth \$5.9 Billion in Japan 301 Dispute*, 12 INT'L TRADE REP. (BNA) 848 (May 17, 1995). For a full description of the *Auto and Auto Parts* Section 301 case and the negotiated settlement, see Eleanor Roberts Lewis & David J. Weiler, *Will the Rubber Grip the Road? An Analysis of the U.S.-Japan Automotive Agreement*, 27 L. & POL'Y INT'L BUS. 631 (1996).

150. When it first began pushing for a resolution to the problem in the *Auto Parts* case, the United States was seeking promises that Japan would hit certain import targets, *i.e.*, that the United States would be guaranteed a certain share of the Japanese market. The final agreement does not contain such guarantees because Japan refused to consider them in any form. Bhagwati, *supra* note 131, at 262, 276.

United States and Japan to review the agreement bi-annually.¹⁵¹ As with all of the other Section 301 cases with Japan, therefore, the United States ended up adopting agreements that require it to closely monitor implementation over many years.¹⁵² It is too early to determine whether the *Auto Parts* case will be viewed as an economic success,¹⁵³ although the two countries have begun the first review.¹⁵⁴ The Japanese government initially refused to

151. *The Administration Weaves the "World Network of Commerce,"* 14 INT'L TRADE REP. (BNA) 132 (Jan. 22, 1997) ("A seminannual report on the status of the auto parts aspect of the deal is due in March or April, while an annual report on the entire accord is due in the fall, possibly in October, industry said."); *U.S., Japan Formalize Auto Agreement, Release Text of Pact Concluded in June,* 12 INT'L TRADE REP. (BNA) 1426 (Aug. 23, 1995); Mark Felsenthal, *U.S., Japan Set to Meet in September to Begin Review of Auto Agreement,* 13 INT'L TRADE REP. (BNA) 1337 (1996) ("Although the Japanese government specified that it was not agreeing to the use of quantitative indicators announced by the United States to determine whether the deal was working, the deal committed the two sides to reviews of the automotive trade twice a year.").

152. Lewis & Weiler, *supra* note 149, at 657-85. In other major Section 301 cases against Japan the United States also resolved the case by adopting negotiated agreements. Examples of these cases include:

1. 301-48 Semiconductors- The case was initially resolved by an agreement that was to last for five years, although the United States threatened sanctions at least once claiming that Japan was not following the agreement. The United States and Japan just completed negotiations in August 1996 that would extend the semiconductor agreement until July 31, 1999. See Appendix A for a description of the case.
2. 301-69 Construction Services- The United States and Japan reached two agreements under which Japan would open up more public works construction projects to bidding by U.S. firms. The United States has expressed dissatisfaction with the experience of U.S. firms in 1994 and 1995.

Mark Felsenthal, *U.S. Firms Urged to "Demonstrate Merits" in Bids on Japan Construction Contracts,* 13 INT'L TRADE REP. (BNA) 1119 (July 10, 1996).

Some scholars abhor the use of Section 301 against Japan because these cases turn into attempts at managed trade in the affected industry sectors. See Bhagwati, *supra* note 132; see also RAJ BHALA, *INTERNATIONAL TRADE LAW* 1162 (1996) ("[T]he greatest potential evil is that sustained use of Section 301 becomes managed trade in the industries championed by the USTR."); Bart S. Fisher & Ralph G. Steinhardt, III, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital,* 14 L. & POL'Y INT'L BUS. 569, 570 (1982) (Fisher and Steinhardt argue against seeking such specific reciprocity through Section 301 because it in effect repeals the law of comparative advantage and confirms the worst fears of U.S. trading partners.).

153. *Kantor Defends Administration's Policy on Japan Trade Pact, Cites High Exports,* 13 INT'L TRADE REP. (BNA) 382 (Mar. 6, 1996) (stating that according to the Clinton Administration exports of U.S. automobiles and parts to Japan rose approximately 36% in 1995). See Lewis & Weiler, *supra* note 149, for a discussion about why the agreement is a success.

negotiate with the United States in the *Photographic Film*, Section 301-99 case.¹⁵⁵ Ultimately, rather than take action unilaterally, the United States initially sought consultations with Japan at the WTO. A panel has now been formed to review some of the GATT issues raised by the film case.¹⁵⁶

The U.S. Section 301 experience with Japan suggests that unilateralism within constrained limits can work against a major trading partner. With Japan, the United States has been willing to retaliate only once. Instead, it has chosen to settle cases and face long commitments to monitoring agreements. Given the nature of the trade dispute and the complexity of the problem at which Section 301 was aimed, however, unilateralism against Japan failed to produce quick solutions or a cure for the persistent trade imbalance.

III. THE WTO DISPUTE SETTLEMENT SYSTEM: ITS PROMISES AND ITS LIMITS

A. Completion of the Uruguay Round: Establishment of the WTO and the Adoption of the Dispute Settlement Understanding (DSU)

One of the major accomplishments of the Uruguay Round was the completion of negotiations to establish a World Trade Organization (WTO). Before the adoption of the agreement establishing the WTO,¹⁵⁷ the rights and obligations of countries under GATT had been overseen by an Interim Operating

154. *Japan Announces EU Parts Purchases Worth \$5 Billion on Eve of Talks with U.S.*, 13 INT'L TRADE REP. (BNA)1418 (Sept. 11, 1996).

155. *Japanese Refusal to Negotiate on Film, Chips Causes Concern*, 13 INT'L TRADE REP. (BNA) 165 (Jan. 31, 1996) (stating Japan will not negotiate with the United States on this issue because of the use of Section 301 and threatened sanctions).

156. Pollack, *supra* note 148 ("[O]ne reason the Clinton Administration ultimately decided to take the Kodak case to the trade group was as a vote of confidence for the world trade rules."); Mark Felsenthal, *WTO Panel Decision in Film Case Likely By May 1997, U.S. Official Says*, 13 INT'L TRADE REP. (BNA) 1337 (Aug. 21, 1996). The WTO panel has been formed to address the U.S. claims that Japan's laws and regulations affecting the distribution and sale of imported consumer photographic film and paper are treated less favorably than Japanese products—an Article III National Treatment Violation. See *infra* note 319.

157. *Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA (Dec. 15, 1993) [hereinafter *WTO Agreement*]; *The Final Act is reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (GATT Secretariat, Geneva 1994) [hereinafter *The Final Act*].

Committee.¹⁵⁸ Until the WTO came into existence in 1995, there was no membership organization, like other U.N. organizations, overseeing the General Agreement on Tariffs and Trade. The Havana Charter, which would have created such an organization—the International Trade Organization¹⁵⁹—never came into force. President Truman did not submit the Havana Charter to the U.S. Senate for ratification as treaty in 1950,¹⁶⁰ which virtually guaranteed that the membership organization would not be established. Nevertheless, the agreement on tariffs and trade that contained the commercial portions of the Havana Charter—GATT—had been put into effect in 1947 by the United States and the other major trading countries.¹⁶¹ The Contracting Parties (the countries which had acceded to GATT) operated under the terms of GATT and began the first of a series of negotiating rounds devoted to the lowering of tariffs.¹⁶² An Interim Operating Committee, aided by a Secretariat, was established to oversee and

158. The General Agreement on Tariffs and Trade (GATT) had been drafted in 1947 to cover the principal commercial obligations the Contracting Parties were to undertake regarding the lowering of tariffs, the abolition of trade quotas and the limitation of discriminatory trade rules. It was drafted pending the establishment of a membership organization — The International Trade Organization (ITO). *Analysis of the General Agreement on Tariffs and Trade*, DEP'T ST., Pub. No. 3938, Commercial Policy Series 93 (1946). When the ITO was not adopted the terms of the GATT were operated by the United Nations Interim Commission for the ITO.

159. Following negotiations with the British in 1945 and 1946 the United States announced and elaborated on plans for the establishment of an International Trade Organization. The United States conceived of the ITO as an organ of the United Nations. The ITO was to have a permanent Secretariat and an expert staff. The organization was then to be open to all countries accepting its charter. *Suggested Charter for an International Trade Organization of the United Nations*, DEP'T ST., Pub. No. 2598, Commercial Policy Series 93 (1946).

160. Although Truman had expected to submit the Charter to Congress, it became clear in 1950 that there was not enough support for the creation of an ITO. Instead, President Truman adopted the GATT as an executive agreement. The President's claimed authority to do this came from the Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. §§ 1351-54 (1996)); see KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 14 (1970); ITC 1985 REPORT, *supra* note 80, at 49-50.

161. The United States accepted the GATT by signing the Protocol of Provisional Application. At the time of that provision, the United States and other signatories agreed to apply Parts I and III of the GATT (arts. I, II and arts. XXIV et seq.) and to apply Part II (arts. III-XXIII) "to the fullest extent not inconsistent with existing legislation." GATT, *supra* note 1, 61 Stat. at A12-A17, A66-A75, A18-A40, 55 U.N.T.S. at 196-204, 268-84, 204-66. See John H. Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law*, 66 MICH. L. REV. 249, 253-54 (1967) for a discussion of how the United States implemented its GATT obligations through the Protocol of Provisional Application.

162. See ITC 1985 REPORT, *supra* note 80, at 49-50.

coordinate GATT functions.¹⁶³ From 1947 until the creation of the WTO, the Contracting Parties operated GATT with this informal structure and considered themselves contractually bound to follow the obligations set forth in GATT.¹⁶⁴

The WTO is organized such that the General Council, composed of Member States of the organization, has three main functions: (1) oversight of the substantive agreements and Member State compliance with the agreements in GATT;¹⁶⁵ (2) dispute resolution between the Member States; and (3) review of the trade policies of the Member States for their compliance with GATT rules.¹⁶⁶ Therefore, one of the major functions to be performed by the newly established WTO is the settlement of disputes. The General Council fulfills this second function of dispute resolution by establishing itself as a Dispute Settlement

163. U.N. INTERIM COMM'N FOR THE INT'L TRADE ORG., THE ATTACK ON TRADE BARRIERS: A PROGRESS REPORT ON THE OPERATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE FROM JANUARY 1948 TO AUGUST 1949, 28 (1949); ITC 1985 REPORT, *supra* note 80, at 50.

164. ITC 1985 REPORT, *supra* note 80, at 27.

165. The WTO Agreement makes the organization responsible for providing "the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement." *WTO Agreement*, *supra* note 157, at art. II(1). The Agreements attached to the WTO Agreement in Annexes 1-3 are the Multilateral Trade Agreements and bind all member States of the WTO, as do the revisions of the GATT 1994 now denominated as the GATT 1994. *Id.* at art. II(2) & (4). In addition to these agreements, the WTO has oversight of four additional agreements that are signed and accepted by only some of the WTO member States, the Plurilateral Trade Agreements. *Id.* at art. II(3).

According to Article III of the WTO Agreement, the WTO is supposed to "facilitate the implementation, administration and operation, and further the objectives, of [the WTO] Agreement," the multilateral Agreements, the GATT 1994 and the framework for the Plurilateral Agreements. *Id.* at art. III(1). The WTO is also supposed to provide a forum for negotiations among member States and "a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference." *Id.* at art. III (2).

In order to perform its oversight function, the General Council of the WTO breaks down into a Council for Trade in Goods, which oversees the functioning of the Multilateral Trade Agreements; a Council for Trade in Services, which oversees the General Agreement on Trade in Services (GATS); and a Council for TRIPS, which oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights. *Id.* at art. IV(5).

166. *Id.* at art. IV (4).

Body (DSB).¹⁶⁷ The DSB operates under the terms of the Dispute Settlement Understanding (DSU).¹⁶⁸

From the time of the adoption of the Ministerial Declaration opening the Uruguay Round negotiations, what to do about GATT dispute settlement was a major issue.¹⁶⁹ During the negotiations, the most complete proposals for reforming the dispute settlement¹⁷⁰ came from the developed countries that had been the heaviest users of the GATT dispute settlement system: the United States, the European Union (EU), and Japan.¹⁷¹ The U.S. delegation to the negotiating group focused on the need to repair the flaws of the GATT system.¹⁷² According to the United States, the problems with the GATT system were the following: (1) the blocking of panel reports by the losing party to the disputes, and (2) the lengthiness of the GATT proceedings.¹⁷³ These concerns about the GATT system prompted the United States to place the establishment of a better dispute settlement system at the forefront of its goals for the Uruguay Round of multilateral trade negotiations.¹⁷⁴ The DSU, adopted at the end of the Uruguay

167. See *id.* at art. IV(3) stating that:

The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfillment [sic] of those responsibilities.

168. Dispute Settlement Understanding, *supra* note 5, at art. 1.2.

169. *Ministerial Declaration on the Uruguay Round*, Sept. 20, 1986, GATT B.I.S.D. (33rd Supp.) at 19, 25 (1987):

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

170. DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2727-29.

171. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 295-300. According to Hudéc, of the 207 GATT panel cases completed by 1993, the United States or the EC had been involved in 190.

172. DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2727-28.

173. *Id.* at 2730-35.

174. In 1985, the Senate Finance Committee requested by the International Trade Commission (ITC) was to identify the institutional and functional obstacles to the proper functioning of the GATT's dispute settlement system. The ITC noted in its thorough study of the GATT system from its inception that:

Three main problems with the GATT resolution process have been claimed: the time required to complete a case is too long; there are too many opportunities for the "defendant" country to obstruct the process;

Round, met the major U.S. concerns by including provisions that covered the adoption and implementation of panel reports,¹⁷⁵ timeliness,¹⁷⁶ and strengthened remedies for prevailing complainants.¹⁷⁷

The DSU attached to the WTO Agreement creates a dispute settlement process consisting of three phases: (1) consultation, (2) a panel process, and (3) a process for compliance and surveillance.¹⁷⁸ The DSU represents an evolution of the GATT dispute settlement system. In many ways, the DSU maintains the basic structure of the GATT system developed under Article XXIII of GATT, 1947.¹⁷⁹ The DSU retains the same subject matter jurisdiction or scope as Article XXIII.¹⁸⁰ The DSU also keeps two of the phases of the GATT dispute settlement system as developed in the years between 1947 and 1993—a conciliation/negotiation phase and a third party dispute resolution phase (the panel process).¹⁸¹ It is in the compliance and surveillance area that the

and the complainant party is often unable to ensure implementation of GATT decisions, once reached.

ITC 1985 REPORT, *supra* note 80, at 4. /

175. Dispute Settlement Understanding, *supra* note 5, at art. 16.4.

176. *Id.* at arts. 12.9 & 20.

177. *Id.* at art. 21.1. A losing Member State is to implement the recommendations of the panel (as adopted by the Dispute Settlement Body (DSB)). If such implementation does not occur, the complaining party can seek compensation or the suspension of concessions. *Id.* at art. 22.

178. A WTO dispute begins with a request by a complaining country for consultations regarding an offending trade practice. *Id.* at art. 3. If the dispute is not settled by the parties then it moves on to a panel process. *Id.* at arts. 2 & 12. The DSU provides complete guidelines on how the panel process begins, the composition of the panel, the terms of reference for the panel and even an annex containing working procedures for panels. *See id.* at arts. 6, 7, 8 & app. 3. Once a panel report favoring the complainant is adopted the DSU also has extensive procedures for enforcement. The losing party is allowed an appeal on legal issues. *Id.* at art. 17. Otherwise, the losing party is given clear instructions on what it must do to comply with the panel or Appellate Body report. *See id.* at arts. 21 & 22.

179. *See* DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2675-720 for a thorough discussion of the development of the GATT dispute settlement system.

180. The DSU expressly adopts the GATT practice developed to deal with disputes under Article XXIII of the GATT 1947. Dispute Settlement Understanding, *supra* note 5, at art. 26. The Uruguay Round negotiators did conduct some negotiations about the scope of Article XXIII. For a complete discussion of this issue, *see infra* p. 73 and accompanying notes.

181. The early GATT dispute settlement system featured mediation like negotiations but, over time the GATT developed the practice of submitting matters to panels of experts. OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL SYSTEM 77 (1987); *see also* DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2675-720. The Contracting Parties generally conducted the conciliation or consultation phase of GATT disputes through bilateral negotiations, although in the 1980's decade additional procedures had been

DSU shows a marked departure from the GATT method for resolving disputes.¹⁸² To achieve the goal of obtaining greater compliance, all of the Contracting Parties had to recognize that the operative feature of GATT decision-making was the culprit of the GATT system.¹⁸³

The GATT system always operated by positive consensus.¹⁸⁴ Effectively, this meant that if any Contracting Party objected to a GATT decision when the General Council met to adopt decisions

adopted by the GATT parties for the facilitation of such negotiations by the GATT Secretariat. *Improvements to the GATT Dispute Settlement Rules and Procedures*, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1990) [hereinafter 1989 Improvements]. The third-party dispute resolution phase of the GATT system had developed the practice of establishing panels who heard and issued reports on cases presented by the Contracting Parties involved in the dispute. Several different understandings on how both phases of the GATT system were supposed to operate had been developed by the Contracting Parties. The first major explication of the GATT dispute settlement system arose from framework negotiations on dispute settlement held during the Tokyo Round. See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210, 215 (1980) [hereinafter 1979 Understanding]. See DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2686-95, for a short history of those negotiations.

Any additional codification of the GATT system, along with several changes, aimed at improving the system's speed and efficiency. As the result of negotiations held following the mid-term review of the Uruguay Round the Contracting Parties developed, 1989 Improvements, *supra* note 181, at 61-62. The Contracting Parties adopted this Understanding following the mid-term review of the Uruguay Round negotiations and agreed to apply its new procedures to all disputes beginning in 1989. See DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2754. For a description of the "improvements" to the GATT system that came from each of these Understandings, see Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomatic*, 29 INT'L LAW. 389, 397-98 (1995). Despite the procedural improvements to the panel process adopted by these Understandings, the GATT system retained limitations that kept it from being perceived as a success by some Contracting Parties. These limitations, and the attempts to address them, led to the creative part of the DSU—the provisions aimed at securing compliance by Member States of the WTO with panel reports.

182. The weakest aspects of the GATT system were enforcement (the General Council could authorize retaliations but had done so only once in the GATT history) and the non-existent surveillance of panel reports. A large part of the DSU focuses on the implementation of panel reports and how the DSU will act to ensure this implementation. Dispute Settlement Understanding, *supra* note 5, arts. 11-13, 15-19.

183. The United States had already decided that the consensus process was responsible for the ineffectiveness of the GATT system. As long as a party losing a GATT case could refuse to accept the decision of the panel, there was no guarantee of compliance. ITC 1985 REPORT, *supra* note 80.

184. The DSU provides a definition of consensus: "The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision." Dispute Settlement Understanding, *supra* note 5, at art. 2.4 n.1.

on the meaning of the GATT Agreement or panel reports generated by the dispute settlement system, the GATT General Council could not take action.¹⁸⁵ A Contracting Party seeking to delay or avoid a case brought under the dispute settlement system could block or delay the process at any or all of the three following points: (1) the establishment of a panel, (2) the adoption of the terms of reference for a panel, and (3) the adoption of the panel report by the General Council.¹⁸⁶ During the years preceding the Uruguay Round negotiations and during the negotiations from 1986 to 1993, there had been an increase in each of these activities.¹⁸⁷ Despite the inevitable slowing down and loss of credibility incurred by each new breakdown of the GATT system, the early negotiations aimed at reforming the process faltered over the issue of abandoning the traditional idea of consensus.¹⁸⁸ Apart from the United States, most countries wanted to allow consensus to continue to govern whether a panel report would be adopted and whether or not the General Council would authorize retaliation against a non-complying defendant.¹⁸⁹ Eventually, the views of most negotiators shifted toward the view of the United

185. For example, in a GATT session in 1981 the Chairman of the General Council stated that "the Council normally proceed[s] on the basis of consensus." According to his description, consensus meant that not delegation to the GATT maintained its objections to a text or attempted to prevent its adoption. (C/M/146 at 20).

186. See generally Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, J. WORLD TRADE, Aug. 1995, at 5, 30. According to Komuro:

[P]arties to the dispute are customarily endowed with the right to participate in the Council's decision-making process and may, therefore, block the adoption of the panel reports by consensus. In other words, the consensus rule, in conjunction with the right of the parties to the dispute to attend the Council, conferred a veto power on disputing parties and considerably delayed the procedures.

Id. at 30.

A party to a GATT dispute did not formally have to object to block the establishment of a panel or the adoption of the terms of reference, but if it failed to cooperate fully, the matter could drag on for months and thus stymie third-party resolution of the dispute through the panel process. See ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 111 n.11, for a description of such an action by the United States in the *Brazilian Pharmaceutical Case*. See Hudec, *Judicialization*, *supra* note 88, at 24-25. Hudec notes that the United States "managed to drag out Brazil's complaint about U.S. retaliation over pharmaceutical patents so that, almost two years after the complaint, the panel still had not yet had its first substantive meeting." *Id.* at 25.

187. See generally ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 234-70 (describing the dispute settlement mechanisms after the Uruguay Round).

188. DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2732-42.

189. *Id.* At the end of the mid-term review of the Uruguay Round (in 1988) the Contracting Parties reaffirmed the use of a consensus.

States regarding the abandonment of positive consensus for the dispute settlement system,¹⁹⁰ but only after the United States had made aggressive use of Section 301.¹⁹¹

The DSU addresses the problem of recalcitrant defendants by reversing the consensus requirement. Under the DSU, all panels are established and panel reports adopted unless there is a consensus against adoption.¹⁹² In effect, the negotiators at the Uruguay Round agreed to the automatic establishment of panels and the automatic adoption of reports.¹⁹³ The DSU added another level of review to the dispute settlement system to counterbalance any ill effects of such a drastic departure from normal procedures. If a panel decision is "bad"—containing poor or non-existent legal reasoning,¹⁹⁴ the DSU provides the parties to the dispute with the right to appeal the panel's legal findings.¹⁹⁵ The Appellate Body decision is then also automatically adopted by the DSB, unless there is a consensus against adoption.¹⁹⁶

These structural alterations to the dispute settlement system mark a shift away from a diplomatic dispute settlement system towards the adjudicative one the United States has always sought.¹⁹⁷ As the GATT Agreement expanded to cover new areas of trade (such as trade in services and agricultural trade) and trade-related disciplines (like the agreements on trade-related intellectual property rights and trade-related investment

190. Young, *supra* note 181, at 390; Miquel Montaña i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 142-46 (1993) [hereinafter *GATT with Teeth*].

191. ROBERT E. HUDEC, *DISPUTE SETTLEMENT IN COMPLETING THE URUGUAY ROUND: A RESULTS ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 180, 186 (1990) [hereinafter *HUDEC, DISPUTE SETTLEMENT*].

192. *Dispute Settlement Understanding*, *supra* note 5, at arts. 12 & 16.

193. Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 21, GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301*, 26 INT'L LAW. 795, 797 (1992).

194. See Hudec, *Judicialization*, *supra* note 88, at 12-19 for a description of various early GATT cases that the parties considered to be legally in error, or at least unpersuasively argued.

195. *Dispute Settlement Understanding*, *supra* note 5, at art. 16.

196. *Id.*

197. Almost every GATT scholar has noted the change of the dispute settlement system towards an adjudicative model. See William J. Davey, *The WTO/GATT World Trading System: An Overview*, in 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 13-77 (Pierre Pescatore et al., eds. 1995) [hereinafter *Davey*]. Davey devotes an entire section of his review of the WTO system with an analysis of why adjudicative system is superior to a diplomatic/negotiation system. Davey contends that an adjudicative system both discourages rule violations by countries and results in greater compliance with the rules. See also *GATT with Teeth*, *supra* note 190, at 142-46.

measures), the WTO acted to enforce these obligations against Member States within the WTO system itself.¹⁹⁸

B. How the DSU Addresses and Fails to Address Section 301 Concerns

One of the crucial issues confronted by the negotiators of the DSU was how the new obligations it imposes would relate to U.S. unilateral power. Would the creation and operation of a WTO dispute settlement system deprive the United States of its right to use its unilateral power? If not, how much would adherence to the WTO rules limit U.S. options for dealing with the unfair trade actions of its trading partners? At the end of the Uruguay Round, most of the countries believed that the new WTO dispute settlement system would effectively end U.S. unilateral activity under Section 301. According to the United States, however, the new WTO dispute settlement system and the DSU do not require the elimination of all unilateral action by means of Section 301. In order to understand why the U.S. interpretation of the DSU and its obligations differ from that of other nations, it is important to understand both how the DSU operates and how it relates to Section 301.

1. The Dispute Settlement System of the WTO

The dispute settlement system of the WTO is an integrated one. With limited and specified exceptions,¹⁹⁹ the DSU provisions apply to all disputes arising under the agreements in GATT

198. As long as the GATT system operated by consensus there was the possibility that there would be no compliance by a losing State. This inability to guarantee compliance meant that a country could justify using self-help measures to obtain the relief it sought. The United States used this argument to justify taking retaliatory action against the EC after it blocked some GATT panel reports. The United States, thus, went outside the GATT system. The change to a negative consensus in the DSU leaves the losing party without the right to avoid the process. The DSU also deprives the complaining party of the right to take action unilaterally in any case that belongs within the scope of GATT Article XXIII. According to Davey, the DSU put a more "judicial like system in place. That occurred because the EC and others decided that a more adjudicative system would be desirable as a means of limiting the U.S. tendency to take unilateral trade action on the ground that the GATT system was inadequate." Davey, *supra* note 197, at 77.

199. Dispute Settlement Understanding, *supra* note 5, at app. 2. Appendix 2 contains a list of the special or additional rules that exist for some of the agreements. In other words, for certain of the GATT agreements there are different rules contained in the text of that agreement.

1994,²⁰⁰ disputes about a Member State's rights and obligations under the Marrakesh Agreement establishing the WTO,²⁰¹ and disputes about the operation of the dispute settlement system itself.²⁰² The operation of the panel system and the issuance of panel reports, however, do not create GATT law. According to GATT, only Member States of the WTO sitting as the Dispute Settlement Body (DSB) can definitively interpret the legal meaning of GATT provisions.²⁰³ Moreover, a panel report adopted by the DSB decides only the case before the DSB, and therefore, lacks any precedential value for future WTO trade disputes.²⁰⁴

The WTO dispute settlement process is triggered when a Member State complains that a benefit it expected under a GATT Agreement has been "nullified or impaired" by: (1) the failure of another Member State to carry out its obligations under the GATT, (2) the application by another Member State of any measure whether or not it conflicts with the GATT, or (3) the existence of any other situation.²⁰⁵ The old GATT dispute settlement system produced panel reports based only on the first

200. *Id.* at app. 1. Appendix 1 lists all of the agreements that are subject to the DSU process. All of the Multilateral Trade Agreements are covered. The Plurilateral Agreements are covered only if the member States that are parties to them agree to use the DSU process.

201. *Id.* at art. 1 & app. 1.

202. *Id.*

203. "Where the rules and procedures of this Understanding provide for the DSB to make a decision, it shall do so by consensus." *Id.* at art. 2.4.

204. According to leading GATT scholar John H. Jackson:

It should . . . be understood that the international legal system does not embrace the common law jurisprudence that prevails in the United States which calls for courts to operate under a stricter "precedent" or "stare decisis" rule. Most nations in the world do not have stare decisis as part of their legal systems, and the international law also does not. This means that technically a GATT panel report is not strict precedent, although there is certainly some tendency for subsequent GATT panels to follow what they deem to be the "wisdom" of prior panel reports. Nevertheless, a GATT panel has the option not to follow a previous panel report, as has occurred in several cases. In addition, although an adopted panel report will generally provide an international law obligation for the participants in the dispute to follow the report, the GATT Contracting Parties acting in a Council or the Ministerial Conference, can make interpretive rulings or other resolutions which would depart from that GATT panel ruling, or even establish a waiver to relieve a particular obligation.

Testimony by John H. Jackson Before the U.S. Senate Finance Committee Hearing, March 23, 1994 on the Uruguay Round Implementing Legislation, reprinted in 6 World Trade & Arb. Materials 125, 132-33 (Sept. 1994) [hereinafter Jackson Testimony].

205. GATT, *supra* note 1, 61 Stat. at A40-A41, 55 U.N.T.S. at 266-68.

two theories—violation of a GATT obligation and non-violation nullification or impairment cases.²⁰⁶

The dispute would begin under the DSU process with a consultation phase. A complaining Member State is first supposed to request consultation about another Member State's GATT breach (or non-breach which causes harm) with that country²⁰⁷ and notify the DSB about its request.²⁰⁸ The defending Member State is required to enter into such consultation with the goal of reaching "a mutually satisfactory solution."²⁰⁹ Failure of the consultation (or the failure of the defending Member States' participation in the process) allows the complaining party to request the establishment of a panel.²¹⁰ In addition to the consultation phase, the DSU provides for the procedures of good offices, conciliation, and mediation to be offered to willing parties by the Director General of the WTO.²¹¹ The request for and use of such negotiation-based settlement techniques can take place any time during the operation of the dispute settlement process. Considered together, these initial provisions of the DSU strongly suggest that the WTO encourages Member States to settle their disputes. The parties to consultation or mediation are required not to disclose any information about the proceeding; therefore, any position taken by one party in a settlement with one trading partner cannot be used against it by another country.²¹²

If the parties cannot negotiate a settlement to their trade dispute, the panel process then becomes available to them. Once a complaining party requests a panel,²¹³ it will be established

206. ANALYTICAL INDEX: A GUIDE TO GATT LAW AND PRACTICE 629-787 (GATT 1995) [hereinafter GATT ANALYTICAL INDEX]. The GATT Analytical Index is a compilation of short descriptions of all of the GATT decisions and panel report decisions that have been issued regarding each major legal obligation codified in the GATT 1947 agreement. See also Davey, *supra* note 197, at 71.

207. Dispute Settlement Understanding, *supra* note 5, at art 4.3.

208. *Id.* at art. 4.4. The complaining party must notify the Dispute Settlement Body, the relevant Council (Goods, Services or TRIPs) and any other Committee related to the Agreement that is the subject of the dispute.

209. *Id.* at art. 4.3.

210. *Id.* at art. 4.7.

211. *Id.* at art. 5. The GATT contracting parties have made use of the conciliation process in the past and obtained the good offices of the Director General. See HUDEC, DISPUTE SETTLEMENT, *supra* note 191, at 201. The office appointed by the Director General can aid the parties by issuing a report if necessary. Although the conciliation system has been successful when chosen by the parties it was not successful when the GATT attempted to impose such a process. See EDMUND MCGOVERN, INTERNATIONAL TRADE REGULATION § 2.32-.33 (1995) [hereinafter INTERNATIONAL TRADE REGULATION].

212. Dispute Settlement Understanding, *supra* note 5, at arts. 4.6 & 5.2.

213. *Id.* at art. 6.1.

unless there is a highly unlikely consensus against establishment.²¹⁴ The dispute resolution model the WTO panel system most closely resembles is that of international commercial arbitration. The DSU, however, makes it clear that the panel process is not completely *ad hoc*, as are some private international arbitrations. The WTO panel process itself is tightly controlled and overseen by the WTO (acting through the DSB), as is the enforcement stage of a dispute. Consequently, it is the DSB rather than the Member State parties to the dispute that controls the life of the dispute once the system is triggered.²¹⁵ The parties can wrest control of the process designed to move directly from review to recommendation to enforcement,²¹⁶ only if they negotiate a GATT-consistent settlement and withdraw the case from the system.²¹⁷

A panel in the WTO system normally consists of three panelists who must be "well-qualified governmental and/or non-governmental individuals."²¹⁸ None of the panelists can be from any Member State that is a party or third-party to the dispute unless the parties agree otherwise.²¹⁹ The WTO Secretariat assists in the selection process of the panelists by maintaining a list of well-qualified panelists²²⁰ and by nominating panelists for a particular panel.²²¹

The ultimate goal of the panel system is to produce a final report for the DSB which resolves the dispute between the two

214. *Id.*

215. The DSB must be notified of a dispute and of the request for a panel. *Id.* at art. 12. The DSB also oversees the establishment of a panel in a particular dispute. *Id.* at art. 8. Once the panel process is underway the DSB oversees it and must be asked for any extension of time the panel finds necessary to complete its task. *Id.* at art. 12.9. Once the final report is done by the panel it is circulated to the DSB, which places the report on its agenda and then takes comments until it takes action to adopt the report. *Id.* at art. 16. Finally, it is the DSB which pursues the issue of implementation of the panel or Appellate Body panel report. The DSB must be notified of a losing party's plan to implement. *Id.* at art. 21.3. The DSB also becomes involved in assisting the parties over conflicts regarding how implementation should proceed. *Id.* at arts. 21.3 & 21.4. Finally after implementation the DSB conducts surveillance of the implementation to make sure the panel report has been dealt with by the losing party. *Id.* at art. 21.6.

216. See generally Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, 29 J. WORLD TRADE 131, 144-46 (1995).

217. Dispute Settlement Understanding, *supra* note 5, at art. 3.7.

218. *Id.* at art. 8.1.

219. *Id.* at art. 8.3.

220. *Id.* at art. 8.4.

221. *Id.* The parties to the dispute are supposed to agree to a panel, but if such agreement is not achieved within a timely fashion the WTO Director-General has authority to appoint a panel. *Id.* at art. 8.7.

parties.²²² In order to facilitate this goal, the DSU establishes working procedures²²³ for the panels, dictates standard terms of reference,²²⁴ and requires the panels to accept both written submissions and oral arguments on the factual and legal issues presented by the dispute.²²⁵

At any time during the panel process, the panelists may, if so requested, give the Member States an opportunity to reach a mutually satisfactory negotiated settlement.²²⁶ If such a settlement is not reached, the final report is submitted to the DSB.²²⁷ Although the parties can protest the panel decision and

222. *Id.* at art. 8.7.

223. *Id.* at app. 3. Appendix 3 on working procedures describes how the process actually operates in a case—when the parties are supposed to submit materials and arguments and the order in which the panel takes and considers submissions. The Annex also provides an estimated time frame for each action to be taken by the panel.

224. *Id.* at art. 7. The standard terms of reference are as follows:

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

Id. at art. 7.1.

225. *Id.* at art. 12.6. After the parties have presented all of their arguments the panel must prepare and circulate to them only a written interim report which contains both the panel's findings of fact and its legal findings and conclusions. *Id.* at art. 15. The interim report procedures were modeled after those adopted in the U.S.-Canada Free Trade Agreement, Jan. 2, 1988, art. 19, 27 I.L.M. 281. According to Hudec the interim report process adds immeasurably to the clarity and responsiveness of the panel reports:

Having worked on both GATT and FTA panels, I would strongly support adding the FTA [of interim reports]. In my one experience with the FTA procedures, I reveal no secrets when I say that the rehearing led to a number of clarifying changes once it became clear how the parties were interpreting certain statements in the report. I can imagine that such a procedure would also be very helpful in removing unnecessary irritants, in strengthening the reasoning, and even in correcting wrong conclusions.

Hudec, *Judicialization*, *supra* note 88, at 27. Parties are allowed to review the report and meet with the panel regarding the interim report. Dispute Settlement Understanding, *supra* note 5, at art. 15.1. If no such review is requested the interim report becomes the final report. *Id.* at art. 15.2. If review and additional arguments are held after the interim review, the final report must reflect the panel's consideration of the issues considered during that review.

226. Dispute Settlement Understanding, *supra* note 5, at art. 11.

227. *Id.* at arts. 12.7, 16.4, & 17.14.

express their views during the DSB consideration of the report,²²⁸ the final panel report will be adopted unless there is a consensus against adoption.²²⁹ Either party can stop the adoption of the panel report only by notifying the DSB of its intention to appeal the decision.²³⁰

Any appeals of final reports will be considered by a three-member panel of a seven member Appellate Body.²³¹ Thus, although the DSB adds a level of appellate review to the panel process, it does not establish an appellate court. The entire Appellate Body will never sit on any given dispute. The Appellate Body panel in any particular dispute is empowered to review only the issues of law raised by the panel report and the panel's legal

228. *Id.* at art. 16.2.

229. *Id.* at art. 16.4.

230. *Id.*

231. The establishment of the Appellate Body was a completely new innovation for the GATT dispute settlement system. During the Uruguay Round negotiations on the DSU, most delegations favored the creation of an appellate process despite the fact that it would create an overall delay. DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2767. Major proposals for such a body were tabled by the EC, the United States, Canada and Mexico. *Id.* at 2767-68. None of the delegations initially agreed on exactly the proper mission for such an appellate body. The EC thought such review should be available if any party thought a panel decision was "erroneous or incomplete." GATT Secretariat, *Statement by the Spokesman of the European Community at the meeting of 5-6 April*, MTN.GNG/NG13/W/39 (Apr. 5, 1990) at 2. The U.S. delegation wanted appellate review for "extraordinary cases where a panel report contains legal interpretations that are questions formally by one of the parties." GATT Secretariat, *Communication from the United States*, MTN.GNG/NG13/W/40 (Apr. 6, 1990) at 5. The Canadian government described the appellate review as providing a method for correcting "fundamentally flawed decisions." GATT Secretariat, *Dispute Settlement, Communication from Canada*, MTN.GNG/NG13/W/41 (June 14, 1990) at 3.

In the 1990 Draft Final Act for the Uruguay Round tabled by then Director-General Dunkel, there was a provision for an appellate body of seven members "three of whom shall serve on any one case." GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/35/Rev. 1 (Dec. 3, 1990) at 296. The Draft Act provision on the Appellate Body was ultimately adopted in the DSU.

The creation of the Appellate Body sparked one of the first and most contentious political battles in the first year of the WTO. The EU held up the appointment of the seven member groups by the Director-General Ruggiero arguing that Europe should be entitled to have two representatives on the Appellate Body. The United States refused to agree to such a position and so no consensus was reached, nor a decision made, until the EU backed off of its original argument. The dispute held up appointment of the Appellate Body until October 1995. The nationality breakdown of the Appellate Body membership has a membership representing each of the major trading nations (EU, Japan and United States), three developing countries (Egypt, the Philippines and Uruguay) and one mid-size developed country (New Zealand). WTO FOCUS, Dec. 1995 at 2.

conclusions.²³² The Appellate Body panel can uphold, modify, or reverse the panel report it reviews,²³³ but it lacks the power to remand a dispute back to the panel. Whatever course the Appellate Body panel report takes, it will automatically be adopted unless there is a consensus against adoption.²³⁴

Original or Appellate Body panel reports are required to make different types of recommendations for resolving a dispute based on the nature of the case before them. If the dispute presents a claim of a violation of a GATT obligation under one of the GATT agreements the panel report must recommend that the offending party bring its legislative measure or practice into conformity with the agreement that is the subject of the dispute.²³⁵ Such a recommendation will require, in most cases, that the Member State substantially modify or eliminate the measure in

232. The limited standard of review for the Appellate Body ended up satisfying the United States. During the negotiations the U.S. proposal had argued for appellate review focused only on specific legal questions rather than the entire dispute—which would have involved the Appellate Body reviewing and potentially re-weighing the factual issues in the dispute. See DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2768.

233. Dispute Settlement Understanding, *supra* note 5, at art. 17.14. See INTERNATIONAL TRADE REGULATION, *supra* note 211, at 2.23-13 for an argument that the inability to remand a case could pose difficulties for the Appellate Body and the parties to the dispute. McGovern argues that if the original panel uses the wrong legal framework and leaves several factual issues unresolved the Appellate Body panel will lack the basis for a good decision. *Id.*

234. *Dispute Settlement Understanding*, *supra* note 5, at art. 16.

235. *Id.* at arts. 3.4 and 22.1. But see John H. Jackson, *The WTO Dispute Settlement Procedures: A Preliminary Appraisal*, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 155, 160-61 (Jeffrey J. Schott ed., 1996):

Government officials, including some in the United States who testified before Congress during 1994, said that all a report requires is compensation and that it does not create a legal obligation to perform. There are strong arguments that this is wrong. Unfortunately, the negotiators for the DSU did not quite nail that down explicitly. However, at least one of the negotiators said the DSU negotiators thought they had it nailed—they discussed it for hours—and the language was intended to mean that there was a legal obligation to perform. It turns out not to be quite that clear.

The DSU has at least 12 clauses that are relevant, and all these add up to quite a strong propensity toward legal obligation. In addition, and perhaps most interesting, there is a clause (Article 22:8) that says that even if there is compensation, the matter remains on the agenda of the dispute settlement body until compliance occurs. The idea is that compensation is only a temporary measure, a fall-back, that must be understood in the context of the other clauses. These include a clause that expresses a distinct preference for bringing measures into consistency and an interesting clause in a separate procedure that governs nonviolation cases.

question.²³⁶ The panel hearing the dispute is allowed to suggest ways in which the Member State can implement its recommendations.²³⁷

If the dispute is a non-violation nullification or impairment case, then the panel report cannot impose an obligation upon the Member State to withdraw the measure.²³⁸ Instead of requiring withdrawal of the measure, the offending party is supposed to reach a "mutually satisfactory adjustment" with the complaining party.²³⁹ Such a mutually satisfactory adjustment can be reached between the parties with the assistance of an arbitration panel²⁴⁰ and can consist of compensation provided by the offending party to the complaining party.²⁴¹

The DSU authorizes the "lesser remedy"²⁴² of compensation in GATT-violation cases only as a temporary measure pending the proper course of action, the withdrawal of the GATT-illegal

236. GATT 1994 contains many different types of legal obligations. Some of the obligations relate directly to how a country governs trade—by passing legislation aimed at goods as they cross the border. A country's tariff schedule, its customs classification system (which allows it to know what tariff to charge a particular good), and its laws about charging additional taxes at the border (for inspectors or to penalize unfair trade actions like subsidies or dumping) are all obviously covered by GATT obligations. Many less obvious measures a country might pass, however, can also create the basis for a GATT-violation claim. One of the core GATT concepts is that of National Treatment. GATT, *supra* note 1, 61 Stat. at A18-A19, 55 U.N.T.S. 204-48. National Treatment concept requires that Member States not discriminate against imports in favor of domestic goods. Article III specifies that such discrimination could come from any "laws, regulations and requirement affecting their internal sale, offering for sale, purchases, transportation, distribution or use." *Id.* Obviously the National Treatment obligation covers any government regulation regarding domestic commercial policy. The breadth of Article III means that many different types of legislation, including legislation for such worthwhile goals as the protection of the health and safety of the population or the environment, could, if designed to discriminate or having discriminatory effects, provide the basis for a GATT-violation case. In many cases the defending country may have serious domestic political concerns about complying with a GATT panel which suggests the removal of such a measure. This is one of the reasons parties to a dispute are given a reasonable time to comply.

237. Dispute Settlement Understanding, *supra* note 5, at art. 12.7.

238. *Id.* at art. 26.

239. *Id.*

240. *Id.*

241. *Id.*

242. There are dangers associated with the concept of compensation which make it a lesser remedy than withdrawal of the offending measure. If a country compensates it is providing the receiving country with additional market access in some other area of trade to makeup for the equivalent measure of harm caused by the offending practice or act. The act of compensation can therefore distort the normal terms of trade that might be operating in the area where compensation is provided. See DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2769, for an expression of such views by one of the GATT Contracting Parties during negotiations on the remedies provisions in the DSU.

measure.²⁴³ If the offending party fails to withdraw the measure or compensate the complaining party, then the DSB must authorize the suspension of concessions (trade retaliation) by the complaining party against the offending country.²⁴⁴ Even if this "last resort" remedy of suspending concessions is authorized, it is only temporary in nature. Retaliation is authorized only until the offending measure is removed, the nullification or impairment of benefits is solved, or the parties to the dispute settle the case.²⁴⁵

The DSU requires the DSB to conduct active surveillance of whether, and in what manner, the offending party complies with the panel's recommendations. A Member State is given a "reasonable" time to implement the recommendations of the panel report before it must compensate or face a suspension of concessions.²⁴⁶ The offending party is entitled to an arbitral panel on the issue of what would constitute a "reasonable" time under the circumstances of the case.²⁴⁷ If the suspension of concessions stage is reached in a dispute, the complaining party is required to retaliate only within the GATT world. It should first seek to suspend concessions in the same sector of trade in which a violation was found.²⁴⁸ If such a response is not "practicable or effective,"²⁴⁹ then the complaining party can turn to other sectors of trade in the same GATT agreement, or in sufficiently serious

243. Dispute Settlement Understanding, *supra* note 5, at art. 22.1.

244. *Id.* at art. 22.2.

245. *Id.* at art. 21.3.

246. *Id.* at art. 22.2.

247. *Id.* at art. 21.3.

248. *Id.* The DSU defines "sector" as:

- (i) with respect to goods, all goods;
- (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;
- (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

Id. at art. 22.4(f).

249. *Id.* at art. 22. The DSU does not define what "practices or effective" means. While such a definition gap is logical—the terms have meaning largely within the circumstances surrounding a particular trade dispute—it does pose a problem for the WTO system. A country could argue that same sector retaliation is neither practicable nor effective because it realizes that it could do more economic harm to its trading partner by engaging cross sectoral or even cross-agreement retaliation. The DSB will have to make the first decision of this issue. If the defending party struck by such retaliation remains unappeased, however, there is possibility of its turning to the WTO for a panel about whether the form of retaliation chosen was proper.

circumstances, to another GATT agreement altogether.²⁵⁰ In the worst case scenario—where the nullification or impairment of benefits is severe and the offending party refuses to withdraw the offending measure or compensate, the DSU authorizes cross retaliation. For example, a country that was having its benefits under the Agriculture Agreement nullified or impaired by illegal subsidies could retaliate under the TRIPs Agreement by withdrawing protection for intellectual property rights held by foreigners.

The complaining country in a WTO dispute is not allowed to determine the amount or extent of retaliation by itself. Any retaliation must be proportional—equivalent to the level of nullification or impairment—and can be objected to by the offending country.²⁵¹ Thus, the level of retaliation can become the subject of an arbitral decision.²⁵² The DSB surveillance done to ensure equitable retaliation, however, should not obscure the WTO goal of coercing the offending country into compliance with its GATT obligations. To the extent it is possible to truly enforce a decision against a country,²⁵³ the DSU is drafted to achieve that goal in most cases.

250. *Id.* at art. 22.3(a). The DSU does offer definitions for “sector,” and for “agreement.” See *supra* note 248 for the definition of “sector.” “Agreement” means:

- (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
- (ii) with respect to services, the GATS;
- (iii) with respect to intellectual property rights, the Agreement on TRIPs.

Id. at art. 22.3(g).

251. *Id.* at art. 22.4. The rationale behind proportional retaliation is to limit the harm to the WTO system. The overall goal of the WTO rules is to liberalize trade. Retaliation is the least preferred form of punishment precisely because it undercuts rather than furthers the goal of the system.

252. *Id.* at arts. 22.6 & 22.7. The arbitrator (which can be an individual or group) is authorized to determine: 1. whether or not the retaliation is proportional; and 2. whether or not the party proposing to suspend concessions is properly retaliating in the same sector, different sector of the same agreement or a different agreement. The arbitral decision about the amount and form of retaliation is final and binding. *Id.*

253. It is a truism of international law that it lacks enforceability. Law has power over sovereign states only if they accept it.

2. The United States as a Plaintiff in the WTO: Pursuing Its Section 301 Concerns

The United States can use the WTO dispute settlement system for some, if not all, of its Section 301 concerns. Complaints in the WTO system are based upon either a GATT violation or on the theory of a non-violation nullification or impairment. The two types of Section 301 claims are those involving a violation of an international agreement or an unreasonable practice that burdens or restrains U.S. commerce. Both types of Section 301 actions could theoretically be channeled through the WTO dispute settlement process. Nevertheless, the differences in the legal theories between the claims cognizable in the WTO system and those recognized under Section 301 suggests that not all Section 301 cases will necessarily go through the WTO system.

a. Section 301/International Violations and Cases and the WTO Dispute Settlement System

If a WTO trading partner violates an obligation spelled out in one of the GATT agreements, the United States can trigger the WTO dispute resolution process by asking for consultations, and later if necessary, the establishment of a panel. A GATT-violation case under Article XXIII, Section 1(a) satisfies one of the requirements for a Section 301 case—that an action by the other country constitute a violation of an international agreement.²⁵⁴ Section 301/International violation cases are GATT-violation cases, and therefore, are proper subjects for a WTO dispute. The reforms of the old GATT dispute settlement system incorporated in the DSU have addressed both the substantive and procedural problems the United States faced regarding Section 301 GATT violation cases.

i. Substantive Changes for Section 301 Wrought by the WTO and the DSU

The recent additions to GATT greatly expanded the possible universe of GATT-violation cases that the United States could

254. There is not a complete overlap between the two definitions. A Section 301 case could be triggered by violation of other international agreements as well. Of the Section 301 cases that have been filed since the statute's first enactment in 1974, however, only one involved a violation of international agreements other than the GATT. Sykes, *supra* note 44, at 321 (dispute over the U.S./Argentina Hides Agreement).

pursue under Section 301.²⁵⁵ The United States was successful in meeting its negotiating objectives for the Uruguay Round. Those objectives included, among other things, increased market access for manufactured goods and agricultural products, the reduction of unfair trading practices including trade-distorting subsidies, and the extension of GATT disciplines to trade in services and the protection of intellectual property rights.²⁵⁶ The Uruguay Round negotiations ended by producing the largest expansion of GATT since its initial entry into force. "GATT" now contains the WTO Agreement, the modified GATT of 1947 (GATT, 1994), and many other agreements including those on Agriculture, Textiles and Clothing, Subsidies, Anti-dumping, Safeguards, Trade-Related Investment Measures, Trade-Related Intellectual Property (TRIPs), and the General Agreement on Trade in Services (GATS).²⁵⁷ Some of the GATT agreements, like the Subsidies and Anti-Dumping Agreements,²⁵⁸ contain improvements upon and clarifications of legal obligations

255. The first two years of operation of the WTO DSU system have seen a wide variety of cases filed covering a wide range of the Uruguay Round agreements. Frances Williams, *Antagonists Queue for WTO Judgment*, FIN. TIMES, Aug. 8, 1996, at 6 ("Another factor encouraging WTO complaints has been the organisation's more comprehensive remit. New or clearer rules on agriculture, food safety, textiles, intellectual property and services have already produced a number of complaints that could not have been handled by GATT.").

256. See 2 GENERAL ACCOUNTING OFFICE, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: URUGUAY FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 9-10, 18-24, 29-41, 88-104, 108-18 (July, 1994) [hereinafter GAO Report]; U.S. INT'L TRADE COMM'N, Pub. No. 2769, THE YEAR IN TRADE 1993: OPERATION OF THE TRADE AGREEMENTS PROGRAM 1-137 (1994) [hereinafter ITC 1994 Report]; JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT 9-39 (1994) [hereinafter URUGUAY ROUND ASSESSMENT].

257. There are actually 21 agreements that comprise the GATT. The major agreements are called the Multilateral Agreements on Trade in Goods and include: General Agreement on Tariffs and Trade 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of the GATT 1994; Agreement on Implementation of Article VII of GATT 1994; Agreement on Pre-shipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; and Agreement on Safeguards. The other major agreements are the General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); and Agreement on Establishing the Trade Policy Review Mechanism. Finally, there are four Plurilateral Agreements: Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement and International Bovine Meat Agreement. *WTO Agreement, supra* note 157, at List of Annexes.

258. Agreement on Subsidies and Countervailing Measures, Annex 1A of WTO Agreement, Agreement on Article VI of the General Agreement on Tariffs and Trade (Anti-dumping), Annex 1A of WTO Agreement. See GAO Report, *supra* note 256, at 51-83.

originally adopted in the Tokyo Round.²⁵⁹ But the Uruguay Round also extended GATT rules to areas of trade in goods, like agriculture and textiles, which had over time evaded the disciplines imposed on other sectors of trade.²⁶⁰ Finally, the Uruguay Round introduced two new areas to WTO supervision—trade in services and the protection of trade-related intellectual property rights, and thus, created the first international trade law obligations governing these areas.²⁶¹

This vast expansion of GATT legal rules means that many more bases exist for Section 301/International violation cases. In addition, WTO's capture of intellectual property rights protection and trade in services through the TRIPs and GATS Agreements means that most of the cases the United States pursued in the 1980s as Section 301/Unreasonable cases are now actionable as GATT-violation cases. Almost all of the Section 301/Unreasonable cases brought from 1985 to the present have involved claims that a trading partner was not allowing reasonable market access to U.S. service providers or providing inadequate intellectual property protection.²⁶² Having brought

259. The Tokyo Round of GATT negotiations was conducted from 1974 to 1979. During those negotiations the Contracting Parties drafted nine different Codes on non-tariff barriers to trade: Technical Barriers to Trade, Import Licensing, Customs Valuations, Subsidies, Antidumping, Government Procurement, Civil Aircraft, International Dairy and Bovine Meat. Unable to procure an agreement by the Contracting Parties to include these Codes on non-tariff barriers in the text of the GATT, the Contracting Parties agreed that the Codes would be GATT-related only. As a result at the end of the Tokyo Round there was no obligation by a Contracting Party to accept the legal obligations in any particular code. For a description of the Tokyo Round Codes, see John H. Jackson et al., *Law and World Economic Independence*, in *IMPLEMENTING THE TOKYO ROUND* 1377 (John H. Jackson et al. eds., 1984). During the Uruguay Round negotiations the Contracting Parties agreed to revise almost all of the codes and to include them within the basic GATT obligations. See GAO Report, *supra* note 256, at 51-83.

Of all the Tokyo Round Codes only four were left "outside" the GATT at the end of the Uruguay Round. These four agreements on Trade in Civil Aircraft, Government Procurement, International Dairy and Bovine Meat, are referred to in the WTO Agreement as Plurilateral Agreements. The Plurilateral Agreements bind only the Member States that have accepted them. *WTO Agreement*, *supra* note 157, at art. 2.4. By contrast, all of the other Codes were made integral parts of the WTO Agreement and became binding on all Member States of the WTO. *Id.* at art. 2.2.

260. URUGUAY ROUND ASSESSMENT, *supra* note 256, at 43-59.

261. General Agreement on Trade in Services, Apr. 15, 1994, *WTO Agreement*, *supra* note 157, Annex 1B [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Apr. 15, 1994, *WTO Agreement*, *supra* note 157, Annex 1C.

262. See Appendix A following this Article; Sykes, *supra* note 44, at 318-24.

most of the issues raised²⁶³ in these two areas into the GATT, the United States is no longer forced to pursue these trade goals by taking unilateral action. The United States has already filed three GATT-violation cases based on violations of the TRIPS Agreement.²⁶⁴

Not all the cases involving either trade in services or intellectual property rights under the GATT or in other GATT agreements, however, are actionable immediately in the WTO system. The United States currently cannot act as a WTO plaintiff on all GATT-violation cases against all WTO trading partners because of the way in which GATT agreements were conceived. All of the GATT agreements embrace the concept that different levels of economic development among WTO membership disallows completely equivalent treatment of all WTO Member States.²⁶⁵ According to the WTO Agreement, the membership of the organization breaks down into three categories of development: developed, developing, and least-developed economies.²⁶⁶ As a result, GATT historically, and also now the

263. The Section 301 and Special 301 cases the United States pursued prior to the adoption of the TRIPs Agreement were against countries that lacked a legal framework to enforce such basic intellectual property rights as patents and copyright. See generally GENERAL ACCOUNTING OFFICE, INTELLECTUAL PROPERTY RIGHTS: U.S. TRADE REPRESENTATIVE INVESTIGATIONS OF FOREIGN COUNTRY PRACTICES, GAO/GGD-94-168FS (July, 1994).

264. In April 1996, shortly after it issued the Special 301 list, USTR self-initiated two Special 301 cases against Portugal 301-103; 61 Fed. Reg. 19,970 and Pakistan, 301-104; 61 Fed. Reg. 19,971 (1996). In the case against Portugal the United States claimed that Portugal had failed to provide for protection for patents existing on January 1, 1996 and thereafter. Portugal was supposed to have such protections in place within one year of the entry into force of the WTO Agreement. TRIPs Agreement, *supra* note 31, at art. 70. In the case against Pakistan, the United States argued that Pakistan had failed to provide for a "mail box" that would allow for the filing of pharmaceutical and agricultural chemical patents while the country was going through its transition period. *Id.* See text *infra* at pp. 58-59 and accompanying notes for a discussion of the transition period. The United States formally asked for consultations in each case (Portugal- WT/DS 37, and Pakistan WT/DS 36). Portugal and the United States settled WT/DS 37 in October 1996. The United States also requested establishment of a WTO Panel in the Pakistan case on July 16, 1996, but one still had not been established as of February 1997. In July, USTR also self-initiated a case against India (301-106) for the same reasons it filed against Pakistan. 61 Fed. Reg. 35,857. The United States simultaneously requested consultations with India under Article 4 of the DSU (WT/DS 50).

265. The rationale for the different treatment is based on the fact that to comply with many GATT rules a country must either expend funds or forego certain sources of revenue it would otherwise be able to obtain. If a country has a developed economy it is expected to be capable of fully performing all of its GATT obligations. For a country with a developing or least-developed economy GATT obligations are more costly and onerous.

266. The WTO Agreements also give additional assistance to any country "which is in the process of transformation from a centrally-planned economy into

WTO, accord developing and least-developed countries somewhat different treatment.²⁶⁷ For many years, GATT struggled with whether the different treatment should amount to substantial exemptions from the GATT rules.²⁶⁸ This approach was followed in the Tokyo Round and resulted in nine different GATT codes being adopted that not all GATT Contracting Partners were obligated to sign or participate in.²⁶⁹ By the time of the Uruguay Round negotiations, however, the developed countries rejected this large scale exemption approach.²⁷⁰ As a result, the Uruguay Round produced agreements in which the same rules applied to all countries. Developing and least developed economies were given some assistance in adjusting to the new legal regime.

The implementation of the different status-different treatment concept, as interpreted by the Uruguay Round, resulted in the adoption of a series of provisions which deal solely with the special needs and concerns of developing and least-developed countries. Most of the GATT agreements, for example, contain phase-in provisions that grant such countries longer time periods in which to comply with the GATT rules established in the agreement.²⁷¹ The phase-in provisions mean that a developing or

a market free-enterprise economy." See TRIPs Agreement, *supra* note 31, at art. 65.3.

267. See *WTO Agreement*, *supra* note 157, at art. XI.2:

The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institution capabilities.

268. See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 275-81 (1993).

269. *Id.*

270. An illustration is what happened during the TRIPs negotiations. The negotiators agreed to the same standards for all countries and then phase-in periods for those obligations. See *Trade-Related Aspects of Intellectual Property Rights*, in 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* 2283 (Terence P. Stewart ed., 1993) [hereinafter *GATT NEGOTIATING HISTORY/TRIPs*]. Other options proposed included: 1. a single cut-off date by which countries acceding to the TRIPs agreement would ensure their conformity with the provisions of the agreement by that cut-off date; 2. different base-line cut-off dates for countries with different stages of economic development; 3. individual country schedules; 4. time-bound exceptions or lower-level obligations; and 5. different transitional periods for different sub-sets of the final agreement. GATT Secretariat, *Transitional Arrangements in a TRIPs Agreement Communication from a Number of Participants*, MTN.GNG/NG 11/W/69 (Mar. 30, 1990).

271. The phase-in requirements for the TRIPs Agreement are in Article 65. TRIPs Agreement, *supra* note 31, at art. 65. Other agreements with phase-in periods include the Agreement on the Application of Sanitary and Phytosanitary Measures, *WTO Agreement*, *supra* note 157, Annex 1A, art. 10; Agreement on Agriculture, *WTO Agreement*, *supra* note 157, Annex 1A, art. 15; Agreement on Technical Barriers to Trade, *WTO Agreement*, *supra* note 157, Annex 1A, art. 12;

least-developed country cannot be pursued under Section 301 for failing to meet a GATT obligation under any agreement until the phase-in period has passed for that country.

The different status-different treatment concept is also fully reflected in the GATS and TRIPs Agreements for which the United States negotiated so strenuously. In the area of trade in services, not all WTO Member States were required to liberalize access to the service market in all of the thirteen sectors of services covered by the Framework Agreement established by GATS.²⁷² GATS also allows Member States to file short term exemptions from the major GATT obligation, the Most Favored Nation rule, with regard to some of the undertakings they make on the service sectors they do agree to liberalize.²⁷³ With regard to intellectual property, the developing and least-developed countries take on the same substantive obligations under TRIPs as other Member States to protect certain forms of intellectual property and to enforce that protection. Both, however, receive longer time periods in which to meet those obligations.²⁷⁴ The developed WTO Member States were required by the TRIPs Agreement to bring their intellectual property systems into compliance with the agreement within one year after the WTO was established, *i.e.*, by the end of 1996.²⁷⁵ By contrast, developing countries have five years to meet TRIPs obligations, and least-developing countries have eleven years to do so.²⁷⁶ In addition to the general phase-in periods, the developing and least-developed countries get an additional period of five years to extend patent protection to products that their domestic intellectual property system considered unpatentable.²⁷⁷ Even if a developing (or least-developed) country is failing to protect intellectual property adequately, it cannot be reached by the WTO dispute settlement system as long as the relevant phase-in period runs. There remains the possibility of bringing a Section 301/Unreasonable case in such a situation, but there are limitations to the use of that theory as well.²⁷⁸

Agreement on Subsidies and Countervailing Measures, Annex 1A of WTO Agreement, *supra* note 157, Annex 1A, arts. 27, 29.

272. See GAO Report, *supra* note 256, at 111-19.

273. GATS, *supra* note 262, at art. II.

274. TRIPs Agreement, *supra* note 31, at art. 65.

275. *Id.* at art. 65.1.

276. *Id.* at arts. 65.2 & 66. A country that is in transition from a centrally-planned economy to a market economy receives the same phase-in period as a developing country as long as it is "undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations." *Id.*

277. *Id.* at 65.4.

278. The implementing legislation for the Uruguay Round expressly includes intellectual property problems as those which the United States may

ii. Procedural Changes for Section 301 Cases Wrought by the WTO and DSU

The DSU also resolved the three major problems the United States faced in bringing GATT- violation cases: (1) lack of timeliness, (2) ability to forestall the system (through the blocking actions), and (3) lack of implementation. With regard to timeliness, the DSU ends the phenomenon under the GATT system of having cases drag on for years²⁷⁹ by placing limits on how long each phase of a WTO dispute can last. The time period for U.S. action under Section 301 is directly linked to the completion of the WTO process.²⁸⁰ If the United States is a successful WTO plaintiff, it will be entitled to relief as soon as the end of a reasonable time for implementation has passed following the adoption of a panel or Appellate Body panel report. Under the DSU process, if the United States pursues a violation case, obtains a panel, and prevails, it will receive the final panel report recommendations by the end of nine months.²⁸¹ The DSB then has an additional two months in which to review and adopt the panel report.²⁸² If the defending party accepts the panel report and takes immediate steps to withdraw the offending measure, the United States could receive relief before the end of a year.

The question of whether a particular WTO case and corresponding Section 301 action could be resolved this quickly, however, depends on the complexity of the case before the WTO panel and the difficulty the defending country has in complying with the panel report. A defending party is allowed some "reasonable time" to comply with a panel report if it is

choose to pursue under the Section 301/Unreasonable theory. URAA, *supra* note 18, § 314(c)(1). According to this provision, USTR may determine that a country is denying adequate and effective protection of intellectual property rights although it is in compliance with the TRIPs Agreement. See Statement of Administrative Action, *supra* note 30, at 4315.

The United States could pursue these problems as unreasonable cases but it would face the same problems it had in previous cases based on intellectual property rights. It is much easier to negotiate a legislative change than to ensure that the target country enforces the new legislation. See *infra* text accompanying notes 40-42 for a full discussion of this issue.

279. See ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 157-61.

280. URAA, *supra* note 18, §§ 314(d), 341(a). The revisions to the timetables for the investigation and determination stages of a Section 301 case were made "to allow DSU dispute settlement proceedings to be completed before trade sanctions may be imposed." Statement of Administration Action, *supra* note 30, at 4315.

281. Dispute Settlement Understanding, *supra* note 5, at art. 12.9. The DSU actually sets six months as the normal time for the actual operation of the panel process, with an additional three months to be made available if the panel cannot meet the normal requirement. *Id.* at art. 12.8.

282. *Id.* at art. 16.4.

impracticable for it to take immediate action.²⁸³ The maximum amount of time allowed for such implementation is fifteen months from the issuance of the panel report.²⁸⁴ Thus, if the panel report in a case is timely and implementation is immediate, there would be positive results in less than nine months. If the panel report is more complex and the maximum amount of time is taken by a defending party to comply, a case could take two years.²⁸⁵ The time period for a WTO dispute would also be affected by a defending country's decision to appeal the panel report. Any review by the Appellate Body must be complete within three months.²⁸⁶ If the DSB adopts the Appellate Body report in a timely fashion (within one additional month) and the defending country takes immediate action to comply, the time period for an appealed case would be fourteen to fifteen months.²⁸⁷ The worst delay in compliance with an Appellate Body report by a defending country would extend a case to thirty months.

The DSU time periods compare favorably with the operation of the GATT system. The average time for obtaining the implementation of a panel report (not the issuance of the report itself) was two years.²⁸⁸ That length of time would be required in the WTO system only in two cases: (1) where the defending country was allowed the maximum amount of time to implement a panel report or (2) where the country appealed the panel report and then was allowed the maximum time to implement the report.²⁸⁹ In most WTO disputes, such time would not be required.²⁹⁰

The DSU system also eliminates the possibility a valid complaint by a Member State will go unaddressed. Unless the parties settle the case, the DSU process requires the panel and Appellate Body to produce report(s), the DSB to adopt the report(s), and the losing country to implement any report findings or face some form of trade coercion. The ability of defending countries to avoid panel reports by blocking them was singled out by the United States as the major problem with the GATT

283. *Id.* at art. 21.3.

284. *Id.* at art. 21.3(c).

285. *See id.* at arts. 20 & 21.3.

286. *Id.* at art. 17.5.

287. *Id.* at arts. 17.14 & 20.

288. ITC 1985 REPORT, *supra* note 80, at 18.

289. *See* Dispute Settlement Understanding, *supra* note 5, at arts. 21.3(c), 17.14 & 20.

290. The defending country would act immediately or reach a mutually agreed upon time with the complaining country (that normally would be shorter than two years) or receive a fairly short period of time to comply even if the "reasonable time" determination went to binding arbitration. *Id.* at arts. 17 & 21.

system.²⁹¹ This blocking activity—in which the United States participated as well—²⁹²intensified during the 1980s, making the GATT system seem less and less effective.²⁹³ The DSU does not allow blocking or even delaying the parties.²⁹⁴

The final limitation of the GATT system was its lack of a surveillance mechanism.²⁹⁵ The losing party was not required to report about whether, or in what manner it implemented a panel report, thus leaving policing of implementation to the complaining country. By contrast, the DSU requires the DSB to remain involved in disputes throughout the implementation process by defending country.²⁹⁶

The complaining party can expect the defending party to notify the DSB of the actions it plans to implement either immediately or within a reasonable time.²⁹⁷ If the complaining party believes the implementation measures of the defending country are inadequate or GATT-inconsistent, it can refer the matter of implementation back to a panel (normally the original panel) for review.²⁹⁸ In addition, the DSB or other Member States are also empowered to raise the issue of whether the report is being fully implemented.²⁹⁹ The DSB is also authorized to review the course of implementation within six months after the reasonable time for implementation has been established.³⁰⁰ The DSB surveillance of the implementation will keep such a WTO dispute on its agenda, and thus subject to comment or discussion by all WTO Member States until the issue is resolved.³⁰¹ A

291. See ITC 1985 REPORT, *supra* note 80, at 4, 193-94; see also GATT NEGOTIATING HISTORY/TRIPS, *supra* note 270, at 2732-36.

292. See ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 279; see also Hudec, *Judicialization*, *supra* note 88, at 32.

293. See Hudec, *Judicialization*, *supra* note 88, at 25-26. The blocking of panel reports normally did not spell the end of compliance in the GATT system. In most cases the blocking country ultimately took some action to respond to the panel report. Nevertheless, the ability to block and occasional use of that power did significantly delay implementation of some GATT panel reports. See GATT NEGOTIATING HISTORY/TRIPS, *supra* note 270, at 2733. Consequently the complaining country in the GATT system received relief much later than it desired.

294. Dispute Settlement Understanding, *supra* note 5, at arts. 16, 17 & 20.

295. ITC 1985 REPORT, *supra* note 80, at 195.

296. The defending party has only a limited number of options: either acceptance and implementation of the report, or appeal and implementation if the Appellate Body affirms the panel or acceptance of some trade action from the complaining party. Dispute Settlement Understanding, *supra* note 5, at arts. 16-17 & 21-22.

297. *Id.* at art. 21.3.

298. *Id.* at art. 21.5.

299. *Id.* at art. 21.6.

300. *Id.*

301. *Id.*

complaining party is thus assured that the course of its GATT-violation case and the solution to its trade problem will be followed by the WTO until the organization has been satisfied.³⁰²

iii. Overall Consequences for Section 301/International Violation Cases

The United State has followed its pledge to pursue all GATT-based claims through the WTO dispute settlement system (See Figure B). In the first two years of the WTO, the United States has filed not only 22 GATT violations, but also two non-violation claims.³⁰³ The DSU is, however, not a complete panacea for all the problems with GATT dispute settlement pointed out by the

302. The DSU not only eliminates most of the limitations of the GATT system it also retains at least one aspect of that system which did assist plaintiffs. The complaining party in a GATT-violation case only has to present evidence about how a measure infringes a GATT obligation. *Id.* at art. 3.8. According to this provision:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

Id.

If such an infringement is shown, the DSU states that it is presumed that the breach has an adverse impact on the complaining party. The complaining party is, therefore, free from the burden of proving harm. Assuming the validity of the complaint in a case the defending party can only prevail by rebutting the charge of breach or justifying the breach by invoking one of the limited exceptions in GATT Article XX. GATT, *supra* note 1, 61 Stat. at A60-A63, 55 U.N.T.S. at 262-64. Article XX provides the general exceptions to the GATT obligations. It allows Member States the right to derogate from GATT obligations in order to protect human, animal or plant life or health or to conserve exhaustible natural resources.

303. See, World Trade Organization (WTO), Overview of the State-of-play of WTO Disputes (Feb. 11, 1997) (on file with author) [hereinafter WTO Cases]. A "claim" means a separate cause of action filed by the United States rather than the number of different countries involved in the U.S. complaints. Two non-violation claims are additional claims made in two of the 17 U.S. filings. Several of the U.S. claims have been resolved by settlements. In other cases the United States has gone to a panel (for example, the case filed by the United States, the EU and Canada against Japan regarding its taxes on alcoholic beverages. (WT/DS10), the banana case against the EU (WT/DS 27), the beef hormone case (WT/DS 26), and the Canadian periodical case (WT/DS 31). The United States prevailed in the dispute with Japan (WT/DS 10) at the panel and the Appellate Body stages of review, but Japan has not yet implemented the panel's recommendations. See *infra* note 312. The WTO panel on the U.S.-Canada case (WT/DS 31) has to date issued an interim (not yet final) report favoring the United States. See *Canada Weighs Response to Ruling by WTO Against Magazine Tax Policy*, 14 INT'L TRADE REP. 105 (Jan. 22, 1997).

United States. If WTO panels follow all the procedural guidelines and report back in a timely fashion, they could still issue faulty legal decisions. To some extent, any dispute settlement process is only as good as the state of the law it construes.³⁰⁴ This means that the United States needs to exercise great care regarding its WTO litigation. If the United States chooses to pursue a claim regarding a GATT obligation that is vague or ambiguous or deliberately left undefined by GATT negotiations,³⁰⁵ as many of the more complex GATT concepts tend to be, then the WTO dispute settlement process could produce mixed results.

The United States has an additional reason to bring only its strongest GATT cases. The WTO system was designed to be an exclusive forum for remedying a Member State's complaints about another WTO member. The DSU provides in Article XXIII that Member States should only resolve violation and non-violation nullification cases through the WTO dispute settlement process.³⁰⁶ As applied to the United States, the Article XXIII

304. ITC 1985 REPORT, *supra* note 80, at 192. According to the ITC Report one of the most common complaints about the GATT dispute settlement system was that "[t]here were many vague, possibly inconsistent or overlapping provisions in the GATT, and many crucial terms are not defined." *Id.*

305. See generally Robert E. Hudec, *Dispute Settlement, in THE NEW WORLD TRADING SYSTEM: READINGS* 135, 137 (OECD 1994).

306. Dispute Settlement Understanding, *supra* note 5, at art. 23.1. Article XXIII reads:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

- a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
- b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

provision means that no GATT violation or non-violation nullification case be pursued under Section 301 unless USTR bases its legal determination of wrongdoing by a trading partner on a WTO panel report. To comply, the United States did not have to alter completely its previous practice under Section 301. In all pre-Uruguay Round Section 301 cases based on a GATT-violation, the United States did submit its claim to the GATT system under Article XXIII or to one of the dispute settlement mechanisms set up by the Tokyo Round Agreements³⁰⁷ and went through the panel process on each case that was not settled. Consequently, the United States never made unilateral legal determinations of GATT violations in its Section 301 cases.

The United States, however, did take unilateral actions under Section 301 in response to GATT-violation cases. The United States used sanctions when the GATT system proved incapable of securing compliance by a country with a panel report favorable to the United States.³⁰⁸ The United States, without GATT oversight, thus chose the time period for what it would accept as appropriate action by the other country and also determined the "proper" amount of retaliatory sanctions to level if that country failed to take the appropriate action.

Article XXIII of the DSU makes not only unilateral determinations but also such unilateral responses GATT-illegal. Article XXIII requires a Member State to follow only DSU procedures for determining whether an offending country is complying in a timely manner³⁰⁹ and what an appropriate level of sanctions would be if an offending country fails to comply.³¹⁰ The effect of these provisions will be to constrain U.S. responses in Section 301/International violation cases. The United States will not be able to determine unilaterally that another country is taking too long to implement a panel report. The DSU has a process for determining what constitutes a reasonable time.³¹¹ Although the United States can participate in negotiating and arbitration on this issue it must, at it already demonstrated in WTO litigation, ultimately accept what the DSB defines as timely compliance.³¹² Similarly, the United States can no longer

307. See generally ITC 1985 REPORT, *supra* note 80, at 63-85.

308. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 297.

309. Dispute Settlement Understanding, *supra* note 5, at art. 23.2(b).

310. *Id.* at art. 23.2(c).

311. *Id.* at art. 21.3.

312. The United States has chosen to pursue an arbitration over what constitutes a "reasonable time" in its first victory at the WTO. In January 1997, the DSB appointed an arbitrator to act as a mediator between Japan and the United States over Japan's implementation of the July 1996 Appellant Body panel ruling against its liquor tax policy. The other countries litigating WT/DS 10 with the United States (the E.U. and Canada) settled with Japan following the

exercise its own judgment on the manner in which it will retaliate or on how severe any retaliation should be.³¹³

There is one other possible outcome to a Section 301/International violation case brought under the WTO system. The United States could argue that another Member State was violating GATT, but the panel decide against it. Should the United States fail to prevail as a plaintiff at the panel level, the only available option for it would be to seek review of the unfavorable report by the Appellate Body. If the Appellate Body panel found a legal error in the panel report, it would reverse the decision and then recommend the offending country withdraw the measure in question. If on the other hand, the Appellate Body panel affirmed the panel report, the United States would be left without any WTO-sanctioned response to the other country's trade practice. At this point, the United States would have to decide whether to accept the WTO ruling and take no action or proceed to take unilateral steps against its opponent.

Any unilateral action by the United States in that case would violate Article XXIII of the DSU. By taking such action, the United States would expose itself to a WTO case being filed against it by the Section 301 target country. Nothing about the DSU, however, can actually stop the United States from taking such unilateral action. Yet, unlike past deployments of Section 301, such unilateral actions would incur the certain price of a WTO dispute settlement action. If the United States could not or would not resolve such a case, it would then face WTO-authorized retaliation. While not all Section 301 target countries could inflict harm if allowed such sanctions, other developed country trading partners could.

Appellate Body report but talks between the United States. The United States does not regard Japan's proposal—to cut its taxes by 2001—to be a "reasonable time" and Japan have not reached a settlement on the timing of Japan's implementation *Uruguay Official Appointed to Mediate Liquor Taxes Dispute Between U.S., Japan*, 14 INT'L TRADE REP. 122 (Jan. 22, 1997). A decision by the mediator was expected by mid-February 1997. *WTO Decision on Japanese Liquor Taxes Due February 14*, BNA TRADE DAILY (Jan. 20, 1997).

313. The DSU provides a scheme for determining how a complaining party can use the suspension of its GATT concessions as the final response for an offending country's failure to comply. Dispute Settlement Understanding, *supra* note 5, at arts. 22.2 & 22.3. Any retaliation must be authorized by the DSB. *Id.* at art. 22.6. The offending country is even entitled to an arbitral review of the issue if the retaliation does not follow the principles established in Article 22. *Id.*

b. Section 301/Unreasonable Cases and the GATT Non-Violation Theory

Section 301 claims can also be based upon the trading practices of other countries that the United States identifies as unreasonable practices. The non-violation nullification theory allows a claim where a country has engaged in practices that, while not GATT-violative, have in fact nullified U.S. benefits under GATT. As applied by the United States, there has been no overlap between Section 301/Unreasonable cases and the non-violation nullification cases under the WTO system. Instead, the United States made frequent³¹⁴ and controversial³¹⁵ use of Section 301/Unreasonable cases just prior to and throughout the Uruguay Round negotiations and always acted unilaterally when it did. During the first two years of the WTO, the United States has continued to file Section 301/Unreasonable cases. For example, the United States filed two such cases against Japan in 1995.³¹⁶ The first case involved claims that Japan placed unfair restrictions on access to its market for automobiles and auto parts.³¹⁷ That case was settled by the two countries after the United State threatened to use sanctions. The other case involves U.S. claims that Japan maintains unfair barriers to the distribution of U.S. photographic film.³¹⁸

This most recent Section 301/Unreasonable case may prove worthy of close examination because it marks a shift in U.S. action under Section 301. In the *Film* case, Japan refused to negotiate under Section 301 with the United States. While doing so, Japan took the position that the complaint being pursued by the United States should have been resolved by the two private

314. See Appendix A following this Article for a listing of the Section 301/Unreasonable cases.

315. See generally JAGDISH BHAGWATI, *WORLD TRADING SYSTEM AT RISK* 51-57 (1991) for a discussion of the rationale for U.S. use of Section 301 to "extract unilateral, that is, unrequited trade concessions from others." *Id.* at 51. The major motive for U.S. action Bhagwati identifies is the "naked use of power to extract trading gains from weaker powers." *Id.* at 53. See also the views of the GATT Secretariat as late as 1994 in its report on U.S. Trade Policy conducted as part of the GATT Trade Policy Review Mechanism, GATT Doc. 1614 (Feb. 17, 1994) at 40-41. According to the Secretariat, "Many Contracting Parties have expressed concern about unilateralism in U.S. trade policy, as embodied in the 'Section 301' family of laws. They point to what they consider the contradictions inherent in laws aimed at opening markets based on threats to close the U.S. market." *Id.* at 40.

316. See Appendix A for a description of the two most recent Section 301 cases involving Japan.

317. 60 Fed. Reg. 35,253 (1995) (termination of investigation); see *supra* note 147 for a discussion of the claims in 301-93.

318. 60 Fed. Reg. 25,253 (1995).

companies, Fuji Film and Kodak Film, involved in the dispute. The United States refrained from threatening sanctions under Section 301, but argued that Japan is directly involved because of several of its laws. Ultimately, the United States filed a complaint with the WTO. Although the USTR determination in the *Film* case states that the Japanese practices were unreasonable,³¹⁹ the two WTO complaints filed by the United States actually contain three major claims: (1) violation of Article III National Treatment, (2) violation of Article XVI of the GATS Agreement, and (3) a non-violation nullification or impairment claim.³²⁰ The U.S. course of action in the *Film* case is striking because the United States reframed an unreasonable case into one which now involved not only claims of GATT violations, but also a non-violation claim. If the United States pursues this non-violation claim before the panel that has been established on one of the Japan claims then that case will mark the first time that the United States has pursued a Section 301/Unreasonable case through the multilateral dispute settlement system.

All of the targets of Section 301/Unreasonable cases have viewed the exercise as one in which the United States unilaterally defines the unfair trading practice and then demands trade concessions to rectify the alleged sin.³²¹ The United States takes the view that it should be allowed to pursue additional legal rules that would satisfy U.S. decreed levels of adequacy even in areas where no multilateral agreement has yet been reached. Section 301/Unreasonable cases have traditionally been aimed at reaching bilateral agreements or forcing the issue into the WTO for multilateral consideration. These goals could only be achieved by conducting extensive negotiations with the Section 301 target country. The ability to use the credible threat of sanctions was

319. 61 Fed. Reg. 30,929-30 (1996) (termination of investigation).

320. Telephone Interview with Joanna McIntosh, USTR Counsel (Sept. 3, 1996) (describing the *Film* case claim). The United States has broken these three claims into two cases before the WTO. In WT/DS 44 the United States has requested a panel to review its claims that Japan's laws, regulations and requirements affecting the distribution and sale of consumer photographic film and paper violate GATT Art. III:4 (National Treatment) and Art. X. A WTO panel has been established for this case. See *supra* note 156. In WT/DS 45 which remains in the consultation stage (the United States having delayed its panel request) the United States has argued that Japan's measure affecting distribution services (not only with regard to film and paper) through the Large-Scale Retail Store Law violates GATS Articles III (transparency) XVI (market access). In both of these WTO cases the United States is also arguing that Japan's measures nullify or impair U.S. benefits (a non-violation claim). WTO Cases, *supra* note 303; see also *U.S. Moves on Japan Film Case; Seeks One WTO Panel, Delays Second*, BNA TRADE DAILY (Sept. 23, 1996). There has been to date no interim or final report issued on the case which has gone to the panel (WT/DS 44).

321. RECIPROCITY AND RETALIATION, *supra* note 19, at 19.

always viewed as necessary support for this U.S. negotiation strategy.

The United States has never pursued an unreasonable case through the GATT dispute settlement system because of the incredible scope of this provision of Section 301. Throughout the life of the statute, Section 301 has been amended to add to an illustrative list of trade policies, or from the U.S. perspective, legislative shortcomings, of foreign governments that can keep U.S. exporters out of the foreign market. The current Section 301, for example, cites the denial of "opportunities for the establishment of an enterprise" as unreasonable.³²² A government would be engaged in such activity if it had any restrictive investment legislation that limited the rights of foreign companies to set up, own, and operate businesses producing goods or services. Another "unreasonable" activity under the terms of the statute consists of government tolerance of "systematic anti-competitive activities by enterprises."³²³ A foreign government would therefore be acting unreasonably if it had no antitrust law, a weak antitrust law, or an adequate antitrust law which it fails to enforce.³²⁴ Since Congress has never adopted

322. 19 U.S.C. § 2411(d)(3)(b)(i)(I).

323. *Id.* § 2411(d)(3)(b)(i)(IV).

324. The United States is well aware of the differences between U.S. standards and other countries'—notably Japan—understanding of competition principles. See GAO Report, *supra* note 256, at 180-81.

Another policy area linked by several parties to the Uruguay Round late in the negotiations was competition policy. Outlining U.S. concerns the President identified antitrust and other competition policies as one of the issue that need to be explored after the completion of the Uruguay Round. A central concern is that foreign business practices may be anti-competitive, even inconsistent with U.S. antitrust laws, and may place U.S. firms at a disadvantage in overseas markets. Administration officials have publicly mentioned trade associations in Japan and the linked relationships between companies there as being problematic. As we pointed out in our August 1993 report on foreign business practices, different historical experiences and government/business relations have led to different perspective on matters such as competition policy. The United States fears that such differences can further lead to competitive advantages for countries that have less stringent competition or antitrust policies and regimes.

Id.

As part of its decision-making process in bringing such a Section 301 case, the United States arranges to have expertise from the Antitrust division of the Department of Justice to review and consider such cases. According to the DOJ's Antitrust Enforcement Guidelines:

Of particular interest to antitrust enforcement is Section 301 (d)(3)(B)(i)(IV), which includes among the "unreasonable" practices of foreign governments that might justify a proceeding the "toleration by a foreign government of systematic anticompetitive activities by enterprises

definition of "unreasonable" that would provide a legislative standard against which to judge any particular foreign legislation, the President, acting through USTR, has been left to determine on a case-by-case basis which government practices are unreasonable enough to trigger the U.S. demand for negotiations to end them.

A review of recent Section 301/Unreasonable cases and U.S. government statements,³²⁵ however, does reveal three different categories of practices that have been designated as "unreasonable," or which could be in the future. Some of the unreasonable claims might be characterized as non-violation claims under the GATT while others probably could not.³²⁶ The

or among enterprises in the foreign country that have the effect of restricting . . . access of United States goods or services to a foreign market." The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

U.S. DEPT OF JUSTICE AND THE FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 10 (Apr. 1995).

325. See Statement of Administrative Action, *supra* note 30, at 1035-36; GAO Report, *supra* note 256, at 41.

While substantially broader than the GATT, the UR agreements would not address all trade practices that may be considered as unfair by the United States. U.S. trading partners would still have considerable latitude to restrict U.S. exports without violating WTO obligations. The UR agreements contain only limited obligations in several areas newly brought into or expanded under its disciplines. For example, WTO member countries would still have leeway to limit access to domestic markets in such areas as agriculture, certain services and investment; there are areas of intellectual property protection (*e.g.*, details of the patent examination system) that are not addressed by the TRIPs agreement. In addition, the UR agreements do not address several significant world trade issues, such as anti-competitive practices, that may unfairly restrict U.S. exports.

In response to these concerns administration trade officials said that under the UR agreements, the United States would maintain its current ability under GATT to unilaterally address non-violation trade issues.

Id. at 41-42.

326. See text *infra* at pp. 77-78.

There is some reason why countries have been hesitant to expand GATT jurisdiction over some or all of the following types of claims—it will be difficult to adapt the GATT rules to deal with some of these issues. See Michael Hart, *What's Next: Negotiating Rules for a Global Economy*, in *NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALISING WORLD ECONOMY* 221, 235 (OECD 1995) [hereinafter Hart].

More difficult issues are raised by the substantive principles that underpin GATT rules: national treatment and MFN treatment. These are concepts that lend themselves well to rules about exchanges of goods and have proven reasonably applicable to investment and services, but may not be wholly suitable to the development of substantive rules about non-trade issues. In effect, rules governing such issues as labour standards,

first category of unreasonable claims is composed of any trade-related practice that, although not covered by GATT, is regarded by the world trading community as likely to affect any other country's efforts to trade more freely. Before the Uruguay Round, the United States considered other governments' limitations on U.S. service providers or their failure to offer protection to certain forms of intellectual property to fall into this category, although not all countries agreed.³²⁷ Trade-related practices that would currently satisfy this definition and have been left completely or partially outside GATT include the lack of adequate antitrust enforcement,³²⁸ discriminatory government procurement, and limitations placed upon foreign direct investment.³²⁹

The second category of past and future "unreasonable cases" includes any aspect of government commercial policy not yet completely accepted by the world trading system as linked to trade. An illustration of this category includes the argument that the provision of labor rights should be recognized as affecting trade. Under this argument, an offending government, by failing to provide adequate rights to its workers, gains unfair advantage in the trading system.³³⁰ Other developed countries, some within the EU, also accept the U.S. position on this issue.³³¹ However, neither the United States nor the EU has to date been able to

environmental protection or competition policy will require establishing process standards, i.e. setting rules not about products and their consumption but about the way products and investment are made.

Id. at 235.

327. GATT NEGOTIATING HISTORY/TRIPS, *supra* note 270, at 2253-56.

328. See WTO's First Year: "An Encouraging Start," WTO FOCUS, Dec. 1995, at 17 [hereinafter *WTO 1st Year*].

A number of recent trade disputes have highlighted the question of the market access implications of competition policy, especially as it applies to certain distribution arrangements. These examples raise the question of whether the WTO should only deal with competition policy-related issues in an *ad hoc* manner in the context of specific trade policy questions, or whether an overall examination of the links between trade and competition should be initiated with a view to developing a coherent multilateral vision of how trade policy and competition policy can be mutually supportive.

Id.

329. GAO Report, *supra* note 256, at 41-42.

330. See *WTO 1st Year*, *supra* note 328, at 17. Arguments in favor of linking the trading system to internationally recognized labor standards stress that non-enforcement of such standards allegedly results in an "unfair" competitive advantage, or in violation of universal human rights, and that if political and popular concerns on these issues are not addressed substantively there will be increased pressure for unilateral trade measures to deal with the situation. See RAJ BHALA, INTERNATIONAL TRADE LAW 1179 (1996).

331. *WTO 1st Year*, *supra* note 328, at 17.

persuade the WTO membership to recognize this issue as a topic for a future round of multilateral trade negotiations.³³²

The third category of potential "unreasonable" cases includes any trade-limiting structural practice within a country that is not actually dictated by a government. Such structural practices usually arise from the way business is conducted in the country's domestic market.³³³ If the normal way of doing business for example, how the distribution of goods is handled or whether business operates only if bribes are paid—limits access by foreign companies—then a structural barrier to trade exists. The United States has isolated a raft of such issues with Japan and pursued them parallel to Section 301 as part of the Structural Impediments Initiative. The Japanese *Auto and Auto Parts* case also involved claims of structural barriers to trade.³³⁴

Until the *Film* case, the United States had always pursued these more difficult to prove cases as Section 301/Unreasonable cases without considering the views of GATT or WTO. The adoption of the DSU may have forced a change in this approach

332. *Id.*; GAO Report, *supra* note 256, at 180.

In the last weeks of negotiations the United States and other nations raised concerns about how some non-trade issues should be reconciled with trade policies in the new global economic environment. In public statements and initiatives, U.S. administration and Congressional leaders pressed for consideration of labor rights policies in international trade law in the new WTO and in U.S. law.

Id.

During the WTO's first ministerial meeting since the formation of the organization (December 9-13, 1996) the United States was unable to get the other WTO countries to launch a work program on trade and core labor standards. Gary G. Yerky, *U.S. Fails to Win Backing for Plan to Study Trade/Labor Standards Link*, 13 INT'L TRADE REP. 1939 (Dec. 18, 1996). The Singapore Ministerial Declaration merely reaffirmed the WTO Member States' obligation to observe internationally recognized labor standards. *See Singapore Ministerial Declaration*, 13 INT'L TRADE REP. 1979 (Dec. 18, 1996).

There is not even agreement within the EU on the issue—the United Kingdom was against the U.S. proposal. *See Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda*, 13 INT'L TRADE REP. 1925 (Dec. 11, 1996) ("Developing nations—along with some developed countries including the United Kingdom—have argued that the lack of high labor standards in some countries could become a pretext for the imposition of trade sanctions by other countries, particularly in the developed world.").

Despite rejection of its proposal, the United States claimed that the Singapore Ministerial Declaration was a necessary first step and that the United States would continue to work for the creation of a labor standards working party at the WTO. *See Administration Will Continue to Press for Creation of Labor Group at WTO*, 14 INT'L TRADE REP. 14 (Jan. 1, 1997).

333. *See* RECIPROCITY AND RETALIATION, *supra* note 19, at 40-41.

334. *See supra* at note 147 for a description of these claims.

evidenced by the measures the United States has taken in the *Film* case.³³⁵

i. Section 301/Unreasonable Cases and the Theory of Non-Violation Nullification

The United States has never taken a Section 301/Unreasonable case to the GATT dispute settlement system although GATT Article XXIII would have theoretically applied to such cases. The DSU was not drafted to alter or in any way expand the scope of GATT cases under Article XXIII. The DSU negotiators considered alterations to the non-violation provision of Article XXIII,³³⁶ but in the end left it as it was.³³⁷

335. The second WTO case (WT/DS 45) to come out of the Section 301 *Film* investigation involves an attack on Japan's Large-Scale Retail Stores Law. According to some scholars:

it [the law] makes it extremely difficult to establish large stores as governmental approval is required and the process of approval employs a screening committee of local merchants. Since the latter are likely to be adversely affected by the competition of a large retail store, they are likely to approach the application with hostility. The result is that most retailers are small. This in turn produces a negative impact on foreign suppliers of consumer goods, since small stores tend to have limited inventories, handling only Japanese brands.

Daniel J. Gifford & Mitsuo Matsushita, *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 269, 302 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); see also Nancy Dunne & Patti Waldmeir, *World Trade: U.S. Takes Fujit-Kodak Battle to WTO: Announcement Signals Shift in Washington's Trade Strategy*, FIN. TIMES, June 14, 1996, at 3. Such a case, however, may be difficult to prove.

There has been some speculation that at least this part of the United States claim against Japan in the *Film* case is weak. The United States has decided to ask for two panels to review the case. The National Treatment claim would be reviewed by the first panel. The United States has delayed its request for a second panel on the GATS issue regarding market access, while it aims to broaden the scope of the investigation to include the regulations governing small and midsize retailers as well as large retailers. Emily Nelson, *Presentation of Data in Kodak's Case Against Japan and Fujit Delayed by U.S.*, WALL ST. J., Sept. 20, 1996, at B4 (Statement of Acting USTR Charlene Barshefsky).

336. The DSU negotiators reviewed this issue of the scope of the non-violation provision because so many new GATT obligations were being considered by other Uruguay Round negotiating groups that they believed the dispute settlement procedures for non-violation cases would become more relevant. DISPUTE SETTLEMENT NEGOTIATING HISTORY, *supra* note 6, at 2771.

337. The DSU negotiators considered the following provision for inclusion in the DSU. It would have altered the scope of the non-violation provision.

The procedures in this Understanding shall apply . . . where a party has recourse to dispute settlement based upon Article XXIII:1 (b) alleging that the introduction or intensification of a measure not in conflict with the General Agreement, and which could not reasonably have been foreseen,

The non-violation theory of Article XXIII, Section 1(b) allows a WTO Member State to argue that benefits it expected under the GATT are being nullified or impaired as a result of "the application [by a Member State] of any measure, whether or not it conflicts with the provisions of this Agreement." According to the provision, there are three elements to a non-violation nullification case: (1) the showing of a benefit, (2) the proof of nullification or impairment of that benefit, and (3) the proof that a non-GATT violative measure caused the nullification or impairment. The potential breadth of Article XXIII, section 1(b) is staggering.³³⁸ According to the language of the provision, *any* measure a country undertakes could form the basis of a WTO dispute settlement case if it nullifies or impairs GATT benefits for another country. By accepting a literal reading, the GATT Contracting Parties would have been countenancing an extremely intrusive review of their domestic commercial policies. The conducting of such reviews by an international organization would have been considered intrusive and offensive to sovereignty precisely because the countries involved had not undertaken any international obligations with respect to domestic commercial policies. GATT, therefore, responded by limiting the non-violation nullification theory when it was argued before dispute settlement panels.³³⁹

The vast majority of all cases under the GATT system were GATT-violation cases.³⁴⁰ To date, only nine non-violation cases

frustrates a [legitimate expectation of a benefit accruing to the party under market access concessions or other commitment under the General Agreement] [REASONABLE EXPECTATION OF A BENEFIT ACCRUING TO THE PARTY DIRECTLY OR INDIRECTLY UNDER THE GENERAL AGREEMENT], upsetting the conditions of competition [and] [OR] having an [ACTUAL OR POTENTIAL] adverse effect on trade.

Id. at 2791.

The contemplated revisions are represented by the phrases in brackets. As the bracketed language indicates the negotiators were interested in clearly spelling out the limits to the non-violation theory.

Ultimately the negotiators were unable to agree to a revision and the Article XXIII:1 (b) provision was left untouched. *Id.* The EC negotiator had earlier stated that the non-violation procedures should not be touched because the legal concepts involved in such cases (good faith and reasonable or legitimate expectations) were clearly developed in other areas and therefore did not need to be addressed in the DSU negotiations. *Id.* at 2771-72.

338. The breadth of the non-violation theory was recognized by the GATT negotiators and there was debate over whether to grant the organization such power. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 37-47 (2d ed. 1990) [hereinafter HUDEC, *GATT LEGAL SYSTEM*].

339. HUDEC, *DISPUTE SETTLEMENT*, *supra* note 191, at 196; *see also Defensive Unfairness*, *supra* note 76, at 423.

340. *See generally* ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 417, 585 (reviewing 207 GATT cases filed between 1948 and 1989).

have been argued, and in only some of these has the theory been accepted.³⁴¹ The extremely limited jurisprudence of non-violation nullification cases does not allow for a complete analysis of what an appropriate claim would be. One point, however, clearly emerges from a review of the non-violation cases and nullification cases that have been considered to date. In interpreting Article XXIII, section 1(b), the GATT Contracting Parties were comfortable only with a limited reading of the theory.³⁴²

The first element of a non-violation claim, the benefit, was successfully argued only when a party could show that it failed to receive the benefits it expected from a tariff concession.³⁴³ The binding of tariff concessions made to trading partners is one of the core GATT obligations set forth in Article II.³⁴⁴ The loss of the benefit from a tariff concession would mean that although one WTO country negotiated in exchange for the covering of another country's tariffs, it did not actually realize the benefits it expected—increased access to the other market. Instead, some measure taken by the other country kept the complaining country from the competitive relationship it expected from its tariff concession. The language of Article XXIII, section 1(b) does not place any limitation on the type of benefit that a Member State must claim. For example, a country could argue that the effect of the GATT rules should be to allow it potential increased market access to any WTO country, since almost all GATT obligations are applied on an MFN basis. One GATT panel did find a non-violation claim not based on a tariff concession and argued that the provision itself was not limited,³⁴⁵ but that panel report was never adopted.³⁴⁶

341. GATT ANALYTICAL INDEX, *supra* note 206, at 657-68; see also Armin von Bogdandy, *The Non-Violation Procedure of Article XXIII :2, GATT - Its Operative Rationale*, J. WORLD TRADE L., Aug. 1992, at 97-99; Ronald A Brand, *Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement*, J. WORLD TRADE L., Dec. 1993, at 120-25 (1993).

342. GATT ANALYTICAL INDEX, *supra* note 206, at 657-63.

343. *Id.* at 660-61; Kumura, *supra* note 186, at 67-68; EEC-Payments and Subsidies Paid to Processors of Oilseeds and Related Animal Feed Proteins, L/6631, adopted on Nov. 20, 1990, 37 S/228, 261, para. 5.20 ("The panel noted that these provisions, as conceived by the drafters and applied by the Contracting Parties serve mainly to protect the balance of trade concessions.").

344. GATT, *supra* note 1, 61 Stat. at A14-A17, 55 U.N.T.S. at 200-04.

345. A GATT panel did find a non-violation nullification in a case which did not involve a tariff concession. EC-Tariff Treatment on Imports of Citrus Products for Certain Countries in the Mediterranean Region, L/5776, Feb. 7, 1985. The panel report states:

[T]he panel considered that although complaints brought previously under Article XXIII:1 (b) had related to benefits arising from Article II, it believed that this did not signify that Article XXIII:1 (b) was limited only to those

The second element, nullification or impairment of the benefit, has also been narrowly construed. The GATT 1947 and the WTO/DSU place the burden on the complaining party to establish this element.³⁴⁷ To prevail, a country has had to show that the measure of the offending country frustrated its reasonable expectations³⁴⁸ or had adverse effects upon it. In the leading non-violation case on the frustration of reasonable expectations, the GATT panel accepted an argument by Chile that a tariff concession it negotiated had been nullified by changes Australia made after tariff concessions to its policy of subsidizing two competitive fertilizer products.³⁴⁹ The removal of the subsidy for the form of fertilizer Chile hoped to sell, accompanied by the continuance of the subsidy on the other product, meant that Chile's product was far more expensive. Even though Chile had negotiated a tariff binding at the duty-free level (0 percent), the change meant that it could not sell into the Australian market. In other words, the action Australia took frustrated Chile's reasonable expectations of increased access to the Australian market that it had at the time it negotiated tariff concessions with Australia. The requirement of "reasonable expectations" does suggest that the affected country must have relied on actions or representations by the other country when it negotiated tariff concessions—that it could not have foreseen the actions which

benefits. The drafting history of Article XXIII confirmed that this article, including paragraph 1(b) thereof, protected any benefit under the General Agreement This would include then the benefits accruing to the United States under Article I:1 [MFN] which applied to bound and unbound tariff items alike.

GATT ANALYTICAL INDEX, *supra* note 206, at 662 (quoting from the panel report at paragraph 486).

The panel report went on to argue that it could find a nullification or impairment under these circumstances because the purpose of Article 1(b) was to maintain the proper balance of rights and obligations between the parties.

The panel noted that the basic purpose of Article XXIII:1 (b) was to provide for offsetting or compensatory adjustments in situations in which the balance of rights and obligations of the contracting parties had been disturbed. One of the fundamental benefits accruing to the contracting parties under the General Agreement, therefore, was the right to adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage. *Id.*

346. The panel report was not adopted because the EC, which was the losing party, blocked its adoption. In the discussion of the panel report the EC representative stated that "this provision had been applied only to cases in which tariff bindings were at stake; it would be a dangerous precedent to extend its application to situations in which no such commitments had been infringed." *Id.*

347. See Dispute Settlement Understanding, *supra* note 5, at art. 26.1(a).

348. GATT ANALYTICAL INDEX, *supra* note 206, at 657-60.

349. The Australian Subsidy on Ammonium Sulphate, GATT/CP 4/39, adopted on Apr. 3, 1950, II/188, 193-4.

cost it benefits.³⁵⁰ If a WTO member country has acted in such a way, it has deprived the other country of its reasonable expectations of the competitive position of its products in the relevant market.³⁵¹

These restrictive interpretations of Article XXIII, section 1(b) argue against the use of the non-violation nullification theory in its present form for most, if not all, Section 301/Unreasonable cases. For example, with regard to the first category of such cases, issues left out of GATT or other international agreements, it would be difficult for the United States to show how the measure of another country satisfied either the benefit or reasonable expectations requirement as interpreted. No U.S. tariff concessions would have been made on the reasonable expectation that these undealt-with non-GATT covered issues would be resolved in accordance with U.S. desires. Consequently, the U.S. could not argue that it had a concrete benefit that was nullified or impaired by another country. The same limitation would apply with regard to the other two categories of unreasonable cases discussed earlier. Unless the United States were to link its tariff concessions to specific promises by other Member States to adhere to U.S. standards, then it could not argue that a benefit it expected had been nullified. This type of negotiating has occurred in the GATT negotiating rounds only when the countries have agreed that a new area should be covered by multilateral rules. It is true that the lack or inadequacy of laws, such as antitrust laws or laws which stymie the distribution and sale of goods internally, could affect market access. If the concept of benefit was expanded to cover market access in general, rather than just tariff concessions, a non-violation claim could be maintained.³⁵² There would still have to

350. GATT ANALYTICAL INDEX, *supra* note 206, at 660 (In the *Oilseeds* case the panel noted that "the United States may be assumed not to have anticipated the EC actions in question.") (quoting from paragraph 148 of the *Oilseeds* panel report).

351. According to the *Oilseeds* panel report (the most recent instance in which a GATT panel finding of a non-violation nullification was adopted):

At issue in the case before it are product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition.

Id. at 559 (quoting *Oilseeds* panel report at paragraph 147).

352. There have been some suggestions that the lack of adequate antitrust legislation would constitute the basis for a non-violation claim. See generally Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy and the GATT*, 17 WORLD ECON. 121 (1994). With regard to the distribution

be some alteration of the "reasonable expectation" requirement. The results of the non-violation cases submitted to the old GATT dispute resolution process, however, do not necessarily establish the meaning of this provision. Since GATT panel reports have no precedential value.

The WTO has the power to reconsider and broaden the scope of Article XXIII, section 1(b) to capture U.S. Section 301/Unreasonable cases, and thereby limit the possible use of future aggressive unilateralism. There are two ways in which such a "redefinition" of Article XXIII, section 1(b) could be achieved. First, the WTO Member States could attempt to reach a WTO decision about how non-violation nullification cases could be argued and proved in ways other than those established in the extremely limited GATT jurisprudence. The only authoritative interpretation of any GATT provision comes from the WTO decision-making process.³⁵³ Interpretations are taken by Member States of the WTO by a three-fourths majority.³⁵⁴ The redefinition of the non-violation theory in such a way would broaden the potential number of cases that any country's trading partners could bring against it. It may be difficult to achieve consensus for a GATT interpretation that would achieve such a result. Whether the WTO membership would consider such an interpretation if Member States faced another wave of Section 301/Unreasonable cases is unclear.

The second way in which the non-violation theory could be re-examined and more expansively interpreted would come from the operation of the DSU panel system. According to Article 3.2 of the DSU, "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations" set out in GATT.³⁵⁵ Nevertheless, since prior panel reports interpreting the breadth of non-violation claims are not binding precedent, there is the possibility that a WTO panel might be presented with a non-

arguments, see SYLVIA OSTRY, *NEW DIMENSIONS OF MARKET ACCESS: OCCASIONAL PAPER NO. 49, 12* (1995), which states that another way to deal with structural impediments to effective market access which is now being debated is to bring a complaint to the WTO under a little-used section of the GATT, Article XXIII:1(b).

The United States has apparently already framed the first non-violation claim based on its objections to Japan's structural impediments as part of the *Film* complaints before the WTO. See *supra* note 335.

353. Dispute Settlement Understanding, *supra* note 5, at art. 3.9. That article states: "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement." *Id.*; see also ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS 99* (1996).

354. *WTO Agreement*, *supra* note 157, at art. IX.2.

355. Dispute Settlement Understanding, *supra* note 5, at art. 3.2.

violation case and a legal argument that would command a reconsideration of the theory. The substantive content of the non-violation theory has never been fully explored or applied. If the theory were given a more textual interpretation, then the WTO, through the dispute settlement panels, would receive a much broader lawmaking power than it currently possesses. This new power would give it "the power to impose new quasi-obligations, by a process of logically extending the sense, purpose, and policy of the legal obligations already consented to."³⁵⁶

Some expansion, or at least re-articulation of non-violation nullification theory, is inevitable because of the adoption of a new agreement to GATT—the TRIPs Agreement. Unlike other GATT agreements, the TRIPs Agreement does not concern itself with increased market access to be gained through the lowering of tariffs or the removal of discriminatory regulations. The TRIPs Agreement requires Member States to offer minimum standards of intellectual property protection and to enforce these standards. Thus, the benefits a WTO Member State would expect to receive from the TRIPs Agreement are not directly linked to increased market access but to the implementation of the TRIPs standards themselves.

A non-violation nullification case under TRIPs should involve the claim that although it had complied with the Agreement's obligations, a country was nullifying another country's benefits under TRIPs Agreement because there still was not effective protection for the patents or copyrights obtained by foreign citizens.³⁵⁷ Whether this is how the non-violation theory will be construed as applied to the TRIPs Agreement is impossible to determine at this point. The WTO Member States agreed to a moratorium on all non-violation cases under the TRIPs Agreement for five years after the WTO Agreement entered into force.³⁵⁸ This five-year period was designed to give Member States time in which

356. HUDEC, DISPUTE SETTLEMENT, *supra* note 191, at 196.

357. See John Gero & Kathleen Lannan, *Trade and Innovation: Unilateralism v. Multilateralism*, 21 CAN.-U.S. L. J. 81, 91 (1995).

The portion of the agreement dealing with enforcement provides, for the first time, binding international obligations for the effective enforcement of intellectual property both internally and at the border. The importance of this innovative section of the TRIPs agreement cannot be overstated. It will make domestic legal procedures subject to international dispute settlement, not in the context of establishing an appeals procedure for the domestic courts individual cases but in ensuring the effective operation of each WTO member's domestic system in enforcing intellectual property rights.

Id.

358. TRIPs Agreement, *supra* note 31, at art. 64.2.

to negotiate over what should constitute a non-violation nullification case under the TRIPs Agreement.³⁵⁹ Negotiations over non-violation theory in the TRIPs context could lead to a reconsideration of the entire theory, and thereby expand or narrow the range of potential claims.

Even apart from the TRIPs context, the non-violation nullification theory faces a fuller elaboration and potential expansion if the WTO sees the anticipated increase in the number of dispute settlement cases filed by Member States. If any particular GATT obligation under one of the agreements is not specific or clear enough, a WTO Member State might feel constrained to file its complaint as a non-violation rather than a violation complaint. Early scholarly predictions on whether the WTO dispute system will spur the filing of more non-violation nullification cases differ widely.³⁶⁰

Only one other category of GATT-based cases can be brought in the WTO dispute settlement system. A country can argue that its benefits are being nullified or impaired by "any other situation" according to Article XXIII, section 1(c).³⁶¹ There has never been a GATT panel ruling adopted on this category.³⁶² The lack of a GATT interpretation of Article XXIII, section 1(c) would appear to make it the appropriate category for bringing trade complaints like the Section 301/Unreasonable cases that are not violations or non-violations as interpreted. Unfortunately, even if the definition of Article XXIII, section 1(c) remains open, the possibilities for relief under that provision have been limited by the terms of the DSU. Article XXIII, Section 1(c) cases are not offered the same enforcement measures available under either of the other two categories of claims. The DSU process is followed in an Article XXIII, section 1(c) case only until a panel report has been circulated to the Member States. After that, the old GATT system for implementation—which required consensus adoption, and thus allowed a country to block adoption of a report unfavorable to it—takes over.³⁶³

The United States could pursue a trading partner for its failure to have a competition law or adequate labor laws under Article XXIII, section 1(c), prevail on the legal issue, and still be unable to obtain WTO relief. Since the defending country could and probably would in most cases block such a report, there appears to be little incentive to invoke Article XXIII, section 1(c)

359. *Id.* at art. 64.3.

360. Compare INTERNATIONAL TRADE REGULATION, *supra* note 211, at 2.27-6 with Vermulst & Driessen, *supra* note 216, at 137.

361. GATT, *supra* note 1, 61 Stat. at A64-A65, 55 U.N.T.S. at 266-68.

362. GATT ANALYTICAL INDEX, *supra* note 206, at 668-70.

363. Dispute Settlement Understanding, *supra* note 5, at art. 26.2.

and use it in the category of Section 301/Unreasonable cases. If anything, the reversion to the old GATT system underscores all of its inadequacies for U.S. purposes of forcing open foreign markets. If the WTO is incapable of policing Article XXIII, section 1(c) cases, then the United States could pursue "any other situation" on its own.

ii. Procedural Aspects of Non-Violation Nullification Cases

Even if the category of non-violation cases was reinterpreted in a more expansive form by the WTO, the United States would probably still prefer to pursue Section 301/Unreasonable cases on a unilateral basis. This is because of procedural aspects of a non-violation nullification case under the terms of the DSU. The DSU requires non-violation cases to be treated the same as GATT-violation cases throughout the dispute settlement process itself. All of the same panel processes, including the right to appeal, apply to these cases. Significant alterations to the process, however, do exist for non-violation nullification cases in two areas. For a party complaining about a non-violation nullification, there are different expectations with regard to how it must prove its case and what relief it can expect.

On the burden of proof issue, the complaining party has to do more than just point out the issues; it must present a "detailed justification" supporting the non-violation claim.³⁶⁴ In other words, substantial legal resources must be devoted by a country to analyzing how to make the non-violation argument and legally support it. The burden of proof rests firmly on the country pursuing such a claim, and it would have to overcome the presumption against the theory provided in past cases. This burden of proof requirement means that if the United States were to pursue a non-violation claim it should pick one which has the strongest chance for being accepted by a panel.

Even if the complaining party can establish its case and prevail, however, it will not receive the full relief accorded in a GATT-violation case. The DSU expressly states that in response to a non-violation finding by a panel, there is no obligation incurred by the offending party to withdraw the measure.³⁶⁵ Instead, the panel or Appellate Body can only recommend that the offending Member State make a "mutually satisfactory adjustment."³⁶⁶ The different remedies available for violation and non-violation nullification or impairment cases reflect the goals

364. *Id.* at art. 26.1(a).

365. *Id.* at art. 26.1(b).

366. *Id.*

and realities of the WTO dispute settlement system. If a Member State is violating a GATT legal rule, then the dispute settlement system should operate to coerce it into compliance with the rule.³⁶⁷ Anything less than the withdrawal of the measure or the removal of its ill effects does not achieve the primary goal of the dispute settlement system—the preservation of the rights and obligations of Member States under the GATT agreement at issue. By contrast, in a non-violation case, the offending country, may have nullified or impaired the benefits of another country but in so doing acted consistently with the GATT. There is no GATT obligation that would be met by forcing the country to abandon the measure or practice in question. One of the most effective non-violation remedies would, therefore, be one which eliminates the consequences (the loss of trade resulting from the measure) rather than the measure itself. Compensation, which provides the complaining party with a trade advantage offsetting the loss from the offending measure, meets that criterion.³⁶⁸ The parties to the dispute are entitled to an arbitral determination of the level of benefits that have been nullified or impaired³⁶⁹ and suggestions for how to reach a negotiated settlement.³⁷⁰ The arbitral decisions on these issues, however, are not binding on the parties. Ultimately, it is the disputants who will have to determine the type of negotiated settlement that each can accept.³⁷¹

iii. Overall Consequences for Section 301/Unreasonable Cases

Non-violation cases under the DSU are harder to prove and less amenable to a satisfactory resolution. These characteristics make non-violation cases much less attractive for the United

367. Under GATT practice there had always been the expectation that if a case were based on a GATT-violation the proper remedy is withdrawal of the measure. Compensation is nowhere mentioned in the text of Article XXIII although the concept does clearly appear in other GATT provisions as a method for a country to “pay” for its inability to follow its GATT obligations. For example, Article II contains an obligation to bind a tariff concession at a negotiated low level and hold it there. Despite the Article II provision, however, the GATT provides an exception in cases where party finds it too difficult to comply with the obligation. After a three year period a party can raise a bound tariff only if it negotiates with affected trading partners and compensates them for the trade losses which come from breaking the Article II obligation. See GATT, *supra* note 1, 61 Stat. at A71-A72, 55 U.N.T.S. at 276-78.

368. The provision regarding relief in a non-violation case suggests that compensation can be included as part of a mutually satisfactory adjustment. Dispute Settlement Understanding, *supra* note 5, at art. 26.1(d).

369. *Id.* at art. 26.1(c).

370. *Id.*

371. *Id.* at art. 26.1(d).

States. The problem with compensation as the form of relief in a non-violation case is that it may not satisfy the complainant country. If the United States were to pursue many of the Section 301/Unreasonable claims it might prefer to bring as a non-violation case, then it would not always be seeking compensation. The U.S. concerns about inadequate intellectual property protection (even after adoption of the TRIPs Agreement) or inadequate antitrust or labor laws would not really be satisfied by a negotiated settlement that offered the United States increased market access opportunities in trade of goods or services. The only relief that would actually satisfy the United States would be a drafting or redrafting of the offending country's legislation and enforcement of the new legislation. The other U.S. preferred option would be a commitment to add the issue to the negotiating agenda for the next round.³⁷² Article 26 of the DSU suggests that the parties make a "mutually satisfactory adjustment" which means that the offending country would have to be willing to accept these types of relief. Even if the country was willing to accept U.S. demands, the United States would still have to monitor its compliance.

In its past uses of Section 301, the United States has never settled a case unless it got some cessation or alteration of the existing practice or a commitment to pursue the issue in the negotiating rounds which would ultimately submit the area to multilateral discipline.³⁷³ Receiving compensation for its losses, thus re-balancing the level of concessions the U.S. party believes it should have been receiving, would only give the United States increased market access in some area other than the one which prompted it to begin the Section 301 case.

The non-violation route in the WTO dispute settlement system fails to address most of the trade concerns the United States has voiced following the conclusion of the Uruguay Round. There is some argument about whether the non-violation theory should ever be used in WTO dispute settlements.³⁷⁴ If there is no GATT violation, then what separates the WTO Member States is a difference over policy issues and the linking of such issues to trade that should be consigned to future GATT negotiations under

372. The trouble about accepting such a commitment as a satisfactory adjustment is that a handful of countries could not ensure that the issue would actually be made part of a future negotiating round. For this option to be a satisfactory solution for the United States it would need to pursue a series of similar non-violation claims against many WTO Member States.

373. See *infra* Appendix A for the results of the Section 301/Unreasonable cases; see also ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 237.

374. See Vermulst & Driessen, *supra* note 216, at 137 (Non-violation nullification is "better dealt with by way of negotiations.").

the auspices of the WTO. Should the WTO membership come to accept this view, then the United States may feel even more compelled to set the agenda for future GATT negotiations by unilateral actions under Section 301.

As long as the United States believes that the lack of antitrust legislation and inadequate labor laws pose significant barriers to market access, the WTO system has its limits. The failure of other countries to have any legislation (as in the case of antitrust) or legislation matching or approximating U.S. standards (as in the case of labor law) does not currently create the basis for a non-violation case. Nothing in the legislative history or the government reports issued about the Uruguay Round indicates that all Section 301 cases must go through the WTO process.³⁷⁵ Consequently, there remains a wide arena in which the United States could choose to pursue Section 301/Unreasonable cases. In the past, the United States pushed non-GATT cases into the jurisdiction of the multilateral system precisely by bringing Section 301/Unreasonable cases.³⁷⁶

Using Section 301/Unreasonable cases to enlarge the body of GATT legal obligations is more effective than any unilateral efforts to obtain new legislation from trading partners on a country-by-country basis.³⁷⁷ To obtain sufficient coverage of an issue through bilateral agreements, the United States would have to pursue even more Section 301/Unreasonable cases than it has in the past. Moreover, the United States would still face the intractable problem of how to police the bilateral agreements it obtains.³⁷⁸ Whether the United States has the economic power to pursue the agenda-setting strategy it used during the Uruguay Round to push contentious areas into the next negotiating round remains to be seen. Many of the countries which accepted the new GATT agreements as well as the need for the more adjudicative dispute settlement system established by the DSU did so in order to contain unilateral actions by the United States.³⁷⁹ The WTO system, as it stands, will capture for resolution only the Section 301/Unreasonable cases the United States was pursuing at the time of the Uruguay Round. As long as the United States continues to expand its list of trade-related issues that limit U.S. market access and are "unreasonable," the

375. See GAO Report, *supra* note 256, at 42.

376. From 1986 to 1993, the largest number of unreasonable cases filed involved failures of U.S. trading partners to offer "adequate" intellectual property protection and adequate market access for U.S. services. See *supra* text accompanying notes 69-73.

377. See *supra* notes 43-71 and accompanying text.

378. *Id.*

379. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 237.

WTO system is incapable of completely displacing U.S. unilateral action. The United States could initiate a barrage of Section 301/Unreasonable cases for each new GATT agenda item it cannot otherwise bring to the negotiating table. Although undoubtedly effective in the Uruguay Round,³⁸⁰ overuse of an agenda-setting strategy could create a great deal of anger and raise questions about the viability of the WTO.³⁸¹

The WTO does have some measure of control over U.S. actions under Section 301 that it lacked before. Although the United States has placed GATT-illegal sanctions against several countries, including in one unreasonable case, *Brazilian Pharmaceuticals*, it managed to avoid a GATT review of its actions. It will be impossible for the United States to evade such review completely under the WTO system. The much vaunted Article XXIII of the DSU does not provide the mechanism for limiting U.S. conduct on Section 301/Unreasonable cases.³⁸² By its terms, Article 23 tracks the scope language of Article XXIII, paragraph 1 of the GATT, and states that when Member States "seek the redress of a *violation* of obligations or *other nullification or impairment*," they are required to use the DSU system. If Section 301/Unreasonable cases do not fall into either Article XXIII, paragraph 1 category, then Article XXIII of the DSU is inapplicable. The United States has argued for this reading of Article XXIII.³⁸³ If the non-violation universe of cases remains narrowly construed and the United States remains aggressive in

380. *Id.*

381. See Hart, *supra* note 325, at 237.

382. In its report on the Uruguay Round the European Commission suggested that Article XXIII would stop the United States from acting under Section 301. GAO Report, *supra* note 256, at 43. According to Professor Chayes, "in the late stages of the Uruguay Round negotiations, [other GATT countries] secured the adoption of a little noticed provision that in effect outlaws Section 301." *THE NEW SOVEREIGNTY*, *supra* note 44, at 101.

Professor Hudec, however, argues that the inclusion of Article XXIII in the DSU represented a game being played by the United States and the other WTO countries. Robert E. Hudec, *International Economic Law: The Political Theatre Dimension*, 17 U. PA. J. INT'L ECON. L. 9, 13 (1996) [hereinafter *Political Theatre*]. President Clinton (and USTR) was aware of the meaning of Article XXIII and how other countries viewed it but was also aware that Congress would insist (as the implementing legislation suggests) on continued use of Section 301. *Id.* According to Hudec, "Congress knew that the understanding was going to be a binding legal document signed by the United States, and the WTO member nations knew that Congress was going to insist on continued use of Section 301." *Id.* at 14. Hudec goes on to describe Article XXIII of the DSU and the U.S. response to it as an illustration of "political theatre"—the tendency of governments to adopt laws and agreements that create the appearance of legal solutions when in reality no solution has been achieved. *Id.*

383. Statement of Administrative Action, *supra* note 30, at 4308 (emphasis added).

pursing its interests, Section 301/Unreasonable cases may continue to be filed.³⁸⁴ While the United States retains power to define its own cause of action and to threaten sanctions if other WTO members fail to comply with its requests, it will have to exercise greater restraint in imposing sanctions in Section 301/Unreasonable cases following the adoption of the DSU.³⁸⁵ Failure to do so could find the United States being brought up as a defendant in the WTO dispute settlement system.

3. United States as a Defending Country in a DSU Proceeding

If the United States continues to pursue Section 301 cases, it could find itself in the WTO system as a defending country in two ways. First, if the United States brings a Section 301 case as a complaining party, loses, refuses to accept the DSB decision, proceeds to take unilateral action, it would clearly be violating Article 23(1). The United States would thus be creating the basis for a violation case to be brought against it. The United States would lose any such case before a GATT panel, since there would be no GATT justification for such action; thus, the United States would have to withdraw the sanctions and compensate the Section 301 target for its losses due to the sanctions or face counter-retaliation by the target country.

The second scenario in which the United States could run afoul of the WTO with Section 301 involves unreasonable cases. Simply pursuing an Section 301/Unreasonable case would not involve a violation of the WTO. The Section 301 statute does not require USTR to initiate such cases or to take retaliatory action

384. Since the adoption of the DSU the United States has only brought two Section 301/Unreasonable cases—both against Japan. This course of conduct is interesting for two reasons. First, the United States has usually pursued more unreasonable cases over the same time frame in the past. This slow down in Section 301/Unreasonable cases could reflect that the United States is satisfied since it got the major universe of unreasonable cases included within the coverage of GATT obligations. Another reason for the slow down, however, could be that the United States has not yet decided which other kinds of unreasonable cases (in antitrust or labor rights) it wants to pursue. Second, the United States has not acted with regard to the Section 301/Unreasonable cases it has filed as it would have in the past. In the *Auto and Auto Parts* case, the United States threatened sanctions but reached a negotiated settlement with Japan after that country filed a complaint with the WTO. In the *Film* case, the United States did not threaten sanctions even when Japan refused for over a year to negotiate over the dispute. Instead of pursuing unilateral action in this case, the United States reframed its complaints into two cases for the WTO each involving one GATT violation claim and a non-violation claim. See *supra* note 156.

385. The United States threatened but did not impose sanctions in the *Auto and Auto Parts* case. According to Professor Hudec the United States backed down and settled that case because the existence of the WTO meant that it had to. Political Theatre, *supra* note 382, at 13.

against countries if they fail to respond to U.S. threats in unreasonable cases. Nevertheless, it is clear that all countries do not share the view that Section 301/Unreasonable cases are outside the jurisdiction of the WTO. In the Japanese *Auto and Auto Parts* case, Japan filed a WTO complaint about the threatened U.S. sanctions,³⁸⁶ but the case was withdrawn when the parties reached a negotiated settlement. As a result, the WTO has not yet had the opportunity to review the jurisdictional issue.

If the United States takes retaliatory action in a future Section 301/Unreasonable case, it stands a strong chance of coming under WTO scrutiny. The United States has tended to use traditional methods for achieving trade retaliation in Section 301 cases, such as imposing high tariffs on the offending countries' goods or placing a quota on such goods coming into the U.S. market.³⁸⁷ Any U.S. retaliation in either form poses GATT problems. Imposing high tariffs might violate GATT Article II, and any use of quotas clearly would violate the Article XI prohibition on quantitative restrictions.³⁸⁸ Placing increased tariffs against a Section 301 target would violate Article II if they were placed on products which the United States had bound (and thus promised to keep low) during prior GATT negotiating rounds. The vast majority of U.S. tariff categories are bound under GATT rules.³⁸⁹ Therefore, to punish a country in any effective way under Section 301, the United States would probably have to commit a violation of the WTO rules.

The Section 301 target country would then be in a position to take the United States through the WTO dispute settlement process, prevail at the panel and appellate levels, and attempt to compel the United States to withdraw the retaliation. The United States could refuse to lift its sanctions, but that would subject it to an argument for temporary compensation and the "mobilization of shame" by the WTO membership as it attempted to coerce the

386. See GATT Focus, Dec. 1995 at 2, 6. The United States also avoided a review of its use of Section 301 sanctions by lifting retaliatory sanctions it had placed against the EC when that country would not lift a ban on beef fed on hormones (301-62). The EU had filed a request for consultations and later a panel on the sanctions arguing violations of GATT Articles I and II as well as Articles 3, 22 and 23 of the DSU (WT/DS 39). In its request for a panel, the EU claimed that the United States had failed to "ensure the conformity of its laws, regulations and administrative procedures with its obligations" under the WTO with respect to the application of Section 301. When the United States lifted the sanctions, the EU decided not to pursue the panel request. The WTO regards the case as settled. WTO Cases, *supra* note 303.

387. The United States used this method against Brazil in 301-61 and threatened to do so against Japan in 301-93.

388. GATT, *supra* note 1, 61 Stat. at A29-A30, 55 U.N.T.S. at 220-22.

389. GAO Report, *supra* note 256, at 42.

United States into lifting the sanctions.³⁹⁰ Eventually, if the United States did not settle the case, there would be WTO-authorized retaliation. Even though the United States has the market size and strength to blunt retaliation by many smaller countries, some trading partners, notably Japan and the EU, could harm the United States.

The consequences of the new WTO process leave the United States with several options for taking action under Section 301: (1) threaten retaliation but stop before taking such action, (2) devise other non-GATT violative forms for retaliation, (3) take traditional retaliatory action but limit it to non-bound tariffs, or (4) take necessary retaliatory measures to obtain U.S. goals and be willing to "pay the price." None of the four options is without its difficulties. If the United States simply threatens retaliation in a series of Section 301 cases but never acts, Section 301 could lose its credibility as an effective trade action. U.S. trading partners became concerned about aggressive unilateralism by the United States only after it started using sanctions to resolve Section 301 cases.³⁹¹

Attempting to frame non-GATT violative sanctions may work in some cases, but will not work against all trading partners. In the case of developing countries, other methods for trade-based retaliation, such as eliminating access to the Generalized System of Preferences,³⁹² already exist. With regard to developed country targets of Section 301, fewer trade-based methods to sanction exist. One type of such measure would be to withdraw from or refuse to table proposals in negotiations for further trade liberalization. For example, the United States could refuse to negotiate additional liberalization in some sector of trade in services to punish Japan or the EU. Similarly, the United States could hold up negotiations on the creation of new regional trading arrangements with targets of Section 301 cases. Such retaliatory action, however, could impair U.S. interests other than the one being pursued under the Section 301 case. Normally, when it decides to take action in any Section 301 case, USTR conducts an extensive review, subject to public comment, about the "costs" to U.S. producers of any U.S. sanctions against a target country. Any non-traditional retaliation would also have to be reviewed

390. Pieter Jan Kuijper, *The New WTO Dispute Settlement System – The Impact on the European Community*, 29 J. WORLD TRADE, Dec. 1996, at 49, 53-54 [hereinafter *New WTO System*].

391. See ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 137.

392. GAO Report, *supra* note 256, at 42; URAA Legislative History, *supra* note 37, at 3907 (Section 301 amended to allow USTR to suspend benefits under the Generalized System of Preferences, the Caribbean Basin Initiative or the Andean Trade Preference Act).

just as carefully. Non-traditional retaliation against larger trading partners could prove too costly for the goal being achieved.

The United States could attempt to fashion its sanctions to avoid GATT-bound tariffs. Such retaliation against certain countries might be effective. Unfortunately, most U.S. tariffs on manufactured goods and agricultural products are bound, and raising them only against the target country would pose two clear GATT violations.³⁹³ Even with the unbound tariffs that remain, however, the United States might not be able to make effective use of them for retaliation purposes. To be effective in coercing the target country to change its practices, the sanctions would have to come on products of U.S. export interest to that country. Unless the unbound tariffs are on products of interest to a particular target country, this method of retaliation will not work. The United States could limit access to its services market in any area not covered by the obligations it has assumed under the GATS Agreement.³⁹⁴ Such retaliation would only be useful against a country with an active services market. In almost all cases, this would be only developed countries. In many cases, it would be impossible to frame a strong enough retaliatory measure using this method.

The fourth option of paying the price might end up being the most frequently exercised. The United States cannot be compelled to withdraw sanctions even if the WTO decision on U.S. retaliation went against it.³⁹⁵ Congress is consulted upon what action to take in response to an adverse WTO ruling.³⁹⁶ Moreover, even if the United States does face a WTO dispute over Section 301 sanctions, it can maintain what might be quite effective sanctions during the dispute settlement process itself (including throughout the panel and implementation stages).³⁹⁷ As a result, the Section 301 target country might be willing to settle the case before the panel report by acceding to whatever objective the United States had originally sought in the case. If not, the country might settle for compensation after the panel report if the United States fails to withdraw the original sanctions. Finally, even WTO-authorized retaliation may not be a realistic prospect for smaller countries in no position to harm the United

393. A violation of GATT Article II, tariff binding, and a violation of Article I, MFN, if the increased tariffs were applied only against the target country.

394. See GAO Report, *supra* note 256, at 111-19.

395. Statement of Administrative Action, *supra* note 30.

396. *Id.*

397. GAO Report, *supra* note 256, at 45.

States.³⁹⁸ The prospect of realistic counter-retaliation by a developed country Section 301 target, however, would probably dictate U.S. strategy. For the cases in which it could not procure a negotiated settlement prior to the WTO proceedings, the United States might prefer to leave its Section 301 sanctions in place throughout the panel process in order to gain leverage for an eventual settlement.

C. International Organizations and Dispute Settlement

I. The Creation of an Adjudicative Dispute Settlement System

The United States worked ceaselessly over the years to push the GATT dispute settlement system into becoming more legalistic. Later, the United States pushed aggressively for the creation of a more adjudicative dispute settlement system for the resolution of GATT disputes. Every legal analysis to date has concluded that the WTO dispute settlement system exemplifies a decisive step towards an adjudicative system.³⁹⁹ These judgments spring from a comparison of the DSU with the GATT system. The GATT dispute settlement system was not adjudicative. The early focus of the system was not the making of legal judgments, about whether a Contracting Party had violated a GATT obligation. Instead, the system was designed to enable governments to resolve trade disputes through negotiated settlements.⁴⁰⁰ Over time, the panel reports issued by the GATT system became longer and more legalistic as they were increasingly devoted to legal analysis of GATT text rather than political issues. The United States actively participated in this transformation process by trying GATT cases before panels like traditional law suits.⁴⁰¹

Notwithstanding U.S. efforts, however, the GATT dispute settlement system was not rationalized. For example, it lacked a written understanding on how the panel process should operate until the completion of the Tokyo Round in 1979. Even when the

398. ITC 1985 REPORT, *supra* note 80, at 135. In the GATT system many developing countries hesitated to bring disputes under Article XXIII because they doubted the usefulness of any GATT-authorized retaliation.

399. See generally Hudec, *Judicialization*, *supra* note 88; Vermulst & Driessen, *supra* note 216; Davey, *supra* note 197; Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994).

400. See generally HUDEC, GATT LEGAL SYSTEM, *supra* note 338, 111-200 (describing the mediation-oriented format used by early GATT panels).

401. Hudec, *Judicialization*, *supra* note 88, at 11-13.

Tokyo Round Understanding and a later Understanding developed during the course of the Uruguay Round were adopted by the Contracting Parties, they stressed the negotiation/mediation aspects of the process as much as the formal panel process used for disputes.⁴⁰² The GATT Secretariat, which was supposed to offer the Contracting Parties legal assistance and to aid panelists in the drafting of panel reports, lacked an Office of Legal Affairs until 1984.⁴⁰³ The GATT system was operated by *ad hoc* panels comprised more often than not by government trade officials, not trade experts or lawyers.⁴⁰⁴ Moreover, the panel reports had no GATT authority unless formally adopted by the Contracting Parties. Finally, the GATT system was not adjudicative, because it completely lacked the means to enforce compliance or conduct surveillance of adherence to panel decisions.⁴⁰⁵

By contrast, the WTO dispute settlement system as established by the DSU does appear to be adjudicative in form and operation. The DSU provides oversight of all aspects of a dispute by the Dispute Settlement Body. The DSB is meant to act solely as a coordinator of disputes for the WTO; its members are not representing their governments as they were in the GATT system. The DSU rules for the composition of panels also indicate an attempt to create a separate legal system through the WTO. The panelists are no longer to be only or even primarily government officials. The Member States are prohibited from seeking to influence them or giving them instructions concerning a case.⁴⁰⁶ The automatic establishment of panels and the required issuance and adoption of panel reports subjects Member State disputants to a process that more closely resembles a lawsuit. The DSU provides for both an initial hearing and resolution (the trial) as well as appellate review. The DSU also contains what resembles a series of procedural rules regarding

402. Young, *supra* note 181, at 397-98.

403. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 137-38.

404. ITC 1985 REPORT, *supra* note 80, at 20-21.

405. The consensus-driven process of the GATT system allowed a country participating in the dispute to block the establishment of a panel and ultimately, the adoption of the panel report itself. The losing party in a GATT dispute could, if willing to ignore political disapproval of other Contracting Parties, effectively avoid following any decision with which it disagreed.

406. Dispute Settlement Understanding, *supra* note 5, at art. 8.9. In addition, the DSU disallows any *ex parte* communication with a panel or Appellate Body panel. *Id.* at art. 18.1.

the form of pleading,⁴⁰⁷ the time period for disputes,⁴⁰⁸ and the participation by interested third parties.⁴⁰⁹

Despite these features, the DSU does not completely establish an adjudicative system. Instead, the DSU establishes a dispute settlement system without the form or powers of a true court.⁴¹⁰ With regard to enforcement, the WTO also lacks, as is true of most other international organizations, power to compel a Member State to obey its legal determinations. The WTO system ultimately rests on the willingness of Member States to accept their legal obligations as defined by the DSB or face WTO-authorized retaliation.⁴¹¹ The WTO system is thus limited by the fact that its potential litigants are governments.

2. The Consequences of a More Adjudicative Dispute Settlement System

Although the WTO system is not completely adjudicative, it follows that model more closely than the GATT system. The cumulative and operative effect of the new DSU provisions may produce certain consequences for the development of GATT law and for the trade policy strategy of WTO Member States. There are three ways in which the settlement of disputes will alter the operation of the WTO: (1) changes in jurisdiction, (2) development of GATT law, and (3) enforcement of GATT law. All of these alterations will have a profound impact on how the United States operates within the WTO.

a. Jurisdiction

At first glance, it appears that there are no jurisdictional consequences arising from the adoption of the DSU. The WTO system still has jurisdiction only over disputes brought by

407. *Id.* at arts. 7 (stating terms of reference for a panel) & 26.1-.2 (stating pleading requirements for Art. XXIII:1(b) & (c) cases).

408. *Id.* at art. 20 & app. 3.

409. *Id.* at art. 10.

410. The DSU does not establish a standing court empowered to pass binding judgments on Member States, but instead retains the *ad hoc* panel system set up in the early years of the GATT. A completely new panel can be chosen for each new WTO dispute. The Appellate Body does have a standing group of potential panelists, but there is no creating of law by the entire group. Instead of an appellate tribunal there is the possibility of a panel of three and no guarantee of a repeat of the same panel for future cases. As for powers, the WTO panel reports lack any direct effect for most Member States. A WTO decision will become part of or be reflected in the law of a Member State (*i.e.*, have the force of law) only if that Member State implements the WTO decision.

411. Hudec, *Judicialization*, *supra* note 88, at 20.

Member States. The WTO is not empowered to bring a dispute settlement case for a Member State or in its own capacity. Nevertheless, the WTO system has already seen an alteration in its case load both with regard to the number of participating countries and the type and number of cases. The GATT dispute settlement system established hundreds of dispute settlement panels from its beginning in 1948 until 1994.⁴¹² By contrast with other forms of international adjudication, like the operation of the International Court of Justice,⁴¹³ the GATT system was incredibly active and comprehensive in its review of GATT law. The WTO system will only deepen this phenomenon.

The design of the WTO system clearly aids complaining countries. If the claim is a dispute involving a GATT violation, the process operates to secure a judgment for the complaining party. The WTO system has in, effect, compulsory jurisdiction. A Member State cannot refuse the DSB a chance to review a trade dispute once a complaint has been filed. In the past, the vast majority of all GATT cases were brought by developed countries.⁴¹⁴ The new system encourages the filing of cases by all Member States.⁴¹⁵ This is because the legalization of the WTO system signals an accompanying depoliticization of the dispute settlement process.⁴¹⁶ A developing country will no longer refrain from bringing a case or settle it early because of the market size of its opponent.⁴¹⁷

412. See generally ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 417-585 (encapsulating summaries of filed complaints).

413. See von Bogdandy, *supra* note 341, at 95.

414. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 295-300.

415. There have been 66 different requests for consultations filed with the WTO DSB from January 1, 1995 through February 15, 1997 comprising 45 distinct legal matters (legal claims). Of these 66 requests for consultation the developing countries have filed 24. See WTO Cases, *supra* note 303.

416. Gilbert R. Winham, *Comments on The Judicialization of GATT Dispute Settlement*, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 51-52 (Michael M. Hart & Debra P. Stegar eds., 1990).

[J]udicialization gives politicians the opportunity to refuse to deal with certain kinds of issues and, therefore, to avoid constituency pressure. If one has a judicial-like process, political leaders can simply refer sharp political issues to a judicial-like process and then be off the hook in terms of deals with constituents. Thus, a judicial-like system process transfers the power of decision from the hands of politicians, who have the capacity to harm each others' interests, to judges or panelists who can only resolve narrowly-defined issues between parties. This helps to avoid or at least contain a broader response in the relations between two nations.

Id. at 52.

417. See G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 366 (1996). Shell characterizes the WTO system as a triumph under regime

The DSU was also designed to ease the approach of developing countries into the WTO system as plaintiffs and defendants. A developing country is entitled to an alternative to the DSU panel process if it is the complaining party in certain cases.⁴¹⁸ If the developing country, however, does not qualify for or choose the alternative, there are still special provisions made for it. The developing country will receive access to the normal panel process, but the process will be fitted out with modifications designed to make it responsive to the capacities (with regard to legal resources) of a developing country to function in a dispute settlement system.

If a developing country prefers, for internal political reasons or because it requires additional time to frame its case, it may choose to file under the regular process. If it does use the regular process, certain DSU provisions are still designed to aid the developing country. The WTO Secretariat is required to provide additional legal advice and assistance to developing countries, including the appointment of a "qualified legal expert from the WTO technical cooperation services" if requested by the developing Member State.⁴¹⁹ In any case it files against a developed country, a developing country can request that the panel of three include one developing country panelist.⁴²⁰ Developing countries are also entitled to an extension of the consultation period in any case if the Chairman of the DSB concurs.⁴²¹ If a developing country is the defending party in a WTO dispute, it should receive special consideration by the panel (through the extension of time) to allow it to "prepare and present

theory because it gives the Member States a set of consistent international legal rules "intended to induce states to negotiate trade relationships 'in the shadow of law' rather than purely on the basis of power relationships."

418. The alternative process is provided by Article 3.12 of the DSU. Dispute Settlement Understanding, *supra* note 5, at art. 3.12. Under the terms of Article 3.12, if a developing country brings a claim against a developed country, it is entitled to replace the negotiation and panel provisions of the DSU with the corresponding provisions of the GATT decision of April 5, 1966. *Procedure Under Article XXIII*, in THE WTO DISPUTE SETTLEMENT PROCEDURES: A COLLECTION OF THE LEGAL TEXT 75-77 (1995). The 1966 decision offers a developing country access to the Director-General of the WTO who can initiate good offices immediately rather than waiting for bilateral consultations to take place. *Id.* at 75. The 1966 decision also provides a shortened time frame for the developing country complaints allowing much quicker movement to the panel process and authorized retaliation. *Id.* at 75-77. There is no right for the defending country to argue over what would be a reasonable time for implementation of a report against it. The 1966 decision also makes it clear that the panel is supposed to be sensitive to the economic issues facing developing countries. *Id.*

419. Dispute Settlement Understanding, *supra* note 5, at art. 27.2.

420. *Id.* at art. 8.10.

421. *Id.* at art. 3.12.

its argument."⁴²² When one or more developing countries are parties to a dispute, the panel report is required to include an analysis of whether the different and more-favorable provision of the agreement (or agreements) subject to the dispute has been considered.⁴²³

The final area in which different arrangements are made for developing and least-developed countries involves implementation of a panel report. Overall, the DSB is required to give special consideration to the interests of developing countries during the implementation phase. The DSB is particularly charged both with determining the severity of harm the offending measure has caused to the developing country's trade and economy⁴²⁴ and taking further action if the defending country shows no indication of implementing the WTO report.⁴²⁵ This further action could well include the DSB authorization of earlier and more punitive retaliation.⁴²⁶

The overall effect of the different and more favorable provisions for developing and least-developed countries should assist the participation by these countries in the system. As if to illustrate this phenomenon, the WTO system did see an increase in cases being filed by developing countries in its first two years of operation.⁴²⁷ Developing countries are complainants in twenty of the fifty cases filed to date.⁴²⁸ Thirteen of the eighteen cases filed by the developing countries were against developed Member States.⁴²⁹ Of these cases, the first panel report issued by the WTO involved a claim filed by Venezuela (later joined by Brazil)

422. *Id.* at art. 12.10.

423. *Id.* at art. 12.11.

424. *Id.* at art. 21.8.

425. *Id.* at art. 21.7.

426. Least-developed countries are entitled to the greatest shelter from the WTO dispute settlement system. Should consultations fail, unlike other Member States, such countries can obtain, upon request, the good offices of the WTO Director-General. If they do so, there is an additional level of negotiating before the other party is entitled to request a panel. *Id.* at art. 24.2. Throughout the entire process, other Member States are counseled to exercise due restraint in pressing a case against a least-developed country. *Id.* at art. 24.1. Similar restraint is required if another Member State prevails at the panel level against a least developed country. In general, Member States are not to seek concessions or WTO-authorized retaliation against a least-developed defendant. *Id.* at art. 24.1. In most cases this will mean that a least-developed country will only be required to withdraw the GATT-illegal measure.

427. *WTO 1st Year*, *supra* note 328, at 6.

428. *See* WTO Cases, *supra* note 303. The number of cases reflect separate legal matters—there are actually 74 complaints made to date. Some of the cases filed by one or more developing countries were done along with developed country Member States.

429. *Id.*; *see also* WTO FOCUS, Dec. 1996, at 1-3.

against the United States.⁴³⁰ The two developing country complainants prevailed on their claims that the U.S. EPA standards for reformulated and conventional gasoline discriminated against Venezuelan and Brazilian imports in violation of the GATT obligation of National Treatment at the panel and Appellate Body level. A similar pattern has developed in other early WTO cases that have completed the DSU process.⁴³¹

An expansion of the number and types of parties to the WTO system should make the organization more relevant to all Member States. The WTO system will be settling disputes for all of the Member States rather than just for the larger economies. Meanwhile, there is no reason to believe that the developed countries will not continue to file the majority of cases in the new system. Of the fifty different cases filed from 1995 to the present, approximately seventy-five percent were filed by developed countries, most of them by the United States, the European Union, Japan, and Canada.⁴³² The United States to date has filed twenty-six complaints with the WTO system, more than any other country.⁴³³ In regard to those 27 complaints, five have been settled by the United States, twelve have gone to the panel level, one has a panel request pending, and the remainder are still in the consultation phase.⁴³⁴

430. *Venezuela-Brazil/United States, Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline*, WT/DS 2/1, Jan. 29, 1996, at 2 [hereinafter Panel Report] issued its final panel report on January 17, 1996. The case had originally been filed by Venezuela on January 23, 1995.

431. Of the six WTO panel reports issued to date three cases were filed by developing countries against the United States—WT/DS 2 Reformulated Gas, WT/DS 24 Textile Imports (Costa Rica-U.S.), and WT/DS 33 Woven Wool Shirts (India-U.S.). All three of the panel reports were unfavorable to the United States. The United States appealed both WT/DS 2 and WT/DS 24 and also lost at the Appellate Body level. See *United States Loses Appeal on Costa Rica Underwear Imports*, BNA TRADE DAILY, Feb. 12, 1997.

432. WTO Cases, *supra* note 303.

433. *Id.*

434. WTO Cases, *supra* note 303; see also UNITED STATES TRADE REPRESENTATIVE, 1995 ANNUAL REPORT (1996); WTO FOCUS, May 1996, at 10. The WTO Cases filed by the United States which have reached the panel level are:

1. EU, Canada, US—Japan: Alcoholic Beverages (WT/DS 10).
2. Ecuador, Guatemala, Honduras, Mexico and United States—EU: Banana Regime (WT/DS 27).
3. U.S.—EU: Measures Affecting Meat and Meat Products [hormones] (WT/DS 26).
4. U.S.—Canada: Certain Measures Affecting Periodicals (WT/DS 31).
5. U.S.—Japan: Certain Measures Affecting Consumers Photographic Film and Paper (WT/DS 44).
6. U.S.—India: Patent Protection for Pharmaceutical and Agricultural Chemical Products (WT/DS 50).

The other jurisdictional change that comes along with the WTO system is a vast expansion of the subject matter for disputes. The WTO system faces a much larger body of law to construe than did the GATT system. The Uruguay Round added three completely new agreements to the GATT—the GATS, the TRIPs and the TRIMs Agreements. In addition, there were major revisions to all of the GATT agreements negotiated during the Tokyo Round. The increase in legal rules should spur an increase in disputes regarding their effect and operation. Two of the new agreements, in particular, the GATS and TRIPs Agreements, should produce different types and larger numbers of disputes for the WTO to resolve.

The GATS and TRIPs Agreements were procured through the efforts of the developed countries. As the world's largest exporter of services, the United States was anxious to obtain greater market access for this form of trade.⁴³⁵ Similarly, the United States along with Japan and the European Union account for a large majority of intellectual property.⁴³⁶ For the WTO to be a viable organization for these countries, it had to guarantee greater access to trade liberalization in services and protection for intellectual property rights. The Uruguay Round provided this liberalization through the imposition of new legal, and thus actionable, rules governing these areas.

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7. U.S. and others—Hungary: Export Subsidies (WT/DS35).
 8. U.S.—Turkey: Taxation of Foreign Film Revenues (WT/DS 43).
 9. U.S.—EC: Customs Classification of Certain Computer Equipment (WT/DS 62).
 10. U.S.—U.K.: Customs Classification of Certain Computer Equipment (WT/DS 67).
 11. U.S.—Ireland: Customs Classification of Certain Computer Equipment (WT/DS 68).
 12. U.S.—Argentina: Certain Measures Affecting Importers of Footwear, Textiles, Apparel (WT/DS 56).

WTO Cases, *supra* note 303.

The United States has also requested one panel—which have not yet been established: US—EU: Duties on Imports of Grains (WT/DS 13).

435. URUGUAY ROUND ASSESSMENT, *supra* note 256, at 99.

The United States is the leading exporter of commercial services: in 1992 U.S. firms exported services worth more than \$162 billion. On the import side the United States ranked second after Germany, with 1992 imports reaching almost \$108 billion. These data explain in large measure why the United States was the *demandeur* of the services negotiations in the GATT and why the US private sector placed a high priority on their successful conclusion.

Id.

436. See GAO Report, *supra* note 256, at 85-86.

Both the GATS and the TRIPs Agreements should be dispute-generating, because each contains new types of obligations.⁴³⁷ GATS is a comprehensive framework agreement that stands apart from the framework of all of the other GATT agreements. GATS required such a separate framework because it brought a whole new area of trade—trade in services—into the realm of international law. GATS, therefore, had to define what constitutes trade in services, how Member States were to meet in the future to negotiate for greater liberalization in the services area, and how to integrate core GATT concepts into this area of trade. The Uruguay Round negotiators broke the service trade into twelve different sectors (and some sub-sectors) which include business services, communications, construction and engineering, distribution, education, environmental, financial, health and social services, tourism and travel, recreation and cultural, transportation, and others.⁴³⁸ Once the sectors were agreed to, the negotiators decided that liberalization would come from each WTO member submitting a schedule of the service sectors it was willing to liberalize and any restrictions placed on such liberalization.

Unlike trade in goods, which is governed largely by border measures, trade in services is governed by internal legislation. A government influences whether a foreign company will own, operate, or invest in business within its country (the type of trade in service that comes when a foreign company establishes itself in a country) by adopting legislation, on foreign direct investment, financial and banking legislation and corporation laws. If discriminatory barriers to trade in services are to be eliminated, there must be the revision or elimination of discriminatory legislation. The schedules a country submits under the terms of GATS reflect its commitments to such liberalization. GATS also applies the core concepts of MFN—non-discrimination with regard to trading partners—and National Treatment—non-discrimination to foreign service suppliers as compared to domestic suppliers—to the framework agreement.⁴³⁹

GATS should generate disputes because Member States will disagree over how to interpret the scheduled commitments to liberalize and over the MFN and National Treatment concepts

437. The United States has already filed a case involving GATS against Japan—as part of the *Film* Section 301. See *supra* note 320. The United States has also filed three WTO cases that involve claims of TRIPs violations. See *supra* text accompanying notes 80-86 and note 264.

438. GATS, *supra* note 261, at art. I.2; see URUGUAY ROUND ASSESSMENT, *supra* note 256, at 106-09 (describing the specific commitments of several of the service sectors).

439. GATS, *supra* note 261, at arts. II & XVII.

applied to this area. As a relatively open services market, the United States will generally not be a defending country in GATS disputes. As a country seeking greater access for its service suppliers, however, the United States has every incentive to seek a true lowering of barriers to service trade in other countries.⁴⁴⁰ In order to reap the benefit of GATS, the United States will not only have to negotiate further liberalization, but also actively litigate against countries which fail to follow the GATS disciplines.

Similarly, in the area of trade-related intellectual property rights, the United States will often be required to turn to WTO dispute settlements to achieve its goals. The TRIPs Agreement not only requires WTO Member States to pass legislation providing for minimum standards of protection, but also requires them to enforce these new international standards. As discussed in Section I.C., the United States receives no real benefits from the adoption of better intellectual property legislation by other countries. Patent, copyright, and trademark holders in any country will receive benefits only if that country enforces those rights against infringers. Once the phase-in periods pass for developing countries, the United States must be prepared, as it has already indicated it will be, by filing early WTO cases⁴⁴¹ to police the TRIPs Agreement actively. If it fails to do so, the multilateral system will not provide better results than the unilateral pressure achieved under Section 301.

b. Development of GATT Law: The Creation of Precedent

GATT panel decisions have never had precedential value.⁴⁴² Like most international law, GATT law follows no theory of *stare decisis*.⁴⁴³ The DSU does not by its terms change this aspect of GATT jurisprudence. Nothing in the DSU says that the panel reports are binding. Nevertheless, the effect of the WTO's more adjudicative dispute settlement system should be to develop the body of GATT law. The system will, in other words, create "operative precedent."

The DSU process places preeminent value on panel decisions themselves rather than to the DSB adoption of those decisions. Since the political adoption of the reports by Member States will be the reality in almost every case, the important part of the dispute settlement process will be the handing down of the panel

440. The United States has already filed its first WTO complaint regarding GATS in the *Film* Section 301 case; see *supra* text accompanying notes 80-86 and 264.

441. See *id.*

442. Davey, *supra* note 197, at 20.

443. Jackson *Testimony*, *supra* note 204, at 132-33.

report. The weight of the WTO system, in other words, rests on the panel reports rather than the political process. The system should, therefore, see a concomitant pressure on the panel reports to be more legalistic, to interpret GATT law more carefully, and to lend it greater clarity whenever possible.⁴⁴⁴

This development of the WTO system only reinforces what has already been happening in the GATT system. Over time, GATT panel reports have become more legalistic,⁴⁴⁵ and panel reports have regularly begun to cite previous reports for the legal propositions they presented.⁴⁴⁶ The first WTO panel and Appellate Body reports, on U.S. Reformulated Gas Standards, continues this trend.⁴⁴⁷ If panels continue to operate in this fashion, there should be the creation of a fairly stable body of "operative precedent"⁴⁴⁸ that will probably be increasingly used as such.

The creation of the Appellate Body should also accelerate this tendency towards a more comprehensive body of GATT law. The Appellate Body panel reports were designed to provide the final word on the legal issues raised in any WTO dispute. Although the appeals process was set up to eliminate the "bad law" that could come from automatic adoption of panel reports, appellate review by recognized trade experts will mean that GATT law and the legal arguments made by parties to a dispute will receive even more extensive consideration. Once the Appellate Body produces

444. See Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 561 (1996). Professor Reitz argues that the panel decisions represent the secondary law of the WTO (the primary sources of law being the GATT and Uruguay Round Agreements).

Now that the DSU has been adopted, the corpus of this body of GATT law will also be more stable. There will be no more problems about whether some or all of the panel reports are legitimate—since there does not have to be political adoption of the reports as there was under the old GATT system. See *id.* at 584-88.

445. See Hudec, *Judicialization*, *supra* note 88, at 19-20.

446. Davey, *supra* note 197, at 79. "While the notion of precedent does not mean that the panel never reached conclusions differing from those of prior panels, they generally do follow past panel decisions as long as they are well reasoned and were accepted in the GATT system as correct." *Id.* at 79.

447. In the panel findings for that report the panel cited ten different GATT reports in a total of 19 citations of authority. Panel Report, *supra* note 430. In the Appellate Body panel report the panel cited seven different GATT reports and a total of 20 citations of authority. *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R. Apr. 22, 1996 [hereinafter Appellate Body Panel Report].

448. Davey, *supra* note 197, at 79 (Davey already describes the GATT dispute settlement as "the creation of a legal system of relatively stable precedent interpreting the clarifying GATT obligations.").

enough reports to constitute a body of law, there will exist an additional and "higher" level of "operative precedent."⁴⁴⁹

There is one other aspect of the WTO system that should increase its legitimacy. The DSU makes express provisions for the participation by third parties to the disputes.⁴⁵⁰ Although third party participation is limited to other Member States (and not extended to individuals or non-governmental organizations), the participation of other players in a dispute will more actively engage the entire WTO membership in the dispute settlement process. The resolution of any dispute will, therefore, reflect the views of not only the parties to the dispute, but any WTO Member State that might be affected. The DSU allows third party participation during the panel process itself, and panel reports are required to reflect a consideration of their concerns and comments.⁴⁵¹

There is no guarantee that the development of a GATT body of "operative precedent" will proceed smoothly. The operation of a dispute settlement system is often controlled by the quality of the law it is construing. In GATT history, there were periods where the panel system operated successfully because there was a general consensus about the nature and extent of GATT obligations.⁴⁵² The GATT panel system exhibited problems when more of the disputes it received involved issues left unaddressed or unresolved by GATT negotiators.⁴⁵³ Each of the Uruguay Round agreements contain some deliberately ambiguous or vague

449. Whether or not the Appellate Body reports achieve this status will have much to do with the quality of the panelists and the reports they produce. If the Appellate Body reports are faulty or perceived as such they may be ignored by later panels. Given the weight of the reports in the system, however, the WTO cannot afford too many that will be ignored. If the Appellate Body review is deemed by Member States to be thorough, comprehensive and correct, it could add substantially to both the credibility and legitimacy of the WTO dispute settlement system.

450. Third parties can intervene in a WTO dispute and offer views in the consultation phase (art. 4.11), panel deliberations (art. 10.2) and appellate proceedings (art. 17.4). Dispute Settlement Understanding, *supra* note 5.

451. *Id.* at arts. 10.1 & 10.2. Many Member States have already used these options. In the *Gas* case (WT/DS 2), the EU participated as a third party interrogatory in the dispute between Venezuela (and Brazil) and the United States.

452. See Homer E. Moyer, Jr., *How Will the Uruguay Round Change the Practice of Trade Law in the United States?*, 30 J. WORLD TRADE, June 1996, at 63, 83. Moyer's advice for the United States in approaching the WTO is that it should choose to follow a sensible assertive litigation strategy. "The first cases brought should be narrowly focused cases of clear violations of WTO Agreements. They should assert moderate positions, firmly and effectively argued. The objective should be to present WTO panels with opportunities to enforce new WTO Agreements responsibly and responsively." *Id.*

453. Hudec, *Judicialization*, *supra* note 88, at 18.

obligations.⁴⁵⁴ The greatest challenge of the WTO dispute settlement system will be for the panels to resolve these legal ambiguities without somehow adding to the body of legal obligations that the Member States agreed to when joining the WTO.⁴⁵⁵ If this challenge is not met successfully, the dispute settlement system could bring down the WTO. Unlike with the GATT system, the Member States will be unable to argue that reform of the process would eliminate their dissatisfaction. The WTO system is as highly evolved along the adjudicative system as it can be unless the sovereign nations are willing to accept a supranational court which produces binding decisions.

c. Enforcement/Compliance

The success of the WTO dispute settlement system will be gauged by whether or not it extracts compliance from its participants. The complaining party to a WTO dispute has every incentive to file a claim because it stands a strong chance of prevailing.⁴⁵⁶ By contrast, the defending party to a WTO dispute must either have a strong legal argument or be prepared to submit to a decision against it. A defending party can avoid a legal determination against itself only by curtailing the process through a negotiated settlement. GATT history reveals that most disputes between contracting parties were settled or were resolved with acceptance of the panel report.⁴⁵⁷ There were enough failures of the system,⁴⁵⁸ however, to create, particularly for the United States, the impression that the system did not work.

The DSU was designed to allay concerns about the true effectiveness of dispute settlement. The WTO system has a true enforcement mechanism. Under the GATT system, the defending party could avoid a panel report, and in most cases, feel confident that the avoidance would not produce any adverse trade

454. See generally GAO Report, *supra* note 256, at 67, 77-78, 119.

455. According to Professor Reitz, "[c]ontroversy is bound to arise over the opposing concepts involved in interpreting textual provisions. The distinction between clarification and enlargement of a provision will inevitably be a source of disagreement." See Reitz, *supra* note 444, at 587.

456. The success rate for complaints to the old GATT system was always relatively high. Over the history of those cases plaintiff countries prevailed in 77% of the cases. In the cases filed in the 1980s plaintiff countries received favorable panel reports in 85 of the cases. ENFORCING INT'L TRADE LAW, *supra* note 3, at 289. In the first six cases to work through the WTO system the complainants prevailed in five of them *Gasoline Case* (WT/DS 2); *Japanese Alcohol Taxes* (WT/DS 10); *Costa Rican Underwear Case* (WT/DS 24); *India Textile Case* (WT/DS 33), *Canadian Periodical Case* (WT/DS 31). WTO Cases, *supra* note 303.

457. ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 277-78.

458. *Id.* at 278-87.

consequences—the General Council was not going to authorize retaliation, and conducted no surveillance to determine whether or not a defending party actually implemented a panel report. While the WTO system lacks any outside source of power to give it authority, it does muster as much authority as it can over sovereign nations by inserting DSB oversight into every aspect of the enforcement process. The DSB must adopt all panel reports and be notified of all plans for the preferred form of implementation of panel report recommendations⁴⁵⁹ or any recognized alternative.⁴⁶⁰ The DSU puts the collective pressure of the WTO membership behind the resolution of each dispute. A losing party in the WTO system cannot simply avoid a report issued against it.

The WTO system does ultimately rest on the willingness of the Member States to follow the rule of law. A rule of law regime, however, does not place its burdens evenly. The smaller and weaker economies stand to gain from the operation of a rule of law system.⁴⁶¹ By contrast, the larger countries carry a heavy burden in a rule of law regime. The multilateral system is not the only option for a larger economy. As the U.S. experience with Section 301 illustrates, unilateral economic power can be used somewhat effectively to pursue certain types of trade goals. The crucial question thus becomes: why should larger countries submit to a rule of law regime? There are three reasons why a large country might comply with such a system: (1) It approves of the results reached by the dispute settlement system; (2) It finds avoidance of the system too costly; or (3) It wants to support the system. A large country is more likely to approve of a system's results, even if they are adverse to it, if it finds them to be legitimate.⁴⁶² The WTO results through the panel reports will be viewed as legitimate if consistent both with regard to past rulings and future expectations regarding the organization's powers.⁴⁶³ The panel reports will also be perceived as legitimate if they are persuasive, *i.e.*, well-reasoned, and transparent, *i.e.*, all reasoning is disclosed and understandable. The WTO system then will be as good as the results produced by the individual panels. While GATT panel reports apparently improved over time, becoming

459. Dispute Settlement Understanding, *supra* note 5, at arts. 16 & 21.

460. *Id.* at art. 22.

461. Small or developing countries can neither easily negotiate with nor defy larger trading partners. By taking their disputes to the WTO system, such countries can rely on the pressure of the system for protection and vindication. A WTO dispute for such countries will be about the GATT legal issue at stake rather than economic power.

462. Young, *supra* note 181, at 408-09.

463. *Id.* at 409.

more analytical and precise, it is too early to tell about the WTO system.

A large country will also be more likely to comply with a rule of law system if avoidance of that system costs too much. The WTO system is designed to provide this type of incentive to comply. The automatic adoption of panel reports in the WTO system means that a losing country cannot avoid being identified as a malefactor. If it is important for that country's self perception or world image to be seen as a supporter of the rule of law, then such labeling could be a heavy cost. The other cost of the WTO system is that it makes it impossible to avoid participation by potentially every WTO Member State.⁴⁶⁴ Smaller countries traditionally could achieve no leverage over larger countries by threatening retaliation. Retaliation often proves more costly to the country taking the action than to the target.⁴⁶⁵ Some aspects of the WTO system, however, change this scenario. Since the WTO does authorize the extreme remedy of cross agreement retaliation,⁴⁶⁶ a smaller country might be able to remove a trade concession highly valued by a large country.⁴⁶⁷

The final reason a large country would be willing to comply with an adverse WTO decision is that it supports the system. To a large extent, a Member State that actively participates in the multilateral system must accept one or even a series of adverse decisions if it wants to pursue its own cases. The WTO as an organization will not survive too much asymmetry.⁴⁶⁸ A powerful

464. The DSU gives the losing party only three options: withdrawal of the offending measure, compensation or acceptance of retaliation. If the offending trade practice or legislation is too important domestically a country may refuse to withdraw it. As a sovereign nation it can only be bound by international law if it so chooses. Taking such a path, however, will, under the WTO system, virtually compel it to compensate the complaining party by offering it another trade advantage for the losses it has imposed. A country might be willing to refuse either to correct its offense or compensate, but only if it believes WTO-authorized retaliation cannot harm it.

465. See generally Gary Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules*, 29 J. WORLD TRADE, Apr. 1995, at 163, 167 (explaining why countries often accept U.S. non-compliance with WTO dispute resolution rules rather than retaliate).

466. Dispute Settlement Understanding, *supra* note 5, at art. 22.3.

467. For example, cross agreement retaliation would allow a country to suspend its market opening for a valuable section of services trade or its adequate enforcement of intellectual property rights. *Id.* at art. 22.3(e)-(g); see also Horlick, *supra* note 465, at 168. The greater threat of retaliation, therefore, reinforces compensation as the default position for a country that cannot or will not end the GATT-violation practice. A smaller country may be willing to accept such compensation and settle a dispute if it does not believe cross agreement retaliation will be authorized and normal same sector retaliation would prove counterproductive.

468. Davey, *supra* note 197, at 80.

country or group of countries wanting to use the system against others while avoiding potentially adverse consequences will break the organization. With regard to this factor, U.S. commitment to the WTO system will prove crucial. As long as the United States continues to make frequent use of the system, it will be compelled to accept its adverse decisions.

3. Consequences of the Adjudicative System for the United States

There are both procedural and substantive consequences for the United States arising from the creation of the WTO system. With regard to procedure, now that the WTO system is in place and operating, the United States must play by the rules. If it brings a Section 301 case against another country for a GATT violation, it must also request consultation with the target country under the terms of the DSU.⁴⁶⁹ Similarly, if it is faced with an adverse ruling, the United States must either implement, or appeal and later implement, the panel recommendations. In its most recent trade actions, the United States has played by the rules. In its latest Section 301 actions involving GATT violation claims, the United States has filed a WTO complaint simultaneously with the Section 301 notice⁴⁷⁰ and acknowledged that it will take no action until the DSU process has issued a determination.⁴⁷¹ The United States also accepted the DSU process as it has worked its way through the first WTO panel and Appellate Body reports issued against it. The United States has accepted the adverse WTO ruling.⁴⁷² The U.S. response to a final WTO determination against it offered the first glimpse of the substantive consequences of the WTO system.⁴⁷³ As a sovereign nation, the United States was under no legal obligation to accept an adverse WTO ruling.

469. URAA Legislative History, *supra* note 37, at 3906-07.

470. See generally Kantor Asks for Consultations on Canadian Split-Run Tax Dispute, INT'L TRADE DAILY (BNA) (Mar. 12, 1996); Paul Blustein, U.S. Files Action Over Canadian Magazine Tax, WASH. POST, Mar. 12, 1996, at C3.

The United States did delay in seeking WTO involvement in the *Film* case because it originally viewed that case as a Section 301/Unreasonable case.

471. URAA Legislative History, *supra* note 37.

472. John Perry & Rossella Brevetti, U.S. Plans to Comply with Ruling in Gas Case, 13 INT'L TRADE REP. (BNA) 1051 (June 26, 1996); *Options to Meet Clean Air, WTO Goals Sought by EPA After Gas Decision Rule*, 13 INT'L TRADE REP. (BNA) 1143 (July 10, 1996).

473. The WTO system is designed to receive complaints by any WTO member about acts, practices or legislation of another Member State which violates GATT obligations or causes nullification or impairment of GATT benefits. The WTO system, therefore, will potentially receive many complaints challenging the form or operation of federal laws and regulations, as well as state law GATT violations.

The Uruguay Round Agreements Act of 1994 (URAA)⁴⁷⁴ provided the implementing legislation for the DSU as it applies to U.S. law.⁴⁷⁵ According to the legislative history of the URAA, the United States simply agreed to the creation of the WTO system and its power to hear all relevant GATT cases. Any adverse WTO ruling on a U.S. law or regulation has no direct effect. Congress will make any determination about whether to withdraw or amend a federal law found to be GATT-violative by a WTO panel.⁴⁷⁶ If Congress refuses to authorize such a change, then the United States will have to respond to an adverse WTO ruling by offering compensation or accepting retaliation. If a federal regulation is found to have violated the GATT by a WTO panel, the process is different. The President is authorized by the URAA to propose and implement changes to federal regulations.⁴⁷⁷

474. URAA, *supra* note 18, at 19 U.S.C. §§ 3512, 3532(c), 3533(f).

475. All of the GATT agreements accepted by the United States following the Uruguay Round negotiations were adopted by the President as executive agreements. The President lacks authority under the Constitution to negotiate or sign international trade agreements. Congress has constitutional power over foreign commerce. U.S. CONST. art. I, § 8, cl. 3. The President gets authority to negotiate and sign trade agreements from fast track legislation passed by Congress. The President received authorization to complete the Uruguay Round negotiations in the Omnibus Trade and Competitiveness Act. That fast track authority was later extended in 1991 and again in 1993 to allow for the finish of the Uruguay Round. *See Senate Approves Fast Track Bill; Kantor Pledges Avert Amendments*, 10 INT'L TRADE REP. (BNA) 1110 (July 7, 1993). Under U.S. law, therefore, executive agreements or trade do not have the direct effect on treaty obligations. As a result, GATT obligations become part of U.S. law only if Congress adopts them by passing implementing legislation. Statement of Administrative Action, *supra* note 30, at 4040. The Statement of Administrative Action describes the Uruguay Round implementing legislation, which the United States Trade Representative signed on April 15, 1994, on behalf of the United States under the authority of the Omnibus Trade and Competitiveness Act. *See* OTCA, *supra* note 17, § 1102. Congress approves the Statement of Administrative Action when it passes the implementing legislation. Statement of Administrative Action, *supra* note 30, at 656.

476. URAA, *supra* note 18, at 19 U.S.C. § 3512(a). Statement of Administrative Action, *supra* note 30, at 1020-21.

477. URAA, *supra* note 18, at § 3533(f), (g); Statement of Administrative Action, *supra* note 30, at 1021.

Before the President proposes such an alteration or amendment to a federal regulation, however, he must consult with the relevant Congressional Committees and take public and private sector views on the proposed changes. URAA, *supra* note 18, § 3533(g). The House Ways and Means and the Senate Finance Committees—the congressional committees with oversight over trade issues—are allowed a 60-day period to express their views on any proposal the Administration may make to amend most federal regulations. Statement of Administrative Action, *supra* note 30, at 1021. The Congressional expression of views will take the form of a non-binding resolution. *Id.* The final rule or regulation proposed by the Administration will normally not go into effect before the end of the Congressional consultation period. *Id.* at 4310. The EPA regulations that are the

One question that remains unanswered is whether the United States will take steps to oversee how the WTO system affects the United States. President Clinton was unable to procure Republican support for the Uruguay Round Agreements Act, largely because of concerns about WTO ruling and U.S. sovereignty,⁴⁷⁸ until he agreed to accept the idea of a WTO Dispute Settlement Review Body.⁴⁷⁹ The purpose of the Dispute Settlement Review Body is to review all final WTO reports which are adverse to the United States in order to determine whether or not the panel exceeded its authority or acted outside the scope of the relevant GATT Agreement.⁴⁸⁰ Former Senate Majority Leader Robert Dole was responsible for the idea of the WTO Dispute Settlement Review Body, and he developed legislation (S.16) to create the organization. Although the Clinton Administration committed itself to support the Review Body legislation in 1995, neither S.16 nor a variation on it that would create the Dispute Settlement Review Body has been submitted to the full Congress.⁴⁸¹ Election year politics stalled S.16,⁴⁸² and consequently, it is unclear whether Congress will ultimately adopt some version of the WTO Dispute Settlement Review Commission Act.⁴⁸³

The U.S. proposal for a Dispute Settlement Review Commission was regarded with general dismay by other WTO Member States. Undoubtedly, these countries felt that the United States' desire for such review flew in the face of its loud and often expressed preference for a more adjudicative dispute settlement

subject of the current WTO process were reviewed and considered under this process.

478. David E. Sanger, *Senate Approves Pact to Ease Trade Curbs*, N.Y. TIMES, Dec. 2, 1994, at A1; David E. Sanger, *Dole and Clinton Strike a Deal on World Trade Pact*, N.Y. TIMES, Nov. 24, 1994, at A1.

479. Gary N. Horlick, *WTO Dispute Settlement and the Dole Commission*, 29 J. WORLD TRADE, Dec. 1995, at 45-46 [hereinafter *WTO/Dole Commission*].

480. *Id.* at 47.

481. The Dole version of the WTO Dispute Settlement Review Commission Act (S. 16) was referred by Senator Dole to the Senate Finance Committee in the First Session of the 104th Congress but has never been sent to the full Senate.

482. *WTO/Dole Commission*, *supra* note 479, at 48.

483. The proposed Dispute Settlement Review Commission will operate as a monitoring body for U.S. involvement with the WTO dispute settlement system. *Id.* at 47. The Dole legislation for the Dispute Settlement Review Commission would appoint five federal appellate judges to form the Commission to review all rulings adverse to the United States to determine whether the WTO panel exceeded its authority, engaged in misconduct, departed from panel procedures or deviated from the applicable standard of review. If the Dispute Settlement Review Commission found such improper action, it would report to Congress. Should there be three such reports during a five year period, Congress could introduce legislation subject to a Presidential veto, proposing the withdrawal of the United States from the WTO. *Id.*

system. The possible U.S. review scheme does not mean, however, that the United States does not support the WTO system. Despite the fact that S.16 has not been passed, the United States has proceeded to file more cases than any other country with the WTO's Dispute Settlement Body.

If a Dispute Settlement Review Commission is set up, it may serve an important function for the United States. Rather than having U.S. responses to adverse WTO rulings become subject to political review and posturing, WTO reports will be reviewed by experienced and neutral judges⁴⁸⁴ who are likely to appreciate the nature and quality of the panel decisions. It will take time for the Dispute Settlement Review Commission to be set up and have enough adverse rulings to review before it is clear that such neutral review will enhance the credibility of the WTO system in the United States. International law scholars have long agreed with the view that the United States has a "distrust of international supervision [that] is deeply embedded in our political tradition."⁴⁸⁵ The United States long desired and fought for an effective dispute settlement system for GATT cases. The WTO system will answer whether this new settlement system actually satisfies the United States when it is the defendant.

IV. CONCLUSION

The United States now stands at a turning point in its economic history. In the past decade, the United States sought to realign a world trading system that appeared stacked against it by taking unilateral action to enforce its understanding of GATT law and to set the agenda for an expansion of GATT law at the negotiating table. The result of these efforts was a Uruguay Round that produced a greatly expanded GATT, including for the first time coverage of areas of great trade importance to the United States: services and intellectual property rights protection. The United States pressure on the system was also responsible for the form and content of the new dispute settlement system established to resolve trade disputes.

Having obtained its trade priorities under the Uruguay Round, the United States needs to resume multilateralism as the primary way in which it will pursue trade liberalization. This is because many of the trade problems (See Figure C) the United States confronts can now be dealt with effectively by the WTO. If

484. *Id.* at 48.

485. Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1026 (1985).

a U.S. complaint against another country involves a violation of international trade law, the WTO dispute settlement system is both more legitimate and equitable than the self-help of unilateralism. Although not all potential cases can be pursued immediately under the WTO system, the GATT now does contain obligations that will ultimately give the United States multilateral assistance in making sure that foreign markets do not remain closed to U.S. products and services because of restrictive, non-existent, or unenforceable legislation on services and intellectual property. If there is a WTO reexamination of the non-violation theory, then the WTO system will cover even more of the U.S. concerns. If it works as designed, the DSU should create an adjudicative dispute settlement system that will operate to protect Member States' rights under GATT and clarify the meaning of GATT law.

Unilateralism, as exemplified by Section 301, has limitations which keep it from being the complete answer for U.S. trade problems. When it acts unilaterally, the United States greatest power comes only when threatening or actually taking action of the type it most desires—market closing. Actions like this, if not always GATT illegal, do violate the spirit of GATT law. Self-help can be justified only when the international system cannot or will not act to vindicate international law. An improved international system capable of doing both, if accepted by its Member States, now exists. Unfortunately, so does the lure of unilateralism. The United States shows an inclination towards pursuit of all of the unfair actions it finds in the trade policies of other countries, even if the world trading system does not yet share its sense of unfairness or urgency (See Figure C).

If the United States continues to make use of Section 301 to force these issues, it will only re-experience the immediate past. Unilateral trade actions will obtain *de jure* relief but not *de facto* compliance with the new international rule being sought by the United States. Unilateralism might be more effective in attempting to set the agenda for and bring about more quickly the next round of multilateral trade negotiations. Nevertheless, the multilateral system can only withstand so much pressure from the outside. If the United States persists in taking unilateral action, it will find itself defending such actions in the WTO. For issues of great concern, becoming a GATT violation may be worth the price. Whether that price is an acceptable one for all U.S. trade problems is unlikely. U.S. efforts to reform the GATT have left it with a new dispute settlement system designed to extract compliance from wayward nations, multilaterally not unilaterally.

APPENDIX
SECTION 301 CASES (1985 - 1996)*

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-48, 6-14-85/6-4-92, Japan, Manufactured Goods (Semiconductors)**</p> <p>USTR initiated pursuant to Semiconductor industry filing petition. Accused Japanese industry of engaging in unfair trade practices: selling semiconductors at "less than fair value" in US and in third markets and restricting foreign access in Japanese home market.</p> <p>-Violation/Unreasonable-</p>	<p>In 8/86 US/Japan reached an agreement on both access and dumping. US chose not to take to GATT. After US sanctions in 1987 Japan filed GATT complaint charging US retaliation violated GATT Articles I and II, but did not request panel. The EC filed a complaint alleging the Japanese monitoring and administrative guidance constituted an illegal restriction of exports raising prices in third markets.</p>	<p>No***</p>	<p>No. However in 1987 it was determined that Japan was not abiding by agreement so US imposed retaliatory tariffs of \$300 million (\$164 for market access and \$136 for dumping). The dumping sanctions were eliminated in late 1987. In 1991, US/Japan extended semiconducting agreement for 5 years and US removed sanctions. However, the US has threatened sanctions again for Japan's failure to live up to the agreement. US</p>	<p>Neither gov't, nor petitioner regarded market share gains as sufficient to lift sanctions imposed; moreover, gains did not occur until later in the first agreement period, when additional sanctions were threatened.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
			<p>and Japan concluded negotiations in August 1996 on extending the semiconductor agreement until July 31, 1999. According to USTR "as under the 1991 arrangement, both governments will continue to review the semiconductor market structure using both qualitative and quantitative factors to ensure the maintenance of open and competitive markets without discrimination based on capital affiliation."</p>	

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-49, 9-16-85/10-6-89, Brazil, IP/Manufactured Goods (Informatics)</p> <p>USTR self-initiated. Restrictions on imports and foreign investment, and lack of copyright protection for computer software.</p> <p>-Unreasonable-</p>	<p>Although this case involved market-access issues, investment and intellectual property issues were also prominent. President Reagan determined that Brazil's policies were unreasonable and a burden on US commerce.</p>	<p>n.a. *****</p>	<p>n.a.</p>	<p>In June of 1987 President Reagan suspended the intellectual property part of the investigation because the Brazilian legislature had taken steps to enact copyright protection for computer software. By November 1987 the US was threatening retaliation for Brazil's failure to follow through with some of the bases for the suspension of the IPR investigation. In 1988 retaliation was suspended following Brazil's implementation of regulations to implement the software law enacted in December 1987. After monitoring the situation the US terminated the investigation in 1989.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
Case No.: 301-50, 6-16-85/6-6-86, Japan, Agriculture related (Cigarettes)				
<p>USTR self-initiated. Alleged Japanese practices violated national treatment provisions of US/Japan Treaty of Friendship, Commerce and Navigation. No GATT case initiated.</p> <p>-Violation/Unreasonable-</p>	<p>Japanese practices of discouraging US cigarette exports through high tariffs, ban on foreign investment in Japanese tobacco manufacturing and restrictions on distribution .</p>	<p>No</p>	<p>No</p>	<p>In October 1986 the US and Japan signed an agreement under which Japan agreed to reduce its tariffs to zero, to eliminate the pattern of discriminatory deferrals in excise tax payments and to terminate discriminatory distribution practices. US objectives were largely achieved.</p>
Case No.: 301-51, 9-16-85/8-14-86, Korea, Services				
<p>USTR self-initiated. Continuing restrictions on insurance providers. Refusal by Korea to allow foreign firms to underwrite life insurance.</p> <p>-Unreasonable-</p>	<p>ROK had violated promise to grant American Home Assurance Co. inter-alia a full license to write marine insurance, sell fire insurance to individuals and businesses.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>US and ROK signed agreement which allowed US firms access to the Korean market to underwrite both life and non-life insurance. The agreement was amended in 1987 and 1988 to set forth the operation of insurance business through joint</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
				ventures. The case gained entry for US and expanded business opportunities for additional US firms.
Case No. 301-52, 11-4-85/8-14-86, Korea, Intellectual Property Rights				
<p>USTR self-initiated. Did not achieve objectives with regard to bureaucratic implementation of policy reforms it thought it had agreed to in 1986.</p> <p>-Unreasonable-</p>	<p>IP policies denied patent protection for pharmaceutical and agricultural chemical products, and copyright protection for software and audio recordings, and permitted Korean firms to register trademarks similar to or even identical to foreign trademarks "not well known" in Korea.</p>	n.a.	n.a.	<p>ROK passed legislation protecting IPRs in 1986 and the investigation was terminated in August 1986. By 1988, however, USTR had established a task force to examine whether ROK was allowing foreigners to obtain IPR protection and enforcing patent rights. ROK laws not really enforced until the additional pressure of a Special 301 identification in 1989.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-53. 4-4-86/12-88. Argentina, Agriculture (Soybean Differential Export Taxes)</p> <p>USTR initiated pursuant to filing by National Soybean Processors Association. Differential taxes imposed on soybeans, and soybean oil and meal, constituted an export subsidy in violation of GATT provisions.</p> <p>-Unreasonable-</p>	<p>Claim that the tax differential distorted Argentina's export mix, encouraging exports of processed soybean products, and thus depressing world prices for soybean oil and meal and reducing US exports of those products.</p>	<p>No</p>	<p>No</p>	<p>Export taxes reduced, but not eliminated.</p>
<p>Case No.: 301-54. 3-31-86/1-30-87. EC, Agriculture (Corn, Sorghum, Oilseeds)</p> <p>USTR self-initiated. US claimed that quantitative restrictions were GATT illegal and that it would suffer export losses.</p> <p>-Violation-</p>	<p>Accession to EC agreement (Portugal and Spain) provided increase in tariffs and quotas were created.</p>	<p>No</p>	<p>No</p>	<p>EC agreed to compensation after US threatened sanctions, but not in perpetuity as desired by US.</p>
<p>Case No.: 301-55. 4-1-86/6-1-90. Canada, Natural Resource (Raw Fish Export Controls)</p> <p>USTR initiated pursuant to filing by seafood processors. Complained of Canadian prohibition on the export of unprocessed herring and salmon violated GATT Art. XI.</p> <p>-Violation-</p>	<p>Unfairly disadvantaged US processors by denying them access to raw materials.</p>	<p>Against Canada; adopted by GATT council in February of 1988.</p>	<p>Against Canada; adopted GATT in February 1988.</p>	<p>Industry did not get what it wanted, reportedly mirror-image legislation in the US. Following the GATT decision Canada agreed to terminate export restrictions by 1989 but stated its intent to adopt</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-56, 8-1-86/10-1-86, Taiwan, Manufactured Goods (Customs Violations)</p> <p>USTR self-initiated investigation. President Reagan claimed the duty payment system on administratively determined import values was in violation of a bilateral agreement.</p> <p>-Unreasonable-</p>	<p>Customs valuation system did not abide by the provisions of the GATT Customs Valuation Code which requires use of the transaction value for imports.</p>	<p>n.a. (Taiwan not GATT/WTO member).</p>	<p>n.a.</p>	<p>some new landing requirements. The US regarded these landing requirements as GATT violative as well. Ultimately the US and Canada submitted the dispute over the landing requirements to a US-Canada FTA panel in 1989. After losing before the FTA panel. The US and Canada settled the case and set up a committee to a review of the settlement in 1993.</p> <p>Taiwan abolished its duty paying schedule.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED / REQUESTED	GATT PANEL RULED	RESULTS***
Case No.: 301-57, 10-27-86/12-5-86, Taiwan, Agriculture & Manufactured Goods				
USTR self-initiated investigation. President claimed that import ban on beer, wine, and tobacco products were actionable under 301. •Unreasonable-	Taiwan had not honored the agreement that they would change certain practices with regard to the importation of beer, wine, and tobacco products within six to twelve months of Oct. 1995.	n.a.	n.a.	When Taiwan agreed to stop these practices the US dropped its plan to take retaliatory action.
Case No.: 301-58, 12-30-86/1-8-87, Canadian, Natural Resource (Softwood Lumber)				
USTR self-initiated investigation. Unreasonable-	Section 301 used as adjunct to settlement of countervailing duty examination.	n.a.	n.a.	Section 301 used in this case for administrative purposes only until Canadians could implement export tax.
Case No.: 301-59, 1-1-87/6-8-88, India, Agriculture (Almond Tariffs)				
USTR initiated pursuant to filing by California Almond Growers Exchange. Quantitative restrictions, high tariffs, and import license requirements were inconsistent with the GATT. •Violation-	Petitioner alleged that India's quantitative restrictions, high tariffs, and import license requirements for almonds caused a burden on US commerce	Yes	No. Agreement reached before panel report completed.	Quota not eliminated immediately but India did bind tariff on almonds.

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-80, 7-14-87/12-88, EC, Agricultural (Third Country Meat Directive)</p> <p>USTR initiated pursuant filing by meat industry. EC's Third Country Meat Directive was an unjustifiable and discriminatory trade barrier to US exports.</p> <p>-Violation-</p>	<p>Directive subjected meat imports from the US to regulatory requirements that are not applied to EEC countries and not justified by any scientific analysis.</p>	<p>Yes, but only after EC blocked earlier requests to establish a panel.</p>	<p>No. Agreement reached before report completed.</p>	<p>Temporary, administrative access provided to US meatpackers but no change in regulation; case recurs in 1990 (see case 83).</p>
<p>Case No.: 301-61, 6-11-87/6-27-90, Brazil, Intellectual Property Rights (Pharmaceutical Patents)</p> <p>USTR initiated pursuant to filing by PMA. Failure to provide process and patent protection for pharmaceutical products.</p> <p>-Unreasonable-</p>	<p>Case part of a broader US effort to encourage stronger international protection of intellectual property rights in this area.</p>	<p>n.a.</p>	<p>n.a. US used Section 301 authority to impose 100% tariffs on a range of Brazilian products.</p>	<p>Retaliation lifted when Pres. Collor of Brazil promised to submit patent legislation to his Congress. Legislation still had not passed as of mid-1997.</p>
<p>Case No.: 301-62, 11-25-87/1-1-89, EC Agriculture (Meat Hormones)</p> <p>USTR self-initiated investigation. US argued ban on growth hormone treated beef was an "illegal trade barrier masquerading as a health measure."</p> <p>-Violation-</p>	<p>Alleged EC violated the GATT requirements for nondiscrimination.</p>	<p>No--not for original complaint. However, yes for 1996.</p>	<p>No--original case. The second case is now a WTO dispute. (WT/DS 26).</p>	<p>None of the objectives achieved in 1989, US used retaliation. In May 1996 US requested a DSB panel for a review of the issues. As part of this effort US suspended its retaliatory duties.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS...
<p>Case No.: 301-63, 12-16-87/1-31-90, EC, Agriculture (Soybean Processing Subsidies)</p> <p>USTR initiated investigation pursuant to filing by American Soybean Assoc. Violation of GATT Art. III:4 according to which imported products should be given treatment no less favorable than that accorded to like domestic products. -Violation-</p>	<p>Alleged that the EC subsidies provided to EC oilseeds processors encouraged purchase of EC oilseeds, to the detriment of imported oilseeds.</p>	<p>Yes</p>	<p>Against EC; adopted</p>	<p>EC agreed to take steps to follow report but as of 1992, US not satisfied with EC solution of a new subsidiary regime.</p>
<p>Case No.: 301-64, 1-24-88/5-31-88, Korea, Agriculture (Cigarettes)</p> <p>USTR initiated pursuant to filing by US Cigarette Export Association. Practices of the Korean Monopoly Corporation were unreasonable, discriminatory, and a burden on US commerce. -Violation/Unreasonable-</p>	<p>Combination of import duties and excise taxes fixed retail price unreasonably high; administrative procedures used to restrict the import and distribution of foreign brands; prevented foreign investment in tobacco sector.</p>	<p>No</p>	<p>No</p>	<p>US and ROK signed an agreement in 1988 under which ROK committed to provide open, non-discriminatory access to its cigarettes market.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>USTR initiated pursuant to filing by American Meat Institute. Restrictive licensing requirements on meat imports violated Art. XI of the GATT and nullified and impaired tariff concessions by Korea.</p> <p>-Violation-</p>	<p>Case No.: 301-65, 2-16-88/4-26-90, Korea, Agriculture (Beef Licensing)</p> <p>Korea had changed the regulations to require a license for each individual shipment and had simultaneously stopped approving licenses.</p>	<p>Yes</p>	<p>Against Korea: adopted</p>	<p>ROK initially refused to accept the panel report but ultimately did so after the US threatened retaliation. The US and ROK conducted several rounds of negotiations on ROK's implementation of the panel's findings.</p>
<p>USTR initiated pursuant to filing by Florida Citrus Mutual. Claimed the import restrictions violated the GATT Art. XI and that their domestic content mixing requirements violated Art. 3.5.</p> <p>-Violation-</p>	<p>Case No.: 301-66, 5-6-88/7-5-88, Japan, Agriculture (Citrus)</p> <p>Quota by the Japanese unfair to the US citrus industry.</p>	<p>Yes</p>	<p>No. Agreement reached before panel report completed.</p>	<p>Quotas eventually eliminated and blending requirements to be eliminated by 1992.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS**
<p>Case No.: 301-67, 4-27-88/1-18-89, Korea, Agriculture (Wine Tariffs)</p> <p>USTR initiated pursuant to filing by Association of American Vintners. Impeded access to the Korean wine market.</p> <p>-Unreasonable-</p>	<p>Tariff and quotas on table wine imports, along with the distribution system that contributed to price escalation on imports, made imported wine uncompetitive with domestic products; absolute ban on certain types of wine.</p>	<p>No</p>	<p>No</p>	<p>US and ROK signed an agreement under which ROK agreed to provide non-discriminatory and equitable access to Korean market.</p>
<p>Case No.: 301-68, 8-10-88/9-23-89, Argentina, Intellectual Property Rights (Pharmaceutical Patents)</p> <p>USTR initiated pursuant to filing by PMA. Lack of patent protection for pharmaceuticals.</p> <p>-Unreasonable-</p>	<p>Alleged that Argentina denied product patent protection for pharmaceuticals and discriminated against US firms in its product registration practices. US settled case when Argentina promised to pass patent legislation.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Since promised legislation not passed until March of 1996, US still regards Argentinean legislation as inadequate and cited the country as a priority watch country in 1996. President Menem of Argentina has asked his Congress to reconsider the patent legislation.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED / REQUESTED	GATT PANEL RULED	RESULTS***
Case No.: 301-69, 11-21-88/7-31-91, Japan, Services (Construction)				
USTR self-initiated investigation. Unfair trade practices in Japan's construction industry. -Unreasonable-	Focused on bidding procedures to make more open to foreign bidding.	n.a.	n.a.	List of eligible projects expanded, for US participation.
Case No.: 301-70, 11-14-88/2-26-90, EC, Manufactured Goods (Copper Scrap Export Restrictions)				
USTR initiated pursuant to filing by the Copper and Brass Fabricators Council. Restrictions imposed by the EC on exports of copper scrap, copper alloy scrap, and zinc scrap. -Violation-	Tended to inflate the price of scrap in those markets, raise it in other markets, and thus provided an unfair advantage to brass fabricators in those countries.	Yes	No. Agreement reached before report completed.	Export restrictions removed.
Case No.: 301-71, 5-8-89/10-1-89, EC, Agriculture (Canned Fruit)				
USTR self-initiated. Subsidies of canned peaches, canned pears, and raisins violated GATT Article XVI. -Violation-	Threatened US exports not only to the EC but to third countries as well.	No	No	EC agreed to reduce its subsidy levels on canned peaches and pears and to modify its regulations for future years.

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED / REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-72, 4-10-89/11-23-90, Thailand, Agriculture (Cigarettes)</p> <p>USTR initiated pursuant to filing by US Cigarette Export Association. Ban on advertising and import of cigarettes was a violation of GATT Art. XI.</p> <p>-Violation-</p>	<p>Alleged effective ban on imports of cigarettes and prohibited foreign investment in cigarette manufacture; restrictions on advertising were intended to put foreign cigarettes at a competitive disadvantage.</p>	<p>Yes</p>	<p>Yes. Against Thailand; adopted.</p>	<p>Import ban lifted by Thailand, but remaining tariffs prohibitive.</p>
<p>Case No.: 301-73, 6-16-89/5-21-90, Brazil, Manufactured Goods (Import Licensing)</p> <p>USTR self-initiated investigation. Protection of domestic producers with extensive and highly restrictive barriers.</p> <p>-Violation-</p>	<p>Alleged that Brazil maintained a 1000 item list of prohibited imports.</p>	<p>US requested panel but it was not established before case resolved.</p>	<p>No</p>	<p>Import licensing system eliminated Brazil informed USTR that it would use tariffs as the major instrument in its trade policy.</p>
<p>Case No.: 301-74, 6-16-89/6-15-90, Japan, Manufactured Goods (Satellites)</p> <p>USTR self-initiated Super 301 investigation. Indigenous satellite development considered unambiguous protection aimed at promoting an infant industry and a violation of the spirit of the GATT Government Procurement Code.</p> <p>-Unreasonable-</p>	<p>Protection of the satellite industry tantamount to Japanese targeting of an important high-technology field in which the US had a strong competitive advantage.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Japan agreed to take measures to improve US access to Japan's market.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-75, 6-16-89/6-15-90, Japan, Manufactured Goods (Supercomputers)</p> <p>USTR self-initiated Super 301 investigation. US producers were discriminated against by Japanese government procurements.</p> <p>-Violation-</p>	<p>Discrimination against US producers in government procurement and high discounts that Japanese producers offered to government-financed purchasers.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>US and Japan reached an agreement to replace an earlier 1987 agreement on supercomputers. There were disputes over implementation.</p>
<p>Case No.: 301-76, 6-16-89/6-15-90, Japan, Manufactured Goods (Wood Products)</p> <p>USTR self-initiated Super 301 investigation. Alleged subsidies, violations of the GATT Agreement on Technical Barriers to Trade.</p> <p>-Unreasonable-</p>	<p>Focus on exclusively technical barriers, such as product standards, building codes, and testing and certification procedures.</p>	<p>No</p>	<p>No</p>	<p>US and Japan reached an agreement--tariffs were not reduced as much as desired.</p>
<p>Case No.: 301-77, 6-16-89/6-14-90, India, Investment</p> <p>USTR self-initiated Super 301 investigation. Protection of domestic producers with extensive and highly restrictive barriers.</p> <p>-Unreasonable-</p>	<p>Restrictions to entry, screening requirements, and equity participation, local content, and export performance requirements.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Objectives not achieved at all. US decided not to respond given the potential for India's participation in the Uruguay Round negotiations.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED / REQUESTED	GATT PANEL RULED	RESULTS***
<p>USTR self-initiated investigation. Protection of domestic producers with extensive and highly restrictive barriers.</p> <p>-Unreasonable-</p>	<p>Case No.: 301-78, 6-16-89/6-14-90, India, Services (Insurance)</p> <p>Government monopoly in that sector restricted foreign firms to a few narrow lines, such as reinsurance and marine cargo insurance.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Objectives not achieved at all. US decided not to respond given the potential for India's participation in the Uruguay Round negotiations.</p>
<p>USTR initiated pursuant to filing on behalf of Amitech Corp. Government of Norway engaged in unfair and discriminatory practices.</p> <p>-Violation-</p>	<p>Case No.: 301-79, 7-11-89/4-26-90, Norway, Manufactured Goods (Toll Equipment)</p> <p>Decision by the Ministry of Transport to reverse the decision to award the contract to petitioner violated the national treatment provisions of the GATT and the GATT government procurement code.</p>	<p>No. US did request consultations under the GATT procurement code.</p>	<p>No. US and Norway settled dispute.</p>	<p>Some compensation received and Norway agreed to follow GPC for future procurements.</p>
<p>USTR initiated pursuant to filing by Heileman Brewing Co. Failure to make serious, persistent and convincing efforts to comply with the 1988 GATT panel report.</p> <p>-Violation-</p>	<p>Case No.: 301-80, 5-15-90/8-5-93, Canada, Manufactured Goods (Import Restrictions on Beer)</p> <p>Markups and restrictions on distribution of beer discriminated against imports and violated both the GATT and Canada-United States Free Trade Agreement.</p>	<p>Yes</p>	<p>Against Canada; adopted.</p>	<p>Problems with implementation of agreement by provinces.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
Case No.: 301-81, 11-15-90/12-21-90, EC, Agriculture (Corn, Sorghum, Oilseeds)				
<p>USTR self-initiated investigation. US claimed that quantitative restrictions were GATT illegal and that it would suffer export losses.</p> <p>-Violation-</p>	<p>Accession to EC agreement (Portugal and Spain) provided increase in tariffs and quotas were created.</p>	<p>No</p>	<p>No</p>	<p>Only a one year extension achieved (extended for another year at end of 1991).</p>
Case No.: 301-82, 11-15-90/12-20-91, Thailand, Intellectual Property Rights (Copyright Enforcement)				
<p>USTR initiated pursuant to filing by International Intellectual Property Alliance. Inadequate enforcement of copyright laws.</p> <p>-Unreasonable-</p>	<p>USTR named Thailand as a "priority country" under the special 301 provisions of the 1988 Trade Act for its failure to adequately protect copyrights and pharmaceutical patents.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>USTR terminated case based on promises from Thailand to revise its copyright law and enforce it vigorously.</p>
Case No.: 301-83, 11-28-90/10-93, EC, Agriculture				
<p>USTR initiated pursuant to filing by National Pork and American Meat Institute. EC's Third Country Meat Directive was an unjustifiable and discriminatory trade barrier to US exports.</p> <p>-Violation/Unreasonable-</p>	<p>Directive subjected meat imports from the US to regulatory requirements that are not applied to EEC countries and not justified by any scientific analysis.</p>	<p>No. EC blocked requests to establish panel.</p>	<p>No</p>	<p>Agreement reached in fall 1992.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED / REQUESTED	GATT PANEL RULED	RESULTS...
<p>USTR initiated pursuant to filing by PMA. Government of Thailand did not provide adequate protection for pharmaceutical products.</p> <p>-Unreasonable-</p>	<p>Case No.: 301-84, 1-30-91/10-92, Thailand, Intellectual Property Rights</p> <p>USTR named Thailand as a priority foreign country under the special 301 provisions of the 1988 Trade Act for its lack of protection of pharmaceutical patent rights.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Sec 301-82.</p>
<p>USTR self-initiated investigation. India failed to provide patent protection and complete lack of protection for products.</p> <p>-Unreasonable-</p>	<p>Case No.: 301-85, 5-26-91/2-26-92, India, Intellectual Property Rights</p> <p>India named as a priority country under Special 301 for inadequate patent protection for some products and the complete lack of protection for other classes of products, particularly pharmaceuticals.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Compromise reached on copyright and film quota, but India renamed priority country in April 1992 because of its refusal to extend patent protection to pharmaceuticals, and due to its problems in implementing copyright commitments.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>USTR self-initiated investigation. Complete lack of protection for pharmaceuticals and agrochemical, and lack of copyright protection for US works.</p> <p>-Unreasonable-</p>	<p>Case No.: 301-86, 5-26-91/1-17-92, China, Intellectual Property Rights</p> <p>USTR claimed that piracy of all forms of intellectual property were widespread in China, accounting for significant losses to US Industries.</p>	<p>n.a. (China not a GATT/WTO member)</p>	<p>n.a.</p>	<p>Agreement reached but IP laws not enforced. See 301-92 for a follow-up case.</p>
<p>USTR self-initiated investigation. Section 301 not used in traditional manner. See the column on negotiating objectives.</p> <p>-Unreasonable-</p>	<p>Case No.: 301-87, 10-4-91/5-29-96, Canada Natural Resources (Softwood Lumber)</p>	<p>n.a.</p>	<p>n.a.</p>	<p>Used for administrative purposes to "withhold or extend liquidation of entries of imports of softwood lumber products originating in certain provinces and territories of Canada," pending completion of the countervailing duty investigation the Commerce Department initiated. Ultimately, controversy dealt with by US-Canada FTA binational panel proceedings.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS**
<p>USTR self-initiated investigation. Barriers selected were significant and appeared to violate multilateral rules and principles that would apply if China were a member of GATT.</p> <p>-Unreasonable-</p>	<p>Investigation a response to China's failure to make firm commitments to "take substantial measures to remove trade barriers" in negotiations held in August, 1992.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>USTR terminated claiming it had reached a satisfactory resolution of issues.</p>
<p>USTR self-initiated investigation. Inadequate copyright protection for computer software, sound recordings, and video games.</p> <p>-Unreasonable-</p>	<p>Taiwan promised to crack down on the movie pirates and to amend its export regulations to require proof of a valid copyright for computer and software shipments but the United States rejected the offer as inadequate.</p>	<p>n.a. (Taiwan not a GATT/WTO member)</p>	<p>n.a.</p>	<p>Taiwan passed legislation. Problems with implementation in 1998.</p>
<p>USTR initiated pursuant to filing by P&M Products and Itudson ICS. Claim that various Indonesian government practices affecting export of pencil slats constituted illegal export subsidies that restricted US exports in third markets.</p> <p>-Unreasonable-</p>	<p>Differential taxes on log and wood product exports, underpricing of government timber stocks, and failure to enforce the terms of timber concession contracts were all investigated by USTR.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>USTR found no evidence of injury to US industry, so even if practice existed, it was not restricting or burdening US trade.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS**
Case No.: 301-91, 5-28-93/2-25-95, Brazil, Intellectual Property Rights				
USTR self-initiated investigation. Failure to enact acceptable patent protection. -Unreasonable-	USTR designated it a priority foreign country under Special 301 in April 1993 and to renew the threat of section 301 sanctions.	n.a.	n.a.	Objective nominally achieved depending on passage of IP bill by Brazilian Congress and subsequent enforcement.
Case No.: 301-92, 6-30-94/3-95, China, Intellectual Property Rights				
USTR self-initiated investigation. Enforcement of intellectual property rights and the provision of market access to persons who rely on intellectual property protection are unreasonable and constitute a burden or restriction on US commerce. -Unreasonable-	No system at the central, provincial and local levels to provide strong, transparent and responsive enforcement of intellectual property rights according to USTR Special 301 investigation.	n.a.	n.a.	Originally US and China reached an agreement in 1995. Following up with monitoring on China, USTR found China was not satisfactorily implementing the agreement. After announcing a list of sanctions it planned to put into place, the United States continued negotiations with China. On June 17, 1996, USTR announced that based on measures China has and will undertake to implement the elements of the 1995

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
				agreement, the US would not invoke the sanctions. USTR will now monitor China's compliance with the 1995 agreement.
Case No.: 301-93, 10-1-94/6-6-95, Japan, Manufactured Goods (Auto Parts)				
USTR self-initiated investigation. Action initiated to determine whether the specific barriers to access to the auto parts replacement and accessories market in Japan are unreasonable or discriminatory and burden or restrict commerce. -Unreasonable-	System channels most repair work to government-certified garages that use very few foreign parts, and the system restricts the development of other garages more likely to carry and use foreign parts.	Japan filed a complaint in WTO thus triggering the consultation phase. US threatens to file a complaint as well.	Case settled by agreement before consultations really began; Japan with drew complaint.	US receives agreement getting most of its negotiating objectives. Too early to determine whether US will be satisfied with Japan's compliance with the agreement which the US will monitor twice a year.
Case No.: 301-94, 10-24-94/9-95, EC, Agricultural (Banana Regime)				
USTR initiated pursuant to filing by Chiquita Brands and the Hawaii Banana Industry. Claim that various policies and practices are discriminatory, unreasonable and burden or restrict US commerce. -Violation-	Investigation of the related rules implementing a community banana policy discriminating against US companies and the framework agreement with Venezuela, Colombia, Costa Rica, Nicaragua.	See 301-100	See 301-100	See 301-100. The United States terminated this investigation to begin the one at 301-100.

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS**
Case No.: 301-95, 11-29-94/8-17-95, Korea, Agriculture				
<p>USTR initiated pursuant to filing by National Pork, American Meat Institute and the National Cattlemen. Practices unreasonable and burden or restriction of United States commerce.</p> <p>-Violation/Unreasonable-</p>	<p>Alleged certain practices of the Government of Korea regarding the importation of meat violate US-Korean bilateral trade agreements.</p>	<p>Complaint filed in WTO. (WT/DS 3)</p>	<p>Case settled by US and Korea before panel could be established.</p>	<p>Settlement appears to meet US goals - Korea agrees to set up US-style standards.</p>
Case No.: 301-96, 1-23-95/Open, Colombia Agriculture				
<p>USTR self-initiated investigation. Claim that various policies and practices are discriminatory, unreasonable and burden or restrict US commerce.</p> <p>-Violation/Unreasonable-</p>	<p>Investigation to determine whether the policies and practices of Colombia regarding the exportation of bananas to the EU are unreasonable and discriminatory and burden or restrict US commerce.</p>	<p>No</p>	<p>No</p>	<p>USTR was advised to implement a process aimed at addressing the remaining burden that existed after Colombia's commitments made in January 1996. US will continue to monitor.</p>
Case No.: 301-97, 1-13-95/Open, Costa Rica, Agriculture (Banana Regime)				
<p>USTR self-initiated investigation. Claim that various policies and practices are discriminatory, unreasonable and burden or restrict US commerce.</p> <p>-Violation/Unreasonable-</p>	<p>Investigation to determine whether the policies and practices of Colombia regarding the exportation of bananas to the EU are unreasonable and discriminatory and burden or restrict US commerce.</p>	<p>No</p>	<p>No</p>	<p>USTR was advised to implement a process aimed at addressing the remaining burden that existed after Costa Rica's commitments made in January 1996. US will continue to monitor.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 801-98, 2-6-95/3-13-96, Canada, Services (Communications)</p> <p>USTR initiated pursuant to filing by Country Music Television. Denial of market access to distribute cable services from US.</p> <p>-Unreasonable-</p>	<p>Investigation of certain acts, policies and practices of the government of Canada that have resulted in the denial of market access for US owned programming services restricted in Canada via cable carriage and in the termination of the authorization of a US owned programming service.</p>	<p>n.a.</p>	<p>n.a.</p>	<p>The United States and Canada settled the case when the US company and the Canadian company signed a partnership agreement.</p>
<p>Case No.: 301-99, 7-2-95/Open, Japan, Manufactured Goods (Photographic Film, Paper)</p> <p>USTR initiated pursuant to filing by Kodak. Barriers to access to the Japanese market for consumer photographic film and paper.</p> <p>-Unreasonable- (Converted to Violation)</p>	<p>Certain acts, policies and practices of Japan deny access to the market for photographic film and paper in Japan and are unjustifiable, unreasonable and discriminatory and actionable under section 301. Particularly maintaining of formal restrictions on inward investment prior to 1976.</p>	<p>On June 13, 1996 the United States requested consultations on: 1) nullification of US tariff benefits caused by Japanese government measures taken to counteract its</p>	<p>Pending. Panel established by the DSB (WT/DS 44) in October 1996 with regard to the first issue. A panel has not yet been requested on the other issue, therefore, the two countries remain in consultation.</p>	<p>Open. Pending the results of the panel and consultations.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
		earlier tariff liberalizations (along with a non-violation claim) and 2) violations of the GATS agreement arising from the requirements of Japan's Large-Scale Retail Store Law (along with a non-violation claim). When consultations did not resolve the dispute, the United States requested establishment of panel. Panel established by WTO		

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/REQUESTED	GATT PANEL RULED	RESULTS***
<p>USTR self-initiated investigation. Claim that various policies and practices are discriminatory, unreasonable and burden or restrict US commerce.</p> <p>-Violation-</p>	<p>Case No.: 301-100, 9-27-95/Open. EU, Agricultural (Banana Regime)</p> <p>Restrictive and discriminatory licensing scheme designed to transfer market share to firms from EU overseas territories and dependencies. U.S. complaint alleges the EC regime for the importation, sale and distribution of bananas is inconsistent with GATT Articles I, II, III, X, XI and XIII along with other claims.</p>	<p>After complaint filed there was a period of consultations. When the consultations failed the US requested a panel.</p>	<p>Pending. Panel was established in May 1996 (WT/DS 27).</p>	<p>Open. Pending the panel's determination.</p>
<p>USTR self-initiated investigation. Trade Compensation requested by US under Article XXIV of GATT.</p> <p>-Violation-</p>	<p>Case No.: 301-101, 10-24-95/11-30-95, EU, Manufactured Goods</p> <p>EU has a GATT obligation to offer trade compensation if, when it expands the EU Customs Union, it alters tariffs against non-members (Art. XXIV). US negotiated with EU until an accepted settlement was reached regarding the accession to the EU of Austria, Finland and Sweden.</p>	<p>No</p>	<p>No</p>	<p>US and EU reached agreement 11-30-95. US reported satisfaction with agreement which provides full compensation for the tariff increases faced by the US.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-102, 3-96/Open, Canada, Manufactured Goods (Magazine)</p> <p>USTR self-initiated investigation, Art. III National Treatment violation.</p> <p>-Violation-</p>	<p>The alleged violative measures in question prohibit or restrain the import into Canada of "split-run" periodicals and provide for discriminatory tax treatment of such periodicals.</p>	<p>US and Canada consulted regarding the issue until US requested the establishment of a panel in June 1996.</p>	<p>The interim panel report issued March 14, 1997 (WT/DS 31) was unfavorable to Canada.</p>	<p>Open. Pending the issuance of response to final panel report.</p>
<p>Case No.: 301-103, 4-30-96/10-31-96, Portugal, Intellectual Property Rights</p> <p>USTR self-initiated investigation, Violation of Art. 70 of TRIPs agreement.</p> <p>-Violation-</p>	<p>Portugal failed to provide patent protection for patents existing on January 1, 1996 and those granted thereafter.</p>	<p>USTR requested consultations with the Government of Portugal, pursuant to GATT Art. XXII and Art. 4 of the WTO DSU.</p>	<p>Case settled during consultations stage. (WT/DS 37).</p>	<p>In August 1996, Portugal issued a law to implement its obligations under TRIPs. USTR terminated the investigation in October 1996 but will monitor Portugal's implementation</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
Case No.: 301-104, 2-28-97/Open, Pakistan, Intellectual Property Rights				
<p>USTR self-initiated investigation. Violation of Art. 70 of TRIPs agreement.</p> <p>-Violation-</p>	<p>Failure to provide "mailbox" (as per Art. 70) for filing of pharmaceutical and agricultural chemical product patent applications, nor has Pakistan established a system for the grant of exclusive marketing rights.</p>	<p>The United States formally requested establishment of panel on July 15, 1996.</p>	<p>No longer open.</p>	<p>Settled by the parties. On 28 February the terms of the agreement were communicated to the Secretariat.</p>
Case No.: 301-105, 6-12-96/Open, Turkey, Intellectual Property Rights				
<p>USTR self-initiated investigation. Violation of Art. III obligation not to use internal taxations to discriminate against imports.</p> <p>-Violation-</p>	<p>US claims that Turkey imposes a 25% municipality tax on box office revenues generated by the showing of foreign films but does not impose the same tax on revenues generated by Turkish films.</p>	<p>USTR requested consultations with the Government of Turkey and when those failed the establishment of a panel in January, 1997.</p>	<p>Pending, unless parties settle case. (WT/DS 43)</p>	<p>Open.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS**
USTR self-initiated investigation. Violation of Art. 27, 65 and 70 of TRIPs Agreement. -Violation-	Case No.: 301-106, 7-2-96/Open, India, Intellectual Property Failure to provide "mailbox" (as per Art. 70) for filing of pharmaceutical and agricultural chemical product patent applications, nor has India established a system for the grant of exclusive marketing rights. Also, claimed violations of TRIPs Agreement Articles 27 and 65.	USTR requested consultations with the Indian Government and when these failed requested a panel in November 1996.	Pending. Panel was established in November 1996. (WT/DS 50).	Open.
Violation of Article II of Subsidies Agreement. -Violation-	Case No.: 301-107, 10-1-96/11-25-96/Australia, Manufactured Goods Providing export subsidies for automobile leather upholstery violation of the Art. III Subsidies Agreement.	US requested consultations under Art. IV of DSU and when those consultations failed, requested the establishment of a panel in January 1997.	Official release from Washington indicates the case has been settled (Nov. 1996).	Case was settled.

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/REQUESTED	GATT PANEL RULED	RESULTS***
<p>Case No.: 301-108, 10-1-96/Open, Argentina, Manufactured Goods (Automobile Upholstery)</p> <p>The United States alleges that these acts, policies and practices are inconsistent with certain provisions of the GATT 1994, the Agreement on Technical Barriers to Trade, the Agreement on the Implementation of Article VII of the GATT 1994, and the Agreement on Textiles and Clothing.</p> <p>-Violation-</p>	<p>Maintaining import duties on certain products (textiles, apparel and footwear) above the Uruguay Round tariff in violation of Art. II of GATT.</p>	<p>US has requested consultations under Art. IV of DSU. February 1977 the DSB established a panel. The EC and India reserved their rights as third parties to the dispute. (WT/DS 56).</p>	<p>Pending.</p>	<p>Open.</p>
<p>Case No.: 301-109, 10-1-96/Open, Indonesia, Investment (Auto/Auto Parts)</p> <p>Alleged violations of Arts I, III of GATT and Article 8 of TRIMs Agreement, Arts 7, 30 of the subsidies Agreement and Art. 64 of the TRIPS Agreement.</p> <p>-Violation-</p>	<p>Country has policy of granting tax and tariff breaks to "national cars," auto companies, based upon the percentage of local content of the cars thus adversely affecting US Auto and Auto Parts exports.</p>	<p>US has requested consultations. (WT/DS 64)</p>	<p>Open</p>	<p>Open.</p>

ALLEGED VIOLATION OR UNREASONABLE PRACTICE	CLAIM	GATT PANEL ESTABLISHED/ REQUESTED	GATT PANEL RULED	RESULTS***
<p>Violations of TRIMs Agreement (Art. 2), Art. I and III of GATT and Art. 3 and 27.4 of the Subsidies Agreement.</p> <p>-Violation-</p>	<p>Case No.: 301-110, 10-1-96/Open. Brazil, Investment (Auto/Auto Parts)</p> <p>Offers reduced duties on imports of assembled cars if car manufacturers agree to meet local content requirements and export a sufficient quantity of the products. Violations of TRIMs Agreement (Art. II), Art. I and III of GATT and Art. 3 and 27.4 of the subsidies Agreement.</p>	<p>US has already entered consultations under Art. III of DSU. (WT/DS 52). Following these consultations the US asked for another series of talks to cover legislative measures passed by Brazil during the consultation period. (WT/DS 65).</p>	<p>Open</p>	<p>Open.</p>

* This table of cases has been developed based upon similar compilations done by the United States Trade Representative; Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL. INT'L BUS. 263, 318-330 (1991-92); THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCIITY AND RETALIATION IN US TRADE POLICY 365-465 (Inst. for Int'l Economics, 1994). The USTR list can be obtained by calling USTR's public file room. USTR initiation and determinations notices for Section 301 cases appear in the Federal Register.

** The chart has been set up to provide information about the legal issues and results of the Section 301 cases filed from 1985-1996. The title of each case appearing in bold type contains the following information: 1) the Section 301 number, 2) the time period of the case (when it was opened and when it was terminated), 3) the target country, 4) the type of trade or trade-related issue involved (trade in goods, services, intellectual property rights, investment).

*** Results have been compiled and suggested by several economic sources including: Bayard & Elliott, USTR termination notices for Section 301, and USTR's list of section 301 cases which is available on the USTR Internet homepage.

.... "No" means a GATT panel could have been established but was not.

..... "n.a." means that the GATT was not relevant to the dispute.