Vanderbilt Journal of Transnational Law

Volume 22
Issue 3 *Issue 3 - 1989*

Article 2

1989

The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988

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The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?

*Steven R. Phillips**

ABSTRACT

This Article examines the changes brought about in United States trade policy by the Omnibus Trade and Competitiveness Act of 1988. Mr. Phillips provides a detailed history of the evolution of the Act's three main revisions of section 301: the transfer from the President to the United States Trade Representative (USTR) of the power to identify foreign unfair trade practices and to take action in response; the imposition of mandatory retaliation by the USTR against unfair trade practices unless one of six exceptions applies; and, under the "Super 301" provision, the USTR's obligation to identify unfair trade balances and either to negotiate reductions in or to take mandatory action against such imbalances. Mr. Phillips states that in cases involving minor trade disputes the revisions effected by the Act should depoliticize and bring greater certainty of action to United States responses to unfair trade barriers. Mr. Phillips observes that although the new authority of the USTR may help take non-trade considerations out of some cases, it probably will not affect the highly controversial disputes. While Super 301 contains mandatory retaliation provisions, the President retains power to influence how the USTR implements retaliatory actions. Super 301 could also cause United States to violate trade agreeements. Mr. Phillips concludes that the Act can only have a minor effect on the United States trade deficit, the largest part of which results from macroeconomic policies.

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I. INTRODUCTION

Assume you are the president of a successful United States company called "Bats R Us," and you want to sell your product, the baseball bat, in Kuno. Kuno is a country that has a large government-organized baseball league that offers a potential market of 1,200,000 players. You seek permission to sell your bats in Kuno, but you are told all bats must carry an official seal. To your amazement, the league will not make those seals available to foreign companies. You cry foul, claiming this is an unfair trade barrier, and ask the United States Government for help. The Government lodges a protest, negotiations ensue, and Kuno eventually agrees to make the seals available to foreign companies.

You are now told that Kuno baseball is "unique" and requires a special bat made according to Kuno's technical requirements. In other words, your bats are substandard. You cry foul again, you ask for help, and the Government negotiates a second time. Kuno concedes that foreign bats can qualify if they meet the new safety standards. But you wait four months before the standards are even published, only to discover that they require a special alloy not used in United States bats. You are outraged, and the Government protests for the third time and again negotiates with Kuno. After threats of retaliation, Kuno revises its standards.

Finally, your bats meet the standard, and you ask Kuno to certify your plant so that you can get the famous seal. The Kuno ministry, however, does not have a travel expense account to pay for inspectors to fly to the United States, and they will not accept a United States certification. For the fourth time you and the Government protest, pointing out that to refuse a third party certification is contrary to international standards. The United States, incidentally, accepts Kuno's certifications. Kuno offers to inspect each shipment as it arrives in Kuno, but this is totally unacceptable to you. Finally, Kuno rewrites its safety regulations, including those applicable to the certification of plants.

Now, four years later, you have your seal, only to discover that the local Kuno distributors are a tight-knit group that tends to protect fellow Kuno bat manufacturers—they do not want to sell your bats. After all your efforts, you have only one percent of the Kuno market. When you complain to a member of the Kuno business community that Kuno im-

poses unfair trade barriers on United States products, the response is that Kuno culture is different, and things take time.

This scenario describes what happened in the famous aluminum bat case with Japan several years ago.[1] Congress was forced to consider trade legislation as a result of these types of unfair trade practices and an escalating trade deficit that reached $170 billion in 1986.[2] Many Americans were resentful of foreign countries that excluded United States products by imposing subtle non-tariff barriers, especially when United States markets were left open to foreign goods. They argued that the United States was losing jobs to foreign countries that erected trade barriers to its exports and that United States competitiveness was declining. Some called for stiff retaliation against countries that allowed these unfair trade barriers.[3] Those more flexible called merely for a level playing field and for reciprocity.[4]

Thus began the lengthy debate in Congress that culminated in the Omnibus Trade and Competiveness Act of 1988 (1988 Trade Act). It took over three years of negotiating, compromising, drafting, and redrafting to pass the 1988 Trade Act.[5] At first, promulgating a comprehensive trade policy that would gain the support of Congress and the Administration seemed like an impossible task. The thousand page bill addressed practically every aspect of trade law, and to reconcile the Senate and House versions required the involvement of an unprecedented 199 conferees divided into seventeen subgroups.[6]

Now that this tremendous task is concluded, it is time to assess what was actually done, the reasons behind the bill, and the possible consequences of the new Trade Act on United States international trade.

Several important aspects of the 1988 Trade Act include provisions that grant the President the authority to negotiate and implement trade agreements (a power essential to United States participation in the Uruguay rounds of the GATT talks), provisions that implement the Harmonized Tariff System, sanctions against Toshiba and Kongsberg for sell-

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1. *See* C. PRESTOWITZ, TRADING PLACES 96-99 (1988).

2. *See, e.g.*, Green, *Trade Tensions Attributed to Many Factors*, CONG. Q., Apr. 13, 1985, at 670; *see supra* appendix B.

3. *See infra* Part IV, section C.1.a.

4. *See infra* Part IV, section C.1.b.

5. Pub. L. No. 100-418, 102 Stat. 1107 (1988) (relevant sections codified at 19 U.S.C.A. §§ 2411-20 (West Supp. 1989)). President Reagan signed the bill into law on August 23, 1988, after he had originally vetoed substantially the same measure. *See infra* note 34.

6. *The Major Obstacles Facing Conferees as They Prepare to Tackle the Trade Bill*, CONG. Q., Feb. 13, 1988, at 306.

ing defense-related materials to the Soviet Union, and changes in the antidumping and countervailing duties statutes.[7] Of particular interest, and the focus of this Article, are the revisions and additions to section 301, the provision relating to the enforcement of United States rights under trade agreements, and the provision relating to retaliation against foreign unfair trade practices.[8] This particular provision is used most often to counter unfair trade barriers imposed by foreign countries that have the effect of discriminating against United States exports.

Section 301 was on center stage throughout the congressional trade debates for at least two reasons. First, through section 301, Congress implemented its new trade policy by reasserting a measure of control over trade issues and by forcing action against trade barriers maintained by United States trade partners. Second, due to Congressman Gephardt's amendment and his presidential candidacy, the issue of specific retaliation against unfair trade practices remained a key issue throughout the debate.

Section 301 continues to draw attention as the Administration follows through with the congressionally-mandated initiation of 301 actions and negotiations. As the time for possible retaliation for foreign unfair trade practices grows near, it is important to put this issue in the perspective of the overall trade policy debate.

This Article will first examine why Congress felt obliged to enact the 1988 Trade Act. And second, after an overview of the history of section 301, this Article will analyze the new 301 provisions. For each main provision of the Act, the analysis will include a review of legislative history and the intent of Congress, and an assessment of the provision's consequences. The Article will also consider how the provisions will actually work and whether any substantive change in United States trade will flow from the Act.

The Article will argue that the final revisions to section 301 are constructive, because most of the harmful provisions were either dropped or diluted in the legislative evolution of the Act. The end result is a new section 301 that is not overtly protectionist and that may help marginally increase United States exports. The only fly in the ointment is the so-called "Super 301" provision, which may cause harmful trade wars. The Article will conclude that although the new section 301 may help reduce some foreign trade barriers, it will have little overall effect on the trade

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7. *See generally* Wehr & Cranford, *Conferees Near Final Accord on Trade Bill*, CONG. Q., Apr. 2, 1988, at 877; Wall St. J., Apr. 1, 1988, at A3, col. 2.

8. 19 U.S.C.A. § 2411 (West Supp. 1989). For a discussion of the history and process of section 301, see *infra* Part III.

deficit, which will be responsive mainly to changes in macroeconomic policies.

II. Policies and Politics Behind the Trade Bill

A. *Brief History of the Trade Bill*

The initial push for new trade legislation began in the early 1980s, when the trade deficit widened and the budget deficit increased sharply. As Senator John Danforth said, "In 1981, the concept for the 1984 Trade and Tariff Act was born, and that 1984 Trade Act was the basis for [the 1988 Trade Act]."[9] In 1982 and 1983, many reciprocity-based trade bills were introduced in Congress.[10] One of the most notable was Senator Danforth's bill, the Reciprocal Trade and Investment Act of 1982,[11] which called for a trade policy based on reciprocal market access. Congress also passed minor changes to section 301 in 1984.

In 1985 Congress again undertook a concerted effort to enact major trade legislation. Negotiations over Japanese automobile quotas were ongoing during the early part of 1985. This focused attention on Japanese trade barriers and the lopsided balance of trade with Japan, attention that culminated in several legislative initiatives. For example, one measure was introduced to limit foreign car imports to fifteen percent of the United States market.[12] On February 20, 1985, resolutions were introduced in both houses of Congress urging the President to maintain the automobile quotas until the Japanese opened their markets and reduced trade barriers.[13] Both resolutions passed overwhelmingly.[14] The Senate

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9. 134 Cong. Rec. S4546 (daily ed. Apr. 22, 1988) (statement of Sen. Danforth). On recent United States trade policy, see generally 1 Laws of International Trade §§ 211.01-.53 (W. Hancock ed. 1989); E. McGovern, International Trade Regulation (1982); DeKieffer, *Foreign Policy Trade Controls and the GATT*, 22 J. World Trade, June 1988, at 73; O. Johnson & S. Winner, *Section 301: A New Direction for U.S. Trade Policy?*, 1987 Private Investors Abroad 5-1; Note, *Free Trade Agreements and U.S. Trade Policy*, 18 N.Y.U.J. Int'l L. & Pol. 1281 (1986).

10. Gadbaw, *Reciprocity and Its Implications for U.S. Trade Policy*, 14 Law & Pol'y Int'l Bus. 691, 692, 723-29, 739-44 (1982).

11. S. 2094, 97th Cong., 2d Sess., 128 Cong. Rec. S678 (daily ed. Feb. 10, 1982); *see infra* note 279 and accompanying text.

12. H.R. 1050, 99th Cong., 1st Sess., 131 Cong. Rec. H401 (daily ed. Feb. 7, 1985); *see* Green, *Hill Set to Pressure Japanese on Auto Parts*, Cong. Q., Feb. 23, 1985, at 357. Other bills were introduced to tax Japanese and other imports by twenty percent and up, such as S. 761, 99th Cong., 1st Sess., 131 Cong. Rec. S3474 (daily ed. Mar. 26, 1985). *See* Green, *Congress Prods Reagan to Get Tough with Japan*, Cong. Q., Apr. 6, 1985, at 645 [hereinafter Green, *Congress Prods*].

13. H.R. Con. Res. 63, 99th Cong., 1st Sess., 131 Cong. Rec. H487 (daily ed. Feb.

resolution demanded that the President retaliate if Japan did not reduce its trade surplus.[15] The Senate Finance Committee passed a bill that called for tariffs and quotas on Japanese imports if Japan did not end its unfair trade practices.[16] These developments prompted Senator Malcolm Wallop to remark, " 'There's great fun in engaging in Japan-bashing,' but 'we consistently narrow the options of both countries by going to statutory measures.' "[17]

On September 21, 1985, the House passed H.R. 3035, a protectionist trade measure that required a twenty-five percent surcharge on imports from the United States most recalcitrant trade competitors.[18]

In September 1985 the Democrats decided to adopt trade as one of their major issues. The House Democratic Caucus met on September 19, 1985, to set strategy for an omnibus trade bill. Congressman Stan Lundine emerged from the meeting and declared, "Trade is the No. 1 Democratic issue."[19] Congressman Guy Vander Jagt retorted that the Democrats were " 'trying to exploit the emotionalism' of trade and jobs."[20] Senator Frank Murkowski summed up the situation when he said that because 1986 was an election year, senators could hardly "afford to do nothing about our trade crisis."[21]

In October 1985 House Democrats announced yet another comprehensive trade measure.[22] In the Senate, Senator Danforth and thirty-two

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20, 1985); S. Con. Res. 15, 99th Cong., 1st Sess., *id.* at S1605.

14. H.R. Con. Res. 63, 131 CONG. REC. H1711 (daily ed. Apr. 2, 1985); S. Con. Res. 15, 99th Cong., 1st Sess., 131 CONG. REC. S3573 (daily ed. Mar. 28, 1985). The Senate vote was 92 to 0. The House vote was 394 to 19. Green, *Congress Prods*, *supra* note 12, at 645.

15. S. Con. Res. 15, *supra* note 13; N.Y. Times, Sept. 14, 1986, § 6 (Magazine), at 90; Green, *Congress Prods, supra* note 12, at 645.

16. S. 1404, 99th Cong., 1st Sess., 131 CONG. REC. S9185 (daily ed. July 9, 1985). The Senate Finance Committee reported the bill 12 to 4 on April 2, 1985. Green, *Congress Prods, supra* note 12, at 645.

17. Green, *Congress Prods*, *supra* note 12, at 646.

18. H.R. 3035, 99th Cong., 1st Sess., 131 CONG. REC. H5972 (daily ed. July 18, 1985); *see* Donnelly, *Congress Presses Ahead on Trade Restraints*, CONG. Q., Sept. 21, 1985, at 1855.

19. Plattner, *Democrats See Political Gold in Trade Issue*, CONG. Q., Sept 21, 1985, at 1856.

20. *Id.*

21. Pressman, *Trade Politics: The Focus Shifts to the Senate*, CONG. Q., July 5, 1986, at 1543.

22. Donnelly, *House Democrats Outline Comprehensive Plan*, CONG. Q., Oct. 19, 1985, at 2125. The House Committee on Energy and Commerce did pass a comprehensive trade measure, H.R. 3777, on November 21, 1985. CONG. Q., Nov. 23, 1985, at 2477.

other senators introduced their own major trade reform legislation on November 20, 1985.[23] The original legislative proposals were intended partly to get the Administration's attention and to prompt it to take tougher trade action.[24] This may have worked, because the Administration in September and October of 1985 began an intense campaign against the unfair trade practices of Japan, Korea, the European Community, and Brazil.[25]

Congress, however, felt that the Administration was merely reacting to political pressure and that the Administration's general trade policy was wholly inadequate. Thus, in 1986 the House of Representatives introduced trade legislation similar to the 1985 bill.[26] In May 1986 the House passed H.R. 4800, the Omnibus Trade Act of 1986, by a 295 to 115 vote.[27] The Administration, however, was not enthusiastic. President Reagan called the House bill "kamikaze" legislation so vehemently protectionist that it would trigger a trade war.[28] The Senate, however, was busy with the Tax Reform Bill and did not have time to work on trade legislation before the end of the congressional term.

When Congress returned in 1987, the stage was set for the final push for comprehensive trade reform. The mood was protectionist. The 1986 House bill, H.R. 4800, was reintroduced as H.R. 3 and reported to the floor of the House by the Ways and Means Committee.[29] The adoption by the House on April 29, 1987, of an amendment proposed by Representative Gephardt evidenced the mood of Congress. The amendment re-

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23. S. 1860, 99th Cong., 1st Sess., 131 CONG. REC. S15,958 (daily ed. Nov. 20, 1985); *see* Donnelly, *Senators Weigh in With Omnibus Trade Bill*, CONG. Q., Nov. 23, 1985, at 2439.

24. *See* Holmer, *Congress and the President—the Issues*, in TRADE POLICY AND U.S. COMPETITIVENESS 14-15 (1987) (C. Barfield & J. Makin eds. 1987) [hereinafter TRADE POLICY].

25. The following cases were a result of this campaign: Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (U.S.T.R. 1985) (initiation of investigation); Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, 50 Fed. Reg. 37,609 (U.S.T.R. 1985) (initiation of investigation); Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (U.S.T.R. 1985); Adequacy of Korean Laws for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (U.S.T.R. 1985) (initiation of investigation).

26. H.R. 4750, 99th Cong., 2d Sess. (1986); H.R. 4800, 99th Cong., 2d Sess., 132 CONG. REC. H2588 (daily ed. May 9, 1986).

27. *Id.* at H3225 (daily ed. May 22, 1986); *see* Pressman, *Over Reagan's Protest, House Votes Trade Bill*, CONG. Q., May 24, 1986, at 1154.

28. Pressman, *Beyond the Trade Hoopla, Looking for Options*, CONG. Q., Nov. 22, 1986, at 2936.

29. H.R. 3, 100th Cong., 1st Sess., 133 CONG. REC. H101 (daily ed. Jan. 6, 1987); *see also infra* notes 267-77 and accompanying text.

quired the President to negotiate with those countries with whom the United States had "excessive" trade surpluses in order to achieve a ten percent annual reduction of the trade surpluses held by these countries; if negotiations failed, the President was required to impose tariffs or to take action that would reduce the trade surplus by ten percent.[30] The House passed H.R. 3, along with the Gephardt amendment, and sent the measure to the Senate.

The Senate Finance Committee worked on trade measures for two months. Finally, on June 25, 1987, the Senate began debating the thousand page bill. The debate ended almost a month later when the Senate passed the bill on July 21, despite continuous veto threats from President Reagan.[31] The Senate adopted 120 of the 164 amendments it considered.[32] The bill then went to conference, where House and Senate conferees tried to work out compromises.[33]

After eight months of wrangling, the legislators finally settled the remaining disputes and dropped the Gephardt amendment, and both houses overwhelmingly passed the conference report. President Reagan, however, vetoed the measure, mainly because of a provision requiring notice of plant closings and a restriction on Alaskan oil exports.[34] The trade bill, stripped of the plant closing measure and the Alaskan oil restriction, was reintroduced as H.R. 4848 and quickly passed by the House[35] and the Senate.[36] The President signed H.R. 4848 on August

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30. 133 CONG. REC. H2755-57 (daily ed. Apr. 29, 1987). The vote on the Gephardt amendment was 218-214. *Id.* at H2789-90. For discussion of the Gephardt amendment, see *infra* Part IV, section C.1.a.

31. 133 CONG. REC. S10,299-307(daily ed. July 21, 1987). This bill passed by a vote of 71 to 27. *Id.* at S10,372.

32. *See, e.g.*, 134 CONG. REC. S10,674 (daily ed. Aug. 3, 1988).

33. *See supra* note 6.

34. 134 CONG. REC. H3531 (daily ed. May 24, 1988). The Senate sustained the President's veto by a vote of 37 to 61, just three votes short of the margin needed to override. 134 CONG. REC. S7385 (daily ed. June 8, 1988).

The plant closing provision required businesses to give 60 days advance notice of mass layoffs or plant closings. This provision was dropped but later became law as a separate bill. Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C.A. § 2101-09 (West Supp. 1989)).

The President's veto message listed several other reasons for his veto: an ethanol provision, the Counsel on Competitiveness provision, a provision requiring negotiations on third world debt, and a provision preventing the President from blocking the entry of propaganda material. 134 CONG. REC. H3532 (daily ed. May 24, 1988).

35. 134 CONG. REC. H5520-624 (daily ed. July 13, 1988). The vote was 376 to 45. *Id.* at H5634.

36. 134 CONG. REC. S10,656-731 (daily ed. Aug. 3, 1988). The vote was 85 to 11. *Id.* at S10,731

23, 1988. The new trade bill went into effect almost seven years after the first Danforth reciprocity bill had been introduced.[37]

B. *Reasons for the Trade Bill*

There were several reasons that compelled Congress to deal with the trade issue in a substantive manner, but the principal catalyst was congressional frustration with the growing trade deficit.[38] The trade merchandise deficit quadrupled in five years; it grew from $38.4 billion in 1982 to $133.6 billion in 1985, $155.1 billion in 1986, and a record $170.3 billion in 1987.[39] Of particular concern was Japan's large trade surplus, which exceeded fifty-eight billion dollars in 1987. A general feeling prevailed that the government had to do something to reduce the trade deficit.

Those who favored tough trade legislation also pointed to the numerous foreign trade barriers that kept United States products out of foreign markets.[40] They complained that the quagmire of foreign government regulations and policies kept United States exports out of foreign markets, particularly the Japanese market.[41] Frequently cited was the National Trade Estimate (NTE) of the United States Trade Representative (USTR), which listed over three hundred pages of foreign trade barriers.[42] Japan alone had a list of trade barriers running twenty pages.[43] Even Ambassador Clayton Yeutter, the USTR at the time, admitted that

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37. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (relevant sections codified at 19 U.S.C.A. §§ 2411-20) (West Supp. 1989)).

38. Green, *supra* note 2, at 67.

39. G. HARRISON, TRADE AND CURRENT ACCOUNT BALANCES: STATISTICS 11 (Congressional Research Service, Issue Brief No. IB87112, 1988); *see infra* appendix B, table 1. The overall trade deficit, which includes services and investments, rose almost as fast—from $8.7 billion in 1982 to $160.7 billion in 1987. G. HARRISON, *supra*, at 14. *See infra* appendix B, table 2. The 1988 Trade Act changed the method for calculating the trade deficit from a c.i.f. basis to a customs basis. V. BAILEY & J. TUCKER, U.S. FOREIGN TRADE HIGHLIGHTS 1988, at 9-12 (United States Department of Commerce, 1989). This is a more accurate method that results in lower numbers. *See infra* appendix B, tables 3, 4.

40. Green, *Congress Seeks to Step up Pressure on Japan,* CONG. Q., Mar. 16, 1985, at 501.

41. *Id.*

42. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REPORT TO CONGRESS ON FOREIGN TRADE BARRIERS, 1986 NATIONAL TRADE ESTIMATE (1986). The NTE report lists significant foreign barriers to United States exports or foreign direct investment.

43. *Id.* at 171-93; *see also* 133 CONG. REC. H2581 (daily ed. April 28, 1987).

Japan was one of the only countries that frustrated him.[44] Many in Congress and the business community argued that all they wanted was a level playing field. Many called for reciprocity.[45] Members of Congress and the business community wanted laws that would force countries to open up their markets to United States goods. They reasoned that if the United States enacted tough laws, particularly mandatory retaliation under section 301, foreign countries would eliminate their trade barriers, United States exports would increase, and the trade deficit would decrease as a result.[46]

This argument is, however, naively simplistic, for it ignores the realities of an extremely complex international trade dynamic. In actuality, unfair trade barriers only account for a negligible percentage of the trade deficit.[47] Several studies show that even if all Japanese unfair trade barriers came down, the United States deficit could decline by only five to eight billion dollars.[48] The major causes of the trade deficit are macroeconomic, such as the strong dollar and the large budget deficit.[49] This sobering evidence, however, did not dampen the spirits of those who believed that the way to attack the trade deficit was to toughen trade laws.

Congress pushed for a trade bill partly to enable it to regain control

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44. *Mastering the World Economy: Hearings Before the Senate Comm. on Finance*, 100th Cong., 1st Sess., pt. 4, at 116 (1987) [hereinafter *February Hearings*].

45. For definition and discussion of reciprocity, see *infra* Part IV, section C.1.b.

46. *February Hearings, supra* note 44, at 113-17.

47. GENERAL ACCOUNTING OFFICE, THE U.S. TRADE DEFICIT: CAUSES AND POLICY OPTIONS FOR SOLUTIONS 20, 28-29 (Report to Congressional Requestors, No. GAO/NSIAD-87-135, 1987).

48. *Id.* at 29.

49. *Id.* at 12-17. The General Accounting Office conducted a symposium on the trade deficit that concluded that the deficit is "overwhelmingly due to the rise of the value of the U.S. dollar" and to the large budget deficit. GENERAL ACCOUNTING OFFICE, SYMPOSIUM ON THE CAUSES OF THE U.S. TRADE DEFICIT 5 (Report to Congressional Requestors, No. GAO/NSIAD-87-135S, 1987). The panel recommended decreasing the value of the dollar, reducing the budget deficit, alleviating third world debt, and improving competitiveness. *Id.* at 12-15. The Office of Technology Assessment (OTA) also conducted an analysis of the trade deficit problem. OFFICE OF TECHNOLOGY ASSESSMENT, PAYING THE BILL: MANUFACTURING AND AMERICA'S TRADE DEFICIT (No. OTA-ITE-390, 1988). OTA concluded that the trade deficit was caused primarily by the budget deficit, which "increased the demand for dollars and pushed up the dollar's value." *Id.* at 4. The OTA report also pointed to a loss of competitiveness in the manufacturing sector, which comprised 85% of the 1987 trade deficit. *Id.* at 2. OTA recommended reducing budget deficits; reducing consumption; increasing savings; decreasing third world debt; and improving manufacturing performance, research and development, and education. *Id.* at 82.

over trade policy.[50] Congress felt that the Administration did not have a coherent trade policy and had not adjusted to the realities of a world economy in the 1980s. Senator Bentsen and Congressman Rostenkowski, as well as many others, decided to take control and set their own trade agenda, which included tougher negotiations, more retaliation, and more relief to domestic industry.[51]

Moreover, Congress was frustrated with the Administration's lack of aggressive action under section 301. Congress felt the Administration was not doing enough under section 301 to fight unfair trade barriers.[52] For example, Senator Heinz expressed dismay that the Japanese had been "getting away with murder for years; and now, after our country is littered with the bodies of dead or dying industries, the Administration is announcing that we may impose capital punishment in the future."[53] Proponents of trade legislation claimed that the President should not have unlimited discretion to take retaliatory action against unfair trade practices, because such authority could allow political and diplomatic concerns to override trade concerns.

Furthermore, the petitioners who filed the section 301 cases felt that the old section 301 was ineffective. Two-thirds of the petitioners believed the section 301 process had no effect on the unfair trade practices that caused them injury.[54]

Finally, there was an overriding reason for the trade bill: politics. Trade had entered the political field as a major player. Trade negotiations and trade deficits make good press stories. Public awareness was heightened because trade issues affected everyone, and jobs were at stake. The Democrats believed the Reagan Administration was vulnerable on the trade issue in light of the large budget and trade deficits.[55] They also saw how Senator Bentsen's protegé Jim Chapman defeated Edd Hargett in the special election in August 1985 for the First District of Texas,

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50. Holmer, *supra* note 24, at 14-15.

51. 134 CONG. REC. S4543 (daily ed. Apr. 25, 1988) (statement of Sen. Bentsen); *see also* Donnelly, *supra* note 23, at 2439 ("It is time for Congress to reassert its constitutional role in foreign trade.") (statement of Sen. Moynihan); Donnelly, *House Democrats Outline Comprehensive Plan*, CONG. Q., Oct. 19, 1985, at 2125.

52. Green, *supra* note 2, at 670.

53. *Comparing Major Trade Bills: Hearings on S. 490, S. 636, and H.R. 3 Before the Senate Comm. on Finance*, 100th Cong., 1st Sess., pt. 1, at 14 (1987) [hereinafter *April Hearings*].

54. GENERAL ACCOUNTING OFFICE, COMBATING UNFAIR FOREIGN TRADE PRACTICES 3-4 (Report to the Chairman of the Senate Comm. on Finance, No. GAO/NSIAD-87-100, 1987).

55. N.Y. Times, Sept. 15, 1985, at E5.

where trade became a key issue after a mistake by Hargett. Hargett had said, "I don't know what trade policies have to do with bringing jobs to East Texas."[56] He had forgotten that a nearby steel plant had just shut down, due in part to foreign competition.[57]

All of these factors contributed to the desire for trade legislation. Of particular interest to Congress and the business community alike was section 301, which allows the President to take action in response to unfair foreign trade practices. Section 301 provides the Administration with leverage to combat foreign unfair trade practices—a tool that many felt was gathering dust in the toolshed of an overcautious Administration.

III. EVOLUTION OF SECTION 301

A. *The 1974 Trade Act and Its Historical Underpinnings*

The objective of section 301 of the Trade Act of 1974 was to provide United States petitioners and the Government with a mechanism to enforce trade agreements and to obtain the elimination of unfair foreign trade practices.[58] While no constitutional right to export goods exists, United States citizens do have the right to ask the Government to enforce trade agreements.[59] Section 301 is one of the few statutes that addresses injury to United States exports.[60]

The concept embodied in section 301 is not a new one. Actually, the President's authority to address foreign unfair trade practices dates back to the days of President Washington. A 1794 statute gave the President the right to place embargoes and other restrictions on imports from any foreign country that discriminated against United States exports.[61] The 1934 amendment to the Tariff Act of 1930 embodied the original concept of retaliation for violations of trade agreements.[62] Section 252(c) of the

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56. N.Y. Times, Sept. 14, 1986, § 6 (Magazine), at 88.

57. *Id.*

58. SENATE COMM. ON FINANCE, REPORT ON TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess. 31, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186-06 [hereinafter 1974 SENATE REPORT].

59. Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y INT'L BUS. 569, 570-71 (1982).

60. Gadbaw, *supra* note 10, at 716.

61. Act of June 4, 1794, ch. 41, 1 Stat. 372 (1794), *cited in* Fisher & Steinhardt, *supra* note 59, at 573 n.18.

62. Act of June 12, 1934, Pub. L. No. 73-316, 48 Stat. 943 (amending Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590), *cited in* Fisher & Steinhardt, *supra* note 59, at 574 n.20.

Trade Expansion Act of 1962 is the first version of the current section 301.[63] Congress enacted section 252(c) because it felt that the institution established pursuant to the General Agreement on Tariffs and Trade (GATT) did not sufficiently protect American interests.[64] This provision of the 1962 law authorized the President to negate benefits of any trade agreements with a foreign country that maintained "unreasonable import restrictions which either directly or indirectly burden United States commerce."[65] The 1962 law was primarily designed to deal with foreign restrictions on United States agricultural exports.[66]

The 1974 Act expanded the scope of the 1962 provision beyond agriculture to allow retaliation against trade restraints that are "unjustifiable, unreasonable or discriminatory,"[67] and permitted a greater variety of forms of retaliation.[68] The Act also gave the President the authority to take unilateral action against a foreign country's imports.[69]

Section 301 imposes different requirements on those invoking its protection, depending on which part of the statute is most applicable to one's case.[70] First, if the foreign unfair trade practice is a violation of a trade agreement, usually of the GATT or a GATT code, a complaining party need not show proof of harm to a United States industry.[71] One must merely show that the practice is inconsistent with the trade agreement.[72] If the practice does not violate a trade agreement but denies a benefit accorded under a trade agreement, then one must establish that the United States suffered a loss of benefits.[73]

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63. Pub. L. No. 87-794, § 252(c), 76 Stat. 872, 879-80, *repealed by* Trade Act of 1974, Pub. L. No. 93-618, § 602(d), 88 Stat. 1978, 2072.

64. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 511, 517 (1975).

65. *Id.*

66. H.R. REP. NO. 40, 100th Cong., 1st Sess. 57 (1987) [hereinafter 1987 HOUSE REPORT]

67. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (codified as amended at 19 U.S.C.A. § 2411 (West Supp. 1989)).

68. Hudec, *supra* note 64, at 515. The new forms of permissible retaliation included the imposition of "duties or import restrictions." *Id.* at 515 n.140.

69. 1974 SENATE REPORT, *supra* note 58, at 7304.

70. 19 U.S.C.A. § 2411 (West Supp. 1989).

71. *Id.* § 2411(a)(1); *see also* General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. pts. 5-6, 6 T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

72. 19 U.S.C.A. § 2411(a)(1)(A). For examples of these types of cases, see Bello & Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 NW. J. INT'L L. & BUS. 633, 636 (1986).

73. 19 U.S.C.A. § 2411(a)(1)(B)(i). An action not inconsistent with the GATT may still impair or nullify benefits. GATT, *supra* note 71, art. XXIII.

Second, if the foreign unfair trade practice is unjustifiable, unreasonable, or discriminatory, one must prove that the practice burdens or restricts United States commerce.[74] An unjustified practice is one inconsistent with a trade agreement other the GATT.[75] It also includes denial of most-favored-nation status, denial of the right to establish an enterprise, and denial of intellectual property rights.[76] Prior to 1988, "unreasonable" referred to practices "not necessarily inconsistent with trade agreements, but which . . . restrict or burden U.S. commerce."[77] This was interpreted to mean inequitable or unfair practices.[78] "Discriminatory" practices was broadly construed and included denial of most-favored-nation treatment.[79] As for proving the act burdens or restrains United States commerce, one can meet the injury requirement by demonstrating increased imports into the United States or displaced United States exports.[80]

B. *Amendments of 1979 and 1984*

The 1979 amendments to section 301 expanded the provision's procedural aspects and remedied some of its perceived weakness.[81] First, the amendments tightened the deadlines for the USTR and the President to make determinations whether to pursue an alleged unfair trading practice.[82] Second, the new provision sought to keep the petitioner more informed during the 301 process.[83] Third, the provision's definitions of "commerce" included services, "whether or not such services are related to specific products."[84] Fourth, the provision required the use of dispute

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74. 19 U.S.C.A. § 2411(a)(1)(B)(ii), (b)(1).

75. *Id.* § 2411(d)(4)(A); *see* Bello & Holmer, *supra* note 72, at 635.

76. 19 U.S.C.A. § 2411(d)(4)(B).

77. SENATE COMM. ON FINANCE, REPORT ON THE TRADE REFORM ACT OF 1979, S. REP. NO. 249, 96th Cong., 1st Sess., 234-35, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 620-22 [hereinafter 1979 SENATE REPORT]; *see* 19 U.S.C. § 2411(a)(2) (Supp. V 1987).

78. Fisher & Steinhardt, *supra* note 59, at 598.

79. *Id.* at 599; Bello & Holmer, *Section 301 Recent Developments and Proposed Amendments*, 35 FED. BAR NEWS & J. 68, 69 (1988). This concept was specifically set forth in the new definition under the 1988 Trade Act and is codified at 19 U.S.C.A. § 2411(d)(5) (West Supp. 1989).

80. Bello & Holmer, *supra* note 72, at 644.

81. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144, 295-96 (codified as amended at 19 U.S.C.A. § 2411(a)(1)).

82. 19 U.S.C. § 2414 (Supp. V 1987); *see also* 1979 SENATE REPORT, *supra* note 77, at 627.

83. 19 U.S.C. § 2416; *see also* 1979 SENATE REPORT, *supra* note 77, at 627-28.

84. 19 U.S.C. § 2411(d); *see also* 1979 SENATE REPORT, *supra* note 77, at 622.

settlement in cases involving trade agreements.[85] Fifth, it gave the President an expanded power to take action on a non-discriminatory basis.[86] Finally, the new provision granted the petitioner the right to obtain information from the USTR concerning practices of foreign governments.[87]

The 1984 amendments further expanded and refined the coverage of section 301. Congress clarified the President's authority to impose restrictions in response to barriers in foreign markets to United States services.[88] Furthermore, the new amendments authorized retaliation against barriers erected by foreign countries to direct investment by United States persons.[89] Finally, the 1984 amendments defined in the statute for the first time the terms "unjustifiable,"[90] "unreasonable,"[91] and "discriminatory."[92]

Prior to the 1988 Trade Act, there was some debate as to the extent of coverage of services. *See* Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How*, 6 N.C.J. INT'L L. & COMM. REG. 381, 402-04 (1981).

85. 1979 SENATE REPORT, *supra* note 77, at 624.

86. *Id.* (current version at 19 U.S.C.A. § 2415).

87. 19 U.S.C. § 2415 (Supp. V 1987).

88. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 2948, 3002-03 (codified at 19 U.S.C. § 2411 (Supp. V 1987)).

89. 19 U.S.C. § 2114a(b)(1)(A).

90. The 1984 definition read:

(A) In general

The term "unjustifiable" means any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States.

(B) Certain actions included

The term "unjustifiable" includes, but is not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment, the right of establishment, or protection of intellectual property rights.

19 U.S.C. § 2411(e)(4). The definition contained in the 1988 Trade Act is substantially the same as the 1984 definition. 19 U.S.C.A. §§ 2411(d)(4)(A), (B) (West Supp. 1989).

91. The 1984 definition read:

(3) Unreasonable

The term "unreasonable" means any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable. The term includes, but is not limited to, any act, policy, or practice which denies fair and equitable—

(A) market opportunities;

(B) opportunities for the establishment of an enterprise; or

(C) provision of adequate and effective protection of intellectual property rights.

19 U.S.C. § 2411(e)(3) (Supp. V 1987); *cf.* 19 U.S.C.A. § 2411(d)(3) (West Supp. 1989).

92. The 1984 definition read:

(5) Definition of discriminatory

The changes in section 301 over the years reflect developments in international trade into new areas such as investment, services, and intellectual property.[93]

C. *The 301 Process: The Old Version*

The old version of section 301 authorized the USTR to initiate investigations, but the USTR seldom used the power. More frequently, a private party would request the USTR to commence a 301 investigation. The USTR then had forty-five days to review the petition and decide whether to start an investigation.[94]

During this forty-five day period, the "Section 301 Committee" considered whether the USTR had jurisdiction to address the practice, whether the practice by a foreign government was actionable under section 301, and whether the petitioner had suffered an injury. The Committee would also ensure that all procedural requirements were met.[95]

If the USTR decided to investigate the case and the 301 Committee concurred, the USTR would enter into consultations with the foreign government to attempt to settle the matter.[96] If the case involved a trade agreement violation, the USTR must seek formal dispute settlement negotiations if the consultations failed.[97]

Based on the 301 Committee's work, the USTR would recommend to

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> The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment.

19 U.S.C. § 2411(e)(5) (Supp. V 1987); *cf.* 19 U.S.C.A. § 2411(d)(5) (West Supp. 1989).

93. Coffield, *Section 301 of the Trade Act of 1974: New Life in the Old Dog*, 33 FED. BAR NEWS & J. 248, 251 (1986).

94. 19 U.S.C. § 2412(a)(2) (Supp. V 1987). For a detailed discussion of the 301 process, see Coffield, *supra* note 82. For a comprehensive list of section 301 cases, see *infra* appendix D.

95. 19 U.S.C. § 2412; Coffield, *supra* note 84, at 392. The Section 301 Committee met to discuss section 301 cases and to decide on a recommendation to submit to the President. The Committee included representatives from the Departments of Labor, State, Treasury, Commerce, Justice, and Agriculture, as well as representatives from the Office of Management and the Budget (OMB) and the Council of Economic Advisors. *Id.* at 396.

96. 19 U.S.C. § 2413.

97. *Id.* § 2413(a). Usually a case will be sent to the GATT for dispute settlement, provided the trade agreement is covered by the GATT. Under the GATT, the United States must first request consultations. GATT, *supra* note 71, art. XXII. If the consultations are fruitless, then the United States may request the establishment of a panel for dispute settlement. *Id.* art. XXIII, para. 2.

the President what action he should pursue, if any.[98] The President was to take "all appropriate and feasible action" to eliminate the practice or to enforce the rights.[99] If the President decided to take action, he could impose tariffs or other restrictions on foreign imports, or he could deny the country the benefits of a trade agreement.[100] However, this left the President a tremendous amount of discretion.

The 1988 Trade Act eliminates the old 301 process. The USTR now has authority to make more decisions, and certain unfair practices can result in mandatory retaliation.[101]

IV. Evaluation of the New Section 301

The 1988 Trade Act rewrote section 301, making changes in substance and policy that can be grouped into four categories: 1) transfer of authority; 2) mandatory retaliation; 3) Super 301; and 4) coverage. Although some provisions overlap, this Article will consider each category separately. Throughout the hearings on the trade bill, the Administration asked Congress to keep the following question in mind when it considered each change or addition: Whether the proposed amendment would help or hinder the ability of United States negotiators to open a foreign market to United States exports.[102] The Article will attempt to answer that question for each category of provisions of the new section 301.

A. *Transfer of Authority to the USTR*

1. Legislative History

Since Congress first created section 301 in the 1974 Trade Act, the President has retained the authority to decide whether to take retaliatory action against nations engaged in unfair trading practices.[103] Under the old law, the USTR was responsible for reviewing petitions.[104] Although the USTR had the responsibility of recommending to the President what action to take under section 301, if any, the President retained the ulti-

98. 15 C.F.R. 2006.1 (1988).

99. 19 U.S.C. § 2411(a).

100. For a list of types of actions and examples of cases, see Bello & Holmer, *supra* note 72, at 633.

101. 19 U.S.C.A. §§ 2411(a)(1), 2414 (West Supp. 1989); *see infra* appendix A.

102. *Trade Reform Legislation: Hearings Before the House Comm. on Ways and Means,* 99th Cong., 2d Sess., pt. 1, at 345 (1986) (testimony of Amb. Yeutter).

103. 19 U.S.C. § 2412(c) (Supp. V 1987).

104. *Id.* § 2412.

mate authority to act.[105] The President had the power both to determine whether the elements of section 301 had been met and to decide whether to take action.[106] He did not even have to make a specific determination—he could let the case die. It is this unlimited discretion that concerned many in Congress.

The notion of transferring some of the President's authority to the USTR first appeared in a 1985 bill known mainly for the twenty-five percent tariff it would have imposed on Japanese imports.[107] The reasons for transferring more authority to the USTR were to strengthen the USTR's status, limit the President's discretion, and make retaliatory action more likely.[108] The transfer of authority issue involves three different steps: first, to decide whether a practice is actionable or unfair under section 301;[109] second, to decide whether to take action and what kind to take;[110] and third, to implement the action.[111] All the proposed trade bills contained various combinations of these three steps. For example, the 1986 House bill transferred only the first determination to the USTR, giving the USTR power to determine whether an act, policy, or practice was actionable under section 301.[112] The 1986 Senate bill, however, transferred all three aspects of authority to the USTR, but that bill died in committee.[113] The bill that finally passed the Senate in 1987 was very similar to the 1986 House bill. It transferred to the USTR only the right to determine whether the practice was "actionable" or unfair under section 301, leaving the President to determine both whether to take action and how to implement it.[114]

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105. *Id.* § 2414(a)(1).

106. *Id.* § 2411(d)(2).

107. H.R. 3035, 99th Cong., 1st Sess. (1985).

108. *See infra* Part IV, section A.2.a

109. 19 U.S.C. § 2414(a)(1)(A) (1982).

110. *Id.* § 2414(a)(1)(B).

111. *Id.* § 2415(a)(1).

112. HOUSE COMM. ON WAYS AND MEANS, REPORT ON H.R. 4750, H. REP. NO. 581, 99th Cong., 2d Sess. 40 [hereinafter 1986 HOUSE REPORT]. The 1986 bill gave the USTR the "authority to determine whether and what section 301 criteria are met by the particular foreign act, policy, or practice . . . in all cases." *Id.* Therefore, the USTR was given authority to make determinations in cases of trade agreement violations as well as cases involving unjustified, unreasonable, or discriminatory acts. This bill left to the President the determination whether to take action. The USTR still would have the right to make recommendations to the President on what kind of action to take.

113. S. 1860, 99th Cong., 2d Sess., § 203, 131 CONG. REC. S15,961 (daily ed. Nov. 20, 1985).

114. S. 490, 100th Cong., 1st Sess., § 304, 133 Cong. Rec. S1864 (daily ed. Feb. 5, 1987); S. REP. NO. 71, 100th Cong., 1st Sess. 13-14 (1987) [hereinafter 1987 SENATE

The House Ways and Means Committee spent considerable time in 1987 discussing the transfer of authority issue during committee hearings and mark-up.[115] The Committee decided to keep draft language that transferred both determinations to the USTR.[116] Thus, the final House language made a more substantive transfer of authority than the 1986 House bill or the 1987 Senate bill. In conference, the Senate agreed to adopt the tougher House provision.[117]

The new section 301 works in the following fashion. First, the USTR must decide whether to investigate within forty-five days. Second, based upon the investigation, the USTR has the authority to decide whether the 301 criteria have been met.[118] Third, if the criteria have been met the USTR must determine whether to take action and decide what kind of action to take.[119] Finally, within thirty days of the determination to take action, the USTR must implement the action, subject to the President's direction.[120]

REPORT].

115. Bello & Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1, 5-6 (1988); Shelton, *The Congressional Perspective*, in TRADE POLICY, *supra* note 24, at 19.

116. H.R. 3, 100th Cong., 1st Sess. § 121, 133 CONG. REC. H2650-52 (daily ed. Apr. 29, 1987); H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 69-71 (1987) [hereinafter 1987 HOUSE REPORT].

117. Bello & Holmer, *supra* note 115, at 7-9; H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 551 (1988) [hereinafter 1988 CONF. REPORT]. There was a last minute effort by Senator Wallop to delete the transfer of authority provision on the grounds that the provision took away the constitutional authority of the President. The effort failed. 134 CONG. REC. S10,660-75 (daily ed. Aug. 3, 1988).

118. The final version reads:

> (1) On the basis of the investigation . . ., the Trade Representative shall—
>
> (A) determine whether—
>
> (i) the rights to which the United States is entitled under any trade agreement are being denied, or
>
> (ii) any act, policy, or practice described in subsection (a)(1)(b) or (b)(1) of section 2411 of this title exists, and
>
> (B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade Representative should take . . . .

19 U.S.C.A. § 2414(a)(1) (West Supp. 1989).

119. *Id.* § 2414(a)(1)(B). The statute allows for a nine month delay in complex cases. *Id.* § 2414(a)(3)(B).

120. *Id.* § 2415(a); *see infra* appendix A.

2. Congressional Intent and Analysis of Language

a. The USTR's new authority to make determinations

Substantial debate took place over the appropriate balance of the roles of the President and the USTR in the retaliation decisionmaking process.[121] Article I, section 8 of the United States Constitution grants Congress authority to regulate commerce with foreign nations.[122] Congress, however, realizes that trade issues often have foreign policy implications and that the President should retain some control over the regulation of foreign commerce. Therefore, Congress has historically delegated much of its authority over foreign commerce to the President.[123]

By transferring to the USTR the authority to make decisions regarding retaliation, Congress intended to "strengthen the negotiating authority and creditability" of the Trade Representative.[124] Congress had several self-serving reasons to bolster the image and authority of the USTR. The primary reason for the shift of authority was Congress's desire to reassert control over trade policy as well as to remove some of the President's discretion and authority over certain trade matters.[125] Congress tends to demonstrate its discontent with the executive branch's handling of trade policy by taking one agency's authority away and giving it to another.[126] Congress likely thought it could better control and influence the USTR than it could the President. For example, Congress can call the USTR before its committees, lobby the USTR and the USTR's deputies on specific matters, and use appropriations bills to coerce the USTR.

Congress also wanted to strengthen the hand of the USTR in the interagency process. The interagency Section 301 Committee is the group that decides whether to recommend that the President take section 301 action. The Committee includes representatives from the Departments of

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121. Shelton, *supra* note 115, at 19; *see generally* Bello & Holmer, *supra* note 115.

122. U.S. CONST. art. I, § 8.

123. Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U.L. REV. 492, 509 (1987).

124. 1987 HOUSE REPORT, *supra* note 116, at 59.

125. 1987 SENATE REPORT, *supra* note 114, at 73-181. Congress did leave the President some authority, including the power to instruct the USTR how to implement the action the USTR has decided to take. *See infra* Part IV, section A.2.b.

126. This is precisely what Congress accomplished by transferring jurisdiction over antidumping matters from the Treasury Department to the Commerce Department. Eberle, *Trade Policy and the Trade Representative*, in TRADE POLICY, *supra* note 24, at 23.

Labor, State, Treasury, Defense, Interior, Commerce, Justice, and Agriculture, and from OMB and the Council of Economic Advisors.[127] Diplomatic or political considerations often override trade considerations,[128] which often leads to "interagency bureaucracy fighting."[129] Former trade negotiator Clyde Prestowitz provided interesting insights into this problem when he described what happened in the Houdaille machine tool case, which involved Japanese targeting. He explained how the various agencies were divided over how to approach the situation. The working group of eight agencies agreed that violations of the law existed but could not agree to recommend that the President take action. Prestowitz observed:

> The State Department did not want to take any strong action against Japan because it never wants to upset our relationship with Japan. The National Security Council was concerned about Japan endorsing SDI and about Japan's support in the UN, and they opposed it. Other agencies had other reasons for opposing it.
>
> The upshot was that the paper was sent to the President without a recommendation. At the last minute, the Prime Minister of Japan sent a personal message to the President asking him to lay off, and the decision was made to take no action.[130]

Under the old law, the President made the final decision whether to retaliate, and therefore, he was subject to pressure from Cabinet officers. Former Trade Representative Robert Strauss vented the frustration this caused, remarking that "the thing I don't like is that whenever a President starts to get tough in a negotiation, or use the 301, is that other branches of the government come and lean on him with things that are second- and third-rate issues to stop him from doing something."[131]

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127. Exec. Order No. 11,846, 3 C.F.R. 971, 972-74 (1971-75); *see supra* note 95 and accompanying text.

128. 134 CONG. REC. S4661 (daily ed. Apr. 25, 1988) (statement of Sen. Packwood). Prior to 1985, no 301 actions were brought. Senator Packwood explained that "[p]art of the reason was military. The Department of Defense would say 'Well, gosh, we need Japan's intelligence-gathering activities and we need the bases.'

Part of it was diplomatic from the State Department: 'Don't retaliate against anybody over anything.'" *Id.*

129. *Mastering the World Economy: Hearings Before the Senate Comm. on Finance*, 100th Cong., 1st Sess., pt. 1, at 66 (1987) (statement of Sen. Daschle) [hereinafter *January Hearings*].

130. *Improving Enforcement of Trade Agreements: Hearing on S. 490, S. 539 and H.R. 3 Before the Senate Comm. on Finance*, 100th Cong., 1st Sess. 108 (1987) [hereinafter *March Hearing*].

131. *January Hearings, supra* note 129, at 45.

Furthermore, as a vice president of Motorola observed, the Japanese are adroit at using the interagency process to their advantage. She observed that the Japanese probe "the U.S. government to find constituencies which favor taking no action."[132] Then they lobby those agencies and urge the secretary of each agency to oppose a 301 action recommendation. In essence, the Japanese play the various agencies against each other.

Under the new section 301, the USTR will have more influence and bargaining power because the USTR alone will make the determination whether to take action. This should make the USTR a more effective advocate for action within the Administration.[133] However, the House report did state that the USTR should still consult with other agencies.[134] The report further explained that in "limited circumstances, broader U.S. national interests may . . . override strictly trade policy concerns."[135] Congress made clear, however, that this exception should be used very rarely.[136]

Congress also sought to strengthen the role of the USTR in order to enhance the status of trade policy.[137] By making the USTR the central trade figure, Congress designated one entity primarily responsible for trade policy. Congress felt that trade problems would receive more serious consideration if the USTR had more authority to make decisions.

Some members of Congress have considered creating a Department of Trade with the sole responsibility of formulating and implementing trade policy.[138] The House even included such a proposal in committee drafts.[139] This idea died in committee, however, and Congress ultimately

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132. *March Hearing, supra* note 130, at 83.

133. *January Hearings, supra* note 129, at 68 (statement of Amb. Strauss).

134. 1987 HOUSE REPORT, *supra* note 116, at 59. The Committee recommended the USTR use the Interagency Trade Policy Committee in order to "obtain information and advice . . . before making his decision on Section 301 action." *Id.*

135. *Id.*

136. *Id.*

137. 134 CONG. REC. S454, (daily ed. Apr. 22, 1988) (statement of Sen. Bentsen).

138. Senators Roth, Baucus, Reigle, and Matsunaga spoke often of creating a Department of Trade that would coordinate trade policy. *January Hearings, supra* note 129, at 50 (Sen. Baucus), 56 (Sen. Roth), 58 (Sen. Reigle), 68 (Sen. Matsunaga). Senator Roth and others spent considerable time working on this idea because they believed it would provide the proper framework for a cohesive and coherent formulation of trade policy. The idea was to take all the international trade functions from 17 or 18 agencies and place them under the aegis of a new department with a Cabinet level secretary. *Id.* at 56.

139. 134 CONG. REC. H2632 (daily ed. Apr. 28, 1987) (statement of Rep. McMillan).

effected its desire for a central trade figure by strengthening the role of the USTR.

Finally, Congress gave the USTR a greater role in trade matters in order to enhance the USTR's image among foreign countries as the principle trade figure. Congress hoped this heightened status would afford the USTR greater leverage at the negotiating table, because foreign officials would realize they were dealing with the person who had the power to take action against them. Some industry associations, however, stood against the transfer of such authority, because they believed the USTR lacked the necessary expertise to determine national macroeconomic policy.[140]

The Administration argued that the President should be responsible for retaliation decisions because of the significance of a 301 action. Ambassador Yeutter commented that "section 301 is the H-bomb of trade policy; and in my judgment, H-bombs ought to be dropped by the President of the United States and not by anyone else."[141] The Administration claimed that removing the President's authority to make trade decisions decreases the importance of trade decisions as well as the involvement of the President.[142] Some in Congress also asserted the impropriety of taking away the President's historical authority to make important trade policy decisions.[143] Although the Constitution allocates responsibilities for foreign trade to Congress, very often trade matters have foreign policy implications and therefore fall within the President's proper ambit of authority.[144]

In the final analysis, the transfer of authority to the USTR will give the USTR a stronger hand in the interagency process at home and more formidable authority overseas. But the transfer of authority is not a panacea. Interagency fighting over whether to take action against other countries will continue in the controversial or critical cases. Congress may therefore have accomplished its objectives, but only in the cases that do not rise to the crisis level. In any event, Congress has sent a signal to the Administration that it will expect rigorous enforcement of trade laws.

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140. *Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means,* 99th Cong., 2d Sess. 1687 (1986) (statement of Footwear Retailers of America).

141. *April Hearings, supra* note 53, at 19 (statement of Amb. Yeutter).

142. *March Hearing, supra* note 130, at 33 (statement of Alan Holmer).

143. 134 CONG. REC. S10,660-62 (daily ed. Aug 3, 1988) (statement of Sen. Wallop).

144. *See supra* notes 121-22 and accompanying text.

b. The USTR's new authority to implement determinations

The new trade bill also transfers to the USTR the authority to implement its determination to retaliate.[145] This measure attempted to ensure that if the USTR made an affirmative determination, the action would actually be implemented and not blocked arbitrarily by the President. This is significant inasmuch as the previous law was criticized for giving the President such wide discretion that the President could almost always avoid taking action.[146]

Although the new provision takes away the President's authority to implement the action, it does provide the President with power to influence how the USTR's decision will be implemented. The House report states that in "policy issues of major magnitude, the President could direct the USTR to take a different course of action."[147] This influence could take the form of a "broad policy direction" or an endorsement of the USTR's decision.[148] The report therefore seems to indicate that the President could also direct the USTR to take a milder action. Congress, however, probably did not intend to allow the President to block retaliatory action by the USTR. In the final analysis, the President retains ample discretion on how to implement retaliation because he can decide which issues are of "major magnitude" and accordingly call for milder action than that selected by the USTR.

The old law imposed on the President no time limitation for taking or implementing an action, but the new provision requires the USTR to implement an action within thirty days of the determination to take action.[149] The new section also provides the right to delay implementation of any action for 180 days in two situations: first, if the petitioner or a majority of the representatives of the domestic industry request a delay; or second, if the USTR determines that "substantial progress is being made," or that delay is "necessary or desirable . . . to obtain United States rights or a satisfactory solution."[150] The latter criterion is rather vague. The USTR might frequently claim that delaying implementation

145. The relevant provision reads: "[T]he Trade Representative shall implement the action the Trade Representative determines . . . to take under [section 301], subject to the specific direction, if any, of the President . . . 30 days after . . . such determination is made." 19 U.S.C.A. § 2415(a)(1) (West Supp. 1989).

146. *March Hearing, supra* note 130, at 83 (statement of Semiconductor Ind. Assoc.).

147. 1987 HOUSE REPORT, *supra* note 116, at 59.

148. *Id.* at 60.

149. 19 U.S.C.A. § 2415(a)(1).

150. *Id.* § 2415(a)(2)(A)(ii).

is "desirable" without specifying for whom it is desirable. As in the original provisions in the Senate and House bills, Congress intended the USTR to resort to an extension when progress is being made toward a settlement.[151]

c. New deadlines: a GATT violation?

The transfer of authority provisions contain deadlines that Congress inserted to provide more certainty of action. Congress accomplished this by requiring the USTR, in most trade agreement investigations, to make a determination on or before

> (i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or
> (ii) the date that is 18 months after the date on which the investigation is instigated, or
> (B) in all [other] cases . . . the date that is 12 months after the date on which the investigation is initiated.[152]

These new deadlines were aimed, in part, at cases referred to the GATT.[153] Almost two-thirds of those who filed section 301 petitions complained that the GATT process takes too much time.[154] Members of the business community cited a citrus case, which took the GATT over eleven years to resolve, and a wheat case still in dispute after twelve years.[155] The average GATT case takes forty-five months to resolve, compared to thirteen months for non-GATT cases.[156] Senator Pryor referred to the GATT dispute settlement process as a "black hole."[157] One industry representative called the GATT process a "joke" and an "oxymoron."[158]

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151. 1987 SENATE REPORT, *supra* note 114, at 81; 1987 HOUSE REPORT, *supra* note 116, at 91.

152. 19 U.S.C.A. § 2414(a)(2).

153. 1987 SENATE REPORT, *supra* note 114, at 81; 1987 HOUSE REPORT, *supra* note 116, at 73-74.

154. GENERAL ACCOUNTING OFFICE, *supra note* 54, at 4, 29.

155. *March Hearing, supra* note 130, at 75 (citing Petition of Florida Citrus Commission, 41 Fed. Reg. 52,567 (1976); Petition of Great Plains Wheat, Inc., 43 Fed. Reg. 59,935 (1978)).

156. GENERAL ACCOUNTING OFFICE, *supra* note 54, at 18.

157. *March Hearing, supra* note 130, at 23.

158. *Id.* at 74. The representative gave several good examples, including the European Community's wheat subsidies case, which was filed in 1975 and remained unsolved 12 years later; and the European Community peach, pear, and raisins case initiated in 1981, which the European Community, through pressure, was able to get the GATT to reverse. *Id.* at 75.

Congress hoped that this GATT-related deadline would spur the adoption of a more expeditious and effective settlement procedure within the GATT.[159] But this new deadline could potentially cause a violation of the GATT. Section 301 requires that cases of trade agreement violations be referred to consultation among the parties and then to dispute settlement before a GATT panel.[160] Theoretically, under the GATT, a party may not take unilateral action in most cases until the GATT process is concluded and the GATT authorizes action.[161] Therefore, an eighteen month section 301 deadline means a case could be pulled from the GATT and, in light of the new mandatory retaliation provision, the United States might take unilateral action in violation of the GATT.

This problem, however, is not new. Actually, the 1974 Trade Act made it clear that unilateral action could be taken even before a GATT finding of a violation.[162] The main difference is the mandatory provisions in the 1988 Trade Act, which will increase the chances and the frequency of retaliation in violation of the GATT. The new bill does allow for delays in the implementation of an action, which could help obviate this kind of violation. The USTR would probably prefer to delay action and avoid a GATT violation, but this will depend on the importance of the case and the prevailing political atmosphere.

d. Interested parties and hearings

Congress included a revised provision requiring the USTR to consult with "interested persons" before making the determinations referred to above.[163] All interested persons may request a public hearing. The most interesting aspect of this provision is the definition of "interested persons," which does not appear in the old provision. The new definition includes "domestic firms and workers, representatives of consumer interests, United States product exporters and any industrial users of any goods or services that may be affected."[164] This could be rather burdensome for the USTR if many section 301 actions occur.

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159. 1987 SENATE REPORT, *supra* note 114, at 74.

160. 19 U.S.C.A. § 2413.

161. GATT, *supra* note 71, art. XXIII. Unilateral action is allowed even under the GATT in limited circumstances. Article XIX (the "escape" clause) allows temporary action to prevent "serious injury" from imports, and article XXVIII allows withdrawals of most-favored-nation status. *Id.* arts. XIX, XXVIII; *see* Hudec, *supra* note 64, at 507, 523-25.

162. Coffield, *supra* note 84, at 383 (citing S. REP. NO. 1298, 93d Cong., 2d Sess. 31, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7708-09).

163. 19 U.S.C.A. § 2414(b)(1).

164. *Id.* § 2411(d)(9).

3. Self Initiation Without an Investigation: An Oversight?

The new section 301 is unclear as to whether an action can be taken without an investigation. Under the old law, section 301(a) gave the President power to "take all appropriate and feasible action" to enforce United States rights and to seek elimination of unfair trade practices; section 301(d) allowed the President to take action on his own motion.[165] This language gave the President broad discretion, including the power to initiate an action without an investigation.

The new section 301, however, deleted the provision giving the President such authority and transferred the authority to the USTR. The USTR now makes unfairness determinations and takes action.[166] The new section 301 provides that "[i]f the United States Trade Representative determines" that there is an actionable unfair practice, the USTR "shall take action."[167] Section 304(a)(1) directs the USTR to make determinations "[o]n the basis of the investigations" initiated under section 302 and the consultations of section 303.[168] Thus, all 301 actions are seemingly conditioned upon a USTR determination, which itself must be based upon an investigation and consultation. This directive forecloses the possibility of an action without prior investigation.

This does not seem consistent with the intent of Congress, inasmuch as Congress was trying to give the USTR as much leverage as possible under the new law. Committee staff members agree that this was not the intention behind the bill. They point to other language in the provision to support their claim that the President can still direct the USTR to take action without an investigation. Specifically, they refer to section 301(a)(1), which instructs the USTR to take action "subject to the specific direction, if any, of the President."[169] They argue that this provision allows the President to "direct" the USTR to take action without an investigation.[170]

Nothing in the House report on the bill explains what the above-quoted clause of section 301(a)(1) means. The report does explain that the "President could direct the USTR to take a different kind of ac-

165. 19 U.S.C. § 2411 (Supp. V 1987).

166. 19 U.S.C.A. § 2411 (West Supp. 1989).

167. *Id.* § 2411(a)(1). The same is applicable to discretionary action. *Id.* § 2411(b).

168. *Id.* § 2414(a)(1). An action may only be initiated by a petition or by the USTR. *Id.* § 2412(a).

169. *Id.* § 2411(a)(1).

170. Confidential interviews with staff members of the House Comm. on Ways and Means and the Senate Comm. on Finance, in Washington, D.C. (May 1988).

tion."[171] This assumes, however, that the USTR has decided to take some kind of action which, according to section 304(a)(1), must be based upon an investigation. Committee staff also point to the "discretionary" action section, which provides that the President can direct the Trade Representative to take "all other appropriate and feasible action."[172] This provision, too, is conditioned on section 304, which requires that determinations be based on prior investigations. Even if the "subject to the [President's] direction" language could be read to allow action without investigation, this construction would conflict with the first words of section 301(a)(1), which conditions action on a determination based upon an investigation.[173]

Nonetheless, it is possible for the USTR to take action without a formal investigation. In order to meet the letter of the new law, the USTR could initiate an action with a Federal Register filing, conduct an investigation or only claim to do so, make several phone calls to meet the consultation requirements, and immediately determine to take action with a second filing. The USTR could avoid the section 304(b) thirty day notice requirement by using the expeditious action exception of 304(b)(2).[174]

4. Summary

The transfer of authority from the President to the USTR will not directly help United States negotiators open foreign markets. It will, however, indirectly help the USTR gain leverage with foreign trade partners insofar as the USTR will now be carrying the big stick of retaliation. At home, this new authority may help enhance the USTR's position among agency heads as the lead person on international trade. Although this new authority may help take non-trade considerations out of some cases, it probably will not affect the highly controversial ones. Much depends on the respective strengths and weaknesses of the personalities of the USTR, the President, and other Cabinet members.

The transfer of authority from the President to the USTR continues the trend of expanding the role of the USTR at the expense of the President. Many may perceive it as a successful coup by Congress to reassert control over trade policy. In practice, however, the President will still maintain indirect control over general trade policy—a point that Con-

171. 1987 HOUSE REPORT, *supra* note 116, at 55.
172. 19 U.S.C.A. § 2411(b).
173. *Id.* § 2411(a)(1).
174. *Id.* §§ 2412, 2414(a), (b)(2).

gress does not dispute.[175] Furthermore, the President maintains the ultimate weapon—the power to fire a recalcitrant USTR. And as a former Trade Representative explained, "although presidents don't like to discharge people, their staffs do."[176]

Alan Holmer, former General Counsel to the USTR, concluded that in the final analysis, the "transfers of authority [will] not significantly change the way unfairness decisions are made."[177] The only difference is that now the USTR, not the President, ostensibly makes the decision. In the critical controversial cases, however, the invisible hand of the President will continue to guide the outcome.

B. *Mandatory Retaliation*

1. Legislative History

Under the old law, the President held the authority and the discretion to determine whether a practice was actionable and to decide whether to take action to enforce United States rights under a trade agreement or to respond to unfair trade practices. As discussed above, the new law transfers to the USTR the authority to make the determination whether a practice is actionable. But section 301 also grants to the USTR the discretion to determine whether to take action. The mandatory retaliation provision limits this discretion in certain circumstances.

The idea of mandatory retaliation for foreign unfair trade practices arose from the same concerns as those behind the transfer of authority provision. These concerns included the lack of action by the Administration, increasing trade deficits, and persistent trade barriers. As a result, the 1986 and 1987 House bills included mandatory retaliation provisions for unfair trade practices.[178] The provisions in the House bills required the President to retaliate when a trade agreement was violated or when an act, policy, or practice was inconsistent with a trade agreement or was

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175. 1987 HOUSE REPORT, *supra* note 116, at 60.

176. Eberle, *Trade Policy and the Trade Representative*, in TRADE POLICY, *supra* note 24, at 23.

177. *March Hearing*, *supra* note 130, at 44.

178. H.R. 4800, 99th Cong., 2d Sess. § 112, 132 CONG. REC. H3027 (daily ed May 21, 1986); H.R. 3, 100th Cong., 1st Sess. § 121, 133 CONG. REC. H2650 (daily ed. Apr. 29, 1987). In 1987 the House essentially adopted the 1986 language on mandatory retaliation. The 1987 bill, however, transferred a more substantial power to the USTR: the right to determine whether a practice was actionable, as well as the right to determine whether to retaliate and how. To conform the mandatory retaliation section to the tougher 1987 transfer of authority provision, the House said the USTR shall take action "subject to the specific direction, if any, of the President." *Id.* at H2650-51.

otherwise unjustified.[179] The 1986 House bill required that the mandatory action affect the foreign country in "an amount that is equivalent in value to the burden or restriction being imposed."[180]

The mandatory action section in the Senate bills was broader, and therefore more strict than the House bills.[181] The Senate bills required the USTR to initiate investigations for those practices identified in the annual NTE report that would result in the greatest expansion of United States exports.[182] The 1987 Senate bill required retaliation in all cases in which the USTR determined, based upon an investigation, that an unfair trade practice had occurred.[183] The bill mandated retaliation for trade agreement violations and unjustifiable practices as well as discriminatory and unreasonable practices. The Senate felt that all types of unfair practices should trigger mandatory retaliation, but many business groups and the Administration strongly disagreed.[184] The 1987 Senate bill provided exceptions to retaliation similar to those in the House bill, while including additional exceptions that would obtain in the event retaliation would harm domestic economic interests or national security.[185]

In conference, the Senate accepted the House version with two amendments. One amendment was merely a technical change,[186] but the other

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179. *Id.*; *see also* 1986 HOUSE REPORT, *supra* note 112, at 261. The House provision also contained several waivers to the mandatory retaliation directive, permitting the parties to resolve the dispute on their own. Retaliation was the last resort. The President would not have to take retaliatory action in the following cases: first, a GATT panel has decided that the trade agreement is not being violated; second, the foreign country has taken satisfactory measures to grant United States trade agreement rights; third, the foreign country has agreed to eliminate the practices or has agreed to an imminent solution; fourth, the foreign country has provided the United States compensatory trade benefits; and fifth, retaliatory action is not in the national economic interest of the United States. H.R. 3, *supra* note 116, § 121(1)(B), at H2650.

180. H.R. 3, *supra* note 116, § 121(1)(D), at H2651.

181. *Compare* S. 1860, *supra* note 23, §§ 202, 205, at S32,765 *with* S. 490, *supra* note 11, § 304, at S1864.

182. 1987 SENATE REPORT, *supra* note 114, at 78. The 1986 bill required investigations if the barrier blocked a "significant portion" of United States exports.

183. *Id.* at 335.

184. *April Hearings, supra* note 53, at 169 (statement of Emergency Comm. for American Trade); *id.* at 150 (statement of United States Chamber of Commerce).

185. The two additional exceptions in the Senate bill were: 1) an exception when retaliation would be impossible or would not be in the national economic interest; and 2) an exception for actions that "would cause harm to the national security of the U.S." 1987 SENATE REPORT, *supra* note 114, at 337.

186. 1988 CONF. REPORT, *supra* note 117, at 559. The amendment merely added to the first exception to mandatory retaliation rulings from dispute settlement proceedings other than the GATT. 19 U.S.C.A. § 2411(a)(2)(A) (West Supp. 1989).

amendment added two exceptions to the mandatory action provision. The exception first was the Senate "national security" exception, and the second was a compromise based on the House "national economic interest" exception.[187] The latter permits an exception to retaliatory action "in extraordinary cases" where such action "would have an adverse impact on the United States economy."[188] This language is more specific and more narrow in scope than the original House provision. Some House members objected to dropping the broader national economic interest waiver, believing the President should be allowed to consider all possible effects before taking retaliatory action.[189]

The final version will operate in the following manner. First, the USTR must determine whether a trading partner has violated a trade agreement or is engaged in unfair trading practices. Next, the USTR is required to take action, subject to the specific direction of the President. The action may include tariffs, suspension of trade agreement benefits, service sector restrictions, or entrance into a trade agreement. Third, the USTR must implement the mandatory action selected, within thirty days of the determination that the practice is actionable. Finally, the USTR can use one of the six waivers to avoid taking action.

2. Congressional Intent and Analysis of Provision

The mandatory retaliation provision was one of the main points of contention between Congress and the Administration throughout the trade bill debate. The primary impetus for the mandatory retaliation provision was Congressional frustration with the Administration's inaction in the face of numerous foreign trade barriers and a rising trade deficit.[190] Congress wanted certainty of retaliation, a level playing field in trade relations, and leverage in trade negotiation. The Administration argued that the mandatory provision would cause trade wars, impose unfair penalties on trade partners, and reduce the flexibility of negotiations.

In January 1987 former Trade Representative Robert Strauss, in an exchange with Senator Packwood, explained his position on the mandatory action proposal. He reported that he would "hate to make [action] mandatory," but that "more mandatory is a bum choice of words." Senator Packwood qualified the term "mandatory" by respond-

187. 1988 CONF. REPORT, *supra* note 117, at 559.

188. *Id.*; 19 U.S.C.A. § 2411(a)(2)(B)(iv); *see infra* appendix A.

189. 134 CONG. REC. H5536 (daily ed. July 13, 1988) (statement of Rep. Kemp); *id.* at H5537 (statement of Rep. Crane).

190. *See* Green, *supra* note 32, at 670; Green, *supra* note 40, at 501-02.

ing, "But not compulsory."[191] Thereafter, the phrase "mandatory, but not compulsory" became the objective of the Finance Committee. Many quoted the epigram as if it were the ultimate accumulation of wisdom.[192] Even Ambassador Yeutter agreed this was a good formulation of the objective.[193] Although the phrase is catchy, it is just as ambiguous as the final language of the mandatory retaliation provision.[194] The question remains whether the provision is actually mandatory or is filled with so many loopholes as to be—for all intents and purposes—discretionary.

a. The case for mandatory retaliation

i. Certainty of action or trade wars?

One of the objectives Congress sought to achieve by enacting the mandatory retaliation provision was "greater certainty of response" by the United States to trade agreement violations and to illegal or unjustifiable foreign trade practices.[195] The House Ways and Means Committee intended the United States to "exercise section 301 authority vigorously."[196] Many in Congress thought the President had not been aggressive enough in using section 301 to open foreign markets. As a former trade negotiator explained, foreign countries think that "we talk loudly and carry a small stick."[197] Therefore, Congress adopted this mandatory language to force the Administration to take action.

The mandatory retaliation provision requires the USTR to retaliate in specified situations. Congress reasoned that by taking more aggressive

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191. *January Hearings, supra* note 129, at 44-45.

192. *March Hearing, supra* note 130, at 9.

193. *February Hearings, supra* note 44, at 114.

194. 19 U.S.C.A. § 2411(a)(1). The mandatory language of the new section 301(a)(1) reads as follows:

> (1) If the United States Trade Representative determines . . . that—
>
> (A) the rights of the United States under any trade agreement are being denied; or
>
> (B) an act, policy, or practice of a foreign country—
>
> (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
>
> (ii) is unjustifiable and burdens or restricts United States commerce;
>
> the Trade Representative shall take action . . . subject to the specific direction, if any, of the President . . . to enforce such rights or to obtain the elimination of such act, policy, or practice.

Id.

195. 1987 HOUSE REPORT, *supra* note 116, at 62; 134 CONG. REC. S4543 (daily ed. Apr. 22, 1988) (statement of Sen. Bentsen).

196. 1987 HOUSE REPORT, *supra* note 116, at 62.

197. *March Hearing, supra* note 130, at 124 (statement of Clyde Prestowitz).

and more certain action, the United States would show other countries that it was serious about opening up markets and that it would not allow countries such as Japan, Taiwan, and South Korea to maintain trade barriers to United States exports. Congress hoped this would lead countries to abolish their barriers, thereby increasing United States exports and decreasing the trade deficit. Clyde Prestowitz illustrated the operation of the mandatory action provision:

> Now, I was engaged in another negotiation on whaling. As you know, the Packwood/Magnusen Act stipulates that any country which whales in violation of the recommendations of the International Whaling Commission automatically loses 50 percent of its fishing allocation in U.S. waters. The Secretary of Commerce is charged with the administration of the Packwood/Magnusen Act. He has no discretion. He must automatically reduce fishing allocation by 50 percent for any country whaling in violation.
>
> In 1984, the Japanese whaling fleet put to sea. They sent a delegation to see the Secretary of Commerce, and effectively they said to him, "We know you have this Packwood/Magnusen Act, sir, but you are really not serious about that, are you? You are not going to enforce that." And the secretary said, well, yes, he was. The delegation the visited the State Department and the National Security Council and the White House, and a number of other bodies, and pleaded their cause.
>
> Now, Mr. Chairman, the Secretary of State very rarely visits the Commerce Department, but on this occasion the Secretary of State visited the Commerce Department and asked the Secretary of Commerce if he had any wiggle room. And other members of government called the Secretary and asked if he had any wiggle room. The Secretary of Commerce was in a beautiful position; he said, "You know, I really feel sorry for those fishermen on those whalers, and I understand the problem. I am sympathetic. I know that eating whale meat has been a part of the Japanese culture for a thousand years, but I don't have any discretion; I have to enforce the law." In the end the Japanese stopped whaling.[198]

In this way, mandatory retaliation can achieve certainty of action and results.

The USTR still retains discretion in the cases of unreasonable and discriminatory practices, because mandatory action applies only in cases of trade agreement violations or unjustifiable practices. To require action seems logical when a trade agreement is violated and negotiations fail.

One of the problems with mandatory retaliation, however, is that it raises the spectre of counter-retaliation. It would be naive to suppose

198. *Id.* at 108-09.

that the United States can bully foreign countries into changing their systems without increasing the likelihood of counter-retaliations. For example, when the United States retaliated against Canadian shakes and shingles, the Canadians counter-retaliated against United States books, computer parts, semiconductors, and Christmas trees.[199] When the United States announced retaliation in the case of the European Community enlargement, the European Community threatened counter-retaliation against United States corn gluten feed.[200] And when the United States retaliated against the Community in the citrus case, it responded against United States lemons and walnuts.[201] Alan Holmer stated that counter-retaliation "is no longer an idle threat."[202]

The fear of counter-retaliation worried the domestic agricultural community, which argued that such retaliation would likely be aimed at agricultural products.[203] As a result, the House bill provided that, in deciding whether to take action, the USTR must consider the impact such action would have on agricultural exports.[204] This provision, however, was dropped from the final bill.

A second problem with mandatory action is that it ignores the realities of a foreign country's domestic political situation. Many countries do not wish to be seen as giving in to the United States; protecting their economy and their jobs is a matter of national pride. As then Treasury Secretary James Baker stated, this new mandatory action provision makes foreign states "more likely to dig in and counterattack."[205] Mandatory retaliation could arouse a "nationalistic backlash" and anti-American sentiments that would increase the likelihood of counter-retaliation and worsened trade relations.[206] For example, United States pressure to gain a larger market for tobacco products in Korea sparked a campaign against the effort that promoted as its theme "U.S. exporting cancer."[207] The Administration argued that mandatory action was like "stick[ing] a

199. *Comprehensive Trade Legislation: Hearings Before the House Comm. on Ways and Means and its Subcomm. on Trade*, 100th Cong., 1st Sess., pt. 2, at 656 (1987) (statement of Alan Holmer) [hereinafter *Comprehensive Trade Leg. Hearings*].

200. *March Hearing, supra* note 130, at 13 (statement of Alan Holmer).

201. *Id.* at 13.

202. *Comprehensive Trade Leg. Hearings, supra* note 199, at 656 (statement of Alan Holmer).

203. *Id.* at 183 (statement of Rep. Daub).

204. 1987 HOUSE REPORT, *supra* note 116, at 62.

205. *February Hearings, supra* note 44, at 33.

206. *Id.*

207. Wash. Times, Feb. 13, 1989, at A7.

retaliation gun to the head of your trading partner."[208]

Hence, domestic politics and nationalistic feelings may prevent countries from giving in to United States demands in certain cases. They are likely to dig in against United States retaliation. For example, Prestowitz points out that the French "are not going to stop subsidizing Airbuses."[209] Similarly, the Koreans are not likely to open up completely their beef market, and the Japanese will continue to try to protect their supercomputer and rice industries. In light of this recalcitrance, mandatory retaliation probably will not help open such markets but will likely cause counter-retaliation.

A further problem is that of mirror legislation. Even though the United States will not always have a trade deficit, the United States maintains many trade barriers itself. A foreign country could well point to a long list of what it considers United States unfair practices in order to justify counter-retaliation or mirror legislation. Alan Holmer illustrated this possibility:

> I can imagine how I would feel if a foreign government official from Country-X came into our offices at the USTR, stuck a retaliation gun to our head, and said, "We're tired of the U.S. trade practices that we, unilaterally in Country-X, have decided are unfair. We want you to get rid of your steel quotas, your textile quotas, your quotas on sugar and meat and dairy products and peanuts and cotton and sugar-containing products and machine tools, we want you to get rid of your Buy-America provisions and your agricultural export subsidies and your price support programs and your Superfund taxes and your custom user fees. We don't like the way you administer the dumping and countervailing duty law; we believe that is unjustifiable. You've got to change those practices. Get rid of your fishing laws, get rid of Section 337, certainly get rid of your extraterritorial technology controls, get rid of the semiconductor third country dumping agreement, do it all in 15 months . . .—do it in the glare of the public spotlight, and if you don't, on all of those things we are going to whack you."[210]

In fact, the European Community issued a report in 1987 listing thirty United States practices it considered unfair trade practices. The report threatened that unilateral action by the United States "could easily be mirrored by equivalent action against U.S. exports."[211]

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208. *March Hearing*, *supra* note 130, at 12 (statement of Alan Holmer).

209. *Id.* at 124.

210. *Id.* at 12.

211. 133 CONG. REC. H2760 (daily ed. Apr. 29, 1987) (statement of Rep. Crane). The European Community's 1989 report alleges 42 unfair United States trade barriers. N.Y. Times, May 4, 1989, at A7.

This new mandatory retaliation provision does create a substantial risk of trade wars. This provision may have some benefits including increasing exports, but this provision is worth pursuing only if the USTR retains enough flexibility to avoid actual retaliation when necessary and thereby minimize the risk of a trade war.

ii. Engage in fair trade or face penalties

Congress hopes that a mandatory retaliation provision will make clear that the United States will expect other countries to maintain policies of fair trade.[212] The United States expects other countries to open their markets to United States exports, and if they refuse to do so, they will be penalized. Senator Danforth expressed the view of many when he explained why he favored mandatory retaliation:

> Japan has to feel that it is their choice. They might choose to keep out our beef or our silicon or our citrus—fine. Let them decide that. But that decision has to carry with it a down side; that decision has to trigger, automatically, something bad that happens to them. . . .
>
> [W]hat I do believe is that there must be penalties which are surely imposed on those who don't want to do business with the United States.[213]

This statement refers to the reciprocity principle, which holds that if the United States allows open access to its markets, its trading partners should allow free access to theirs—equal competitive opportunity. And if they do not, they must pay some penalty.[214] The principles of reciprocity and fair trade, however, are based on the incorrect assumption that a universal understanding or definition of "open markets" exists. Not all accept the definition of "open markets" prevalent in the United States. Prestowitz has observed:

> For example, when we say "open" in terms of an open market, we include in that the assumption that a buyer is prepared to change suppliers if a new supplier offers the same goods at a better price or better goods at the same price. . . . Implicit in the use of the term "open" are the assumptions that there will be a functioning judicial system that will deliver justice more or less fairly and rapidly; that there is due process; that a single American citizen can get an injunction against his own government and stop that government cold in its tracks if need be; that the lawmaking

212. N.Y. Times, Apr. 28, 1988, at A1; 134 CONG. REC. S4683 (daily ed. Apr. 25, 1988) (statement of Sen. Danforth).

213. *February Hearings, supra* note 44, at 115.

214. For a discussion of the principle of reciprocity, see *infra* Part IV, section C.1.b.

> procedures are open; that constituents can observe the laws being debated; that they can lobby their representatives; that they can attend hearings and that nothing will be done in secret or behind closed doors. In other words, our use of the term "open" derives from our rights as individual Americans in a society dedicated to freedom of the individual.
>
> [M]ost societies in the world do not have that kind of openness . . . .[215]

Japan, for example, has a history of isolationism.[216] It does not have an "open" society by the Western definition. Actually, countries such as Japan, France, and Korea are "closed" societies. They prefer to buy from their own and thereby protect those they consider their "family." Additionally, they believe that United States products do not sell well because they are not as well made as their own. Thus, in their eyes, it is the fault of United States that it has a hard time selling exports to Japan. They suggest the United States make better products. From this perspective, one can understand that such countries feel that a "penalty" such as mandatory retaliation is unjustified.

Another view is that these numerous unfair trade barriers are merely consequences of social and political attitudes that cannot be changed easily or rapidly.[217] There may be some truth to this point of view, but most in the United States feel that it provides no excuse for unfair practices that cause $170 billion trade deficits.[218]

In certain cases, having a mandatory action "penalty" may actually help reduce trade barriers, even though the idea is premised on peculiarly American assumptions. A prime example of how the threat of retaliation can work effectively is the recent telecommunications case. The 1988 Trade Act required the Administration to identify "priority foreign countries . . . that deny mutually advantageous market opportunities" to United States telecommunications products.[219] If negotiations failed to open the markets in the priority country, then the Act required mandatory retaliation.[220] The Administration identified Japan as a priority country, and negotiations ensued.[221] Eleven days before the deadline, negotiators announced that they had reached an accord.[222]

Japan apparently agreed to open its market as a result of the pressure

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215. *March Hearing, supra* note 130, at 110-11 (statement of Clyde Prestowitz); *see also* C. PRESTOWITZ, *supra* note 1, at 81, 99.

216. C. PRESTOWITZ, *supra* note 1, at 81-99.

217. *March Hearing, supra* note 130, at 112.

218. *See January Hearings, supra* note 129, at 13 (statement of Sen. Heinz).

219. 19 U.S.C.A. § 3103(b)(1) (West Supp. 1989).

220. *Id.* § 3105.

221. The USTR made the determination on April 29, 1989.

222. Wall St. J., June 29, 1989, at A3; N.Y. Times, June 29, 1989, at A1.

imposed by the threat of mandatory retaliation. Japan promised to improve access to the Japanese cellular phone market, and the accord results were proclaimed "the most significant fruits" of the 1988 Trade Act.[223] And while it is obviously too early to tell whether this indicates a change in Japan's overall trade policy,[224] this victory indicates that mandatory retaliation can work in some cases. However, there are substantial risks inherent in any retaliatory action.

iii. Leverage vs. flexibility

Finally, by providing for mandatory retaliation, Congress intended to provide more leverage to United States negotiators.[225] The power to call for mandatory retaliation enhances the USTR's bargaining clout. The certainty of action will force foreign countries to take seriously United States complaints about unfair trade barriers. The United States will no longer "talk loudly and carry a small stick."[226] Mandatory retaliation coupled with tighter deadlines will force foreign countries, and the Administration for that matter, to sit down and attempt to negotiate a solution.

The Administration argued that mandatory retaliation reduces its flexibility to handle each negotiation on a case-by-case basis.[227] Ambassador Yeutter claimed that if mandatory action had been in force during negotiations of the Japan leather case, the parties never would have reached a settlement.[228] The same was true in the European Community case, in which negotiations produced a settlement only after negotiations were extended for thirty days.[229]

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223. N.Y. Times, June 29, 1989, at A1.

224. N.Y. Times, June 30, 1989, at D44.

225. 1987 HOUSE REPORT, *supra* note 116, at 62.

226. *See March Hearing, supra* note 130, at 124 (statement of Clyde Prestowitz).

227. *February Hearings, supra* note 44, at 113 (statement of Amb. Yeutter).

228. *Id.* at 114.

229. *March Hearing, supra* note 130, at 14. Alan Holmer, General Counsel to the Office of the United States Trade Representative, reported:

> We set a deadline of July 1 for that case, and if we had been required to retaliate on July 1, as opposed to the case being able to spill over for a day or two and allowing Ambassador Yeutter and his counterpart Mr. DeClerc to be able to have a Transatlantic plane ride where they were able to reach a settlement in that case, you might have had a cycle of retaliation and counter retaliation making it impossible to get that case resolved. They were able to declare a cease-fire on July 1, and they set another deadline of December 31.
>
> Well, you had a problem with respect to the French; you had a problem with respect to the Christmas holidays; you had a situation where we were close to getting an agreement, but we needed about a 30-day period to get an acceptable

Negotiators, however, usually find some way to work within the given time-frame, and mandatory retaliation merely puts more pressure on both parties to negotiate a solution. Although the provision may work in some cases, in the controversial cases the United States will always encounter nationalist feelings and difficult domestic political situations—regardless of how much leverage Congress gives the USTR.

iv. Amount and form of retaliation

If the USTR decides to take action and none of the waivers apply, the action selected must "affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce."[230] That is, the USTR must retaliate against the infringing country dollar-for-dollar. Determining the relevant figures could be very difficult. Assessing the dollar value of a trade barrier is not easy because it is based on economic assumptions such as expected exports, market share, volume, exchange rates, and inflation.[231]

The new provisions also give the USTR the right to choose how to retaliate. The USTR, instead of the President, has the sole specific authority to suspend or withdraw trade agreement benefits, impose duties, and enter into binding agreements. The final bill stated that the USTR must give preference to increasing tariffs or duties. The USTR may also restrict or deny "service sector access authorization."[232]

The USTR may take action against "any goods or economic sector" regardless of whether those goods were actually involved in the unfair practice.[233] This possibility, while always present, does represent a change in policy from early 301 cases. One commentator observed:

> [T]he view among policy makers has been that the punishment should fit the crime where possible, and if the act, practices or policy which has been determined to be unjustified or unreasonable is in the product area, the retaliation should also be in the product area. Likewise, if the act, practice or policy is in the service area, the retaliation should also be in the service

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resolution of that case.

Id.

230. 19 U.S.C.A. § 2411(a)(3) (West Supp. 1989); *see* 1988 CONF. REPORT, *supra* note 117, at 63.

231. *See, e.g.*, 19 U.S.C.A. § 2241 (factors to be considered in the National Trade Estimate Report).

232. 19 U.S.C.A. § 2411(c)(2)(A).

233. *Id.* § 2411(c)(3).

area.[234]

Whether the USTR will continue the policy of sector specific retaliation is not clear, but trade dispute agreements will still seek to provide compensation to the same sector of industry hurt by the unfair practice. The new provision stipulates that any compensatory trade agreement must benefit, if possible, the economic sector that is affected by the unfair practice.[235]

b. The case for discretion: waivers

The mandatory action provision provides the President with substantial discretion in fashioning a remedy to an asserted unfair trade practice. The statute provides that the USTR shall take action "subject to the specific direction, if any, of the President regarding any such action."[236] To understand this language, one must refer back to the transfer of authority section.[237] The 1987 House report stated that the quoted language authorized the President to give direction in "policy issues of major magnitude."[238] By analogy, the same interpretation should apply to the mandatory action provision. The USTR must still take action, but in major cases the President can tell the USTR how to retaliate.

Furthermore, the provision grants the USTR discretion in determining whether to proceed with an investigation. The USTR can decline to investigate if the action would not be "effective."[239] This appears to have been added in conference, as it was not in the original House or Senate bills.[240]

The new section 301 also provides six situations in which mandatory action may be waived. First, waiver occurs if a GATT panel or a dispute settlement panel determines that United States trade agreement rights are not being denied, or that the practice is not a violation of United States rights or a denial of trade agreement benefits.[241] This

234. Coffield, *supra* note 84, at 395.

235. 19 U.S.C.A. § 2411(c)(4).

236. *Id.* § 2411(a)(1).

237. *Id.* § 2514(a)(1); *see also infra* Part IV, section A.2.b. The "subject to" language appeared in the 1987 House bill when the House transferred all three determinations to the USTR. In that bill, as in the final version, the USTR has the authority to implement the action "subject to the specific direction" of the President. 1987 HOUSE REPORT, *supra* note 116, at 59-60.

238. 1987 HOUSE REPORT, *supra* note 116, at 59.

239. 19 U.S.C.A. § 2412(c).

240. 1987 SENATE REPORT, *supra* note 114, at 329; 1987 HOUSE REPORT, *supra* note 116, at 366.

241. 19 U.S.C.A. § 2411(a)(2)(A); 1987 HOUSE REPORT, *supra* note 116, at 61.

waiver allows for the possibility of a GATT determination after the case is initiated and still pending. Thus, if the case is decided by the GATT before the USTR is required to take action, and the GATT decides the issue, then the USTR will be able to use this waiver to avoid taking retaliatory action. This is sensible inasmuch as taking unilateral action contrary to a GATT ruling could itself be a GATT violation.

The second opportunity for waiver occurs when the USTR finds that "the foreign country is taking satisfactory measures" to grant United States trade rights.[242] The term "satisfactory" is rather vague and susceptible to varying interpretations. Congress likely intended the USTR to invoke this waiver when the unfair practice cannot be wholly eliminated but the foreign government is taking appropriate measures to ameliorate the practice. Still, this waiver could encompass a broad range of situations, giving the USTR considerable discretion.

Third, the USTR can avoid mandatory action if the foreign country has "agreed to eliminate or phase out the act, policy, or practice," or has "agreed to an imminent solution . . . that is satisfactory" to the USTR.[243] Agreeing to eliminate or phase out a practice seems straightforward, and this language is probably aimed at trade agreements. But how does the foreign country agree? Vague promises to end an unfair practice raise questions of enforceability. Furthermore, what period will be used to phase out a practice? Many of these practices will be covered by the Super 301 provision discussed below, which imposes a three year limit for the elimination of or compensation for the priority practices. The "imminent solution" language, however, is just as vague as the "satisfactory" language. Despite these uncertainties, this waiver is useful in addressing the types of cases General Counsel Holmer and Ambassador Yeutter described earlier—cases in which the two countries are on the verge of reaching an agreement.[244]

The fourth waiver covers situations in which it is "impossible for the foreign country" to eliminate or phase out the practice or take satisfactory measures, but the country instead provides the United States with "compensatory trade benefits."[245] This waiver covers cases in which the foreign country cannot eliminate the practice because of domestic political or economic ramifications. If the foreign country provides "satisfac-

242. 19 U.S.C.A. § 2411(a)(2)(B)(i); 1987 HOUSE REPORT, *supra* note 116, at 67.

243. 19 U.S.C.A. § 2411(a)(2)(B)(ii).

244. *March Hearing, supra* note 130, at 14 (European Community case); *February Hearings, supra* note 44, at 114 (Japan case); *see also supra* notes 228-29 and accompanying text.

245. 19 U.S.C.A. § 2411(a)(2)(B)(iii); 1988 CONF. REPORT, *supra* note 117, at 63.

tory" compensatory trade benefits, the USTR does not have to take action. The benefits should aid the "domestic industry" that would have been helped by the elimination of the practices.[246]

Fifth, the USTR does not have to take retaliatory action if such action would have an "adverse impact on the United States economy substantially out of proportion to the benefits of such action."[247] This waiver was a compromise based on the House's "national economic interest" waiver. The final version is expressed more specifically and phrased in terms of a cost-benefit analysis. Congress intended this waiver to apply to situations in which the United States economy would suffer from mandatory action, such as the substantially increased cost of a vital import, or the possibility of harmful counter-retaliation.[248]

The House report specifically called for consideration of any impact retaliation would have on agricultural exports.[249] Although the House version was changed in the final bill, it can be assumed that Congress intended the USTR to give special consideration to agricultural exports. It is arguable that every mandatory action could cause counter-retaliation against agricultural exports and that the risk thereof substantially outweighs any benefits that would accrue from retaliation. Congress, however, made clear that the USTR could use this waiver only in "extraordinary cases." As the House report indicates, exercise of the waiver should be an "exceptional, not routine, practice."[250]

Finally, a waiver occurs in the event retaliatory action "would cause serious harm to the national security of the United States."[251] This waiver is applicable mainly to situations in which the United States may, for example, lose a military base if the United States retaliates. The waiver could also operate to ensure the supply of defense-related products.

3. Summary

The mandatory retaliation provision will help open up foreign markets, but at great risk. Mandatory retaliation will increase the certainty that the Administration will take action to seek elimination of foreign trade barriers, and it will give United States negotiators some additional

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246. 19 U.S.C.A. § 2411(c)(4); 1988 CONF. REPORT, *supra* note 117, at 64.

247. 19 U.S.C.A. § 2411(a)(2)(B)(iv); 1988 CONF. REPORT, *supra* note 117, at 63.

248. 1987 HOUSE REPORT, *supra* note 116, at 62.

249. *Id.*; *see also Comprehensive Trade Leg. Hearings*, *supra* note 199, at 183 (statement of Rep. Daub).

250. 1987 HOUSE REPORT, *supra* note 116, at 62.

251. 19 U.S.C.A. § 2411(a)(2)(B)(v).

leverage. In most cases, the provision will probably produce some benefits for United States exporters. This provision, however, increases the likelihood of counter-retaliation in the controversial or sensitive cases.

Fortunately, the USTR has many ways to avoid mandatory action. The USTR holds a great deal of discretion in the early stages. For example, the USTR has discretion whether to accept a petition. Prestowitz observed that the USTR will now be "less anxious to accept a petition due to the possibility of mandatory retaliation."[252] The USTR also has discretion in deciding whether to investigate an action.[253] Moreover, the USTR has discretion in determining whether the practice falls within one of the mandatory categories. Finally, if all else fails, the USTR can use one of the six waivers, three of which are so vague as to be applicable to virtually any case. As has been observed, the Administration would "go to great lengths to avoid taking action against the foreign country."[254] The mandatory retaliation provision makes this more true than ever.

In sum, Ambassador Yeutter received the "wiggle room" he wanted,[255] and Congress may have obtained a provision that is "mandatory but not compulsory . . . assuming that is a hair you can split."[256] Due to the numerous waivers and the discretion given to the USTR, this provision is far from being rigid and absolutely mandatory. A skilled USTR staff should be able to find creative ways to use the leverage of mandatory retaliation to tailor desired results while using the available discretion and waivers to avoid trade wars.

C. *The Prize Fight: Super 301 vs. Gephardt*

1. Legislative History of Super 301 and Gephardt

a. Gephardt's approach: forced reductions of trade surpluses

The original Gephardt excess trade surplus concept can be traced to H.R. 3035, a bill that passed the House in September 1985.[257] That bill required the imposition of a twenty-five percent tariff on countries that had a worldwide trade export surplus of 150 percent or a bilateral sur-

252. *March Hearing, supra* note 130, at 128.

253. 19 U.S.C.A. § 2412(c) (The USTR has the "discretion to determine whether action . . . would be effective."); *see also* Bello & Holmer, *supra* note 72, at 647.

254. Coffield, *supra* note 84, at 399.

255. *February Hearings, supra* note 44, at 114.

256. 133 CONG. REC. S4661 (daily ed. Apr. 25, 1987) (statement of Sen. Packwood).

257. H.R. 3035, 99th Cong., 1st Sess., 131 CONG. REC. H5972 (daily ed. July 18, 1985)

plus of 165 percent.[258] The surplus had to be traced to unfair practices that locked out United States exports.[259] Ambassador Yeutter called this bill a defeatist measure that told the "rest of the world . . . [w]e just can't compete anymore."[260] H.R. 3035 did not become law, but it did mark the beginning of a long odyssey.

In 1986 the House Democrats introduced H.R. 4750.[261] After extensive hearings on the bill, the House Committee on Ways and Means adopted an amendment introduced by Representative Gephardt on April 30, 1986.[262] One month later, H.R. 4750 passed as part of H.R. 4800 with the Gephardt amendment attached.[263]

The Gephardt amendment required the President to identify countries that maintained an "excessive trade surplus" linked to unfair trade practices.[264] The President would be required to negotiate, within six months, the elimination of the offensive practices and to achieve a ten percent reduction in the trade surplus.[265] If negotiations failed, the President would have to take actions specifically to reduce the surplus by ten percent. This was a watered down version of the earlier H.R. 3035 and was aimed primarily at Japan, South Korea, Taiwan, and West Germany.[266] The Senate did not handle the trade bill in 1986, so the bill died. The contenders, however, returned for a third round in 1987.

In 1987 the Democrats introduced H.R. 3, which was virtually identical to the 1986 bill. The House Ways and Means Subcommittee on Trade, however, dropped the portion of Gephardt's amendment that re-

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258. *Id.* at H5951.

259. *Id.*

260. Donnelly, *Congress Presses Ahead on Trade Restraints,* CONG. Q., Sept. 21, 1985, at 1855, 1857.

261. H.R. 4750, 99th Cong., 2d Sess. (1986); *see supra* notes 22-26 and accompanying text; *see also* Donnelly, *supra* note 260.

262. *House Democratic Leaders Push Trade Bill,* 1986 CONG. Q. ALMANAC 341 [hereinafter *Trade Bill*].

263. H.R. 4800, 99th Cong., 2d Sess., 132 CONG. REC. H2588 (daily ed. May 9, 1986). The vote was 295 to 115. 132 CONG. REC. H3225 (daily ed. May 22, 1986).

264. The bill defined an "excessive trade surplus" country as one with a trade surplus in excess of three billion dollars and whose non-petroleum exports to the United States were 175% of its imports from the United States. 132 CONG. REC. H3031 (daily ed. May 21, 1986).

265. *Id.* at H3030.

266. *Id.*; *see also Trade Bill, supra* note 262, at 342. The countries that would have qualified under Gephardt's amendment in 1986 were Brazil, Hong Kong, Italy, Japan, South Korea, Taiwan, and West Germany. Bello & Holmer, *supra* note 115, at 30 n.162.

quired mandatory percentage reductions in trade surpluses.[267] On March 25 the full Committee adopted a watered-down version of Gephardt's amendment requiring negotiations with "major trading partners" that had an "excessive trade surplus" of 175 percent with the United States and that maintained a pattern of unfair trade practices.[268] If negotiations failed, the President was required to retaliate.[269]

Representative Gephardt, dissatisfied with the Committee's version, took his fight to the floor of the House, where he introduced a tougher amendment.[270] There ensued an interesting debate in which Chairman Rostenkowski opposed Gephardt.[271] The main difference between the Committee bill and the Gephardt amendment was the enforcement mechanism of surplus reduction. The Committee bill merely required dollar-for-dollar retaliation in the first year after negotiations failed.[272] The Gephardt amendment, however, added another step: if the offending country had not eliminated its unfair trade practices and if it still had a large trade surplus, the USTR was to restrict trade with the country by an amount equal to the unfair practice or otherwise take action to achieve a ten percent reduction in the trade surplus.[273]

Several members of Congress were concerned about possible counter-retaliation against agricultural exports if the Gephardt amendment were passed and enforced.[274] One member of Congress noted that the four countries that were the primary targets of the Gephardt amendment account for about one-third of United States agricultural exports, which

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267. Bello & Holmer, *supra* note 115, at 32; Cranford, *Trade Legislation Passes First Hurdle in House,* CONG. Q., Mar. 14, 1987, at 468.

268. 1987 HOUSE REPORT, *supra* note 116, at 77-78.

269. *Id.* The Committee bill provided two exceptions to retaliation: first, where retaliation would cause substantial harm to United States economic interests; and second, where the economic harm would outweigh foreign policy objectives. Bello & Holmer, *supra* note 115, at 33.

270. 133 CONG. REC. H2755 (daily ed. Apr. 29, 1987).

271. *Id.* at H2757, H2789. The Chairman called the Gephardt amendment a "dangerous precedent." *Id.* at H2789.

272. 133 CONG. REC. H2557 (daily ed. Apr. 28, 1987) (statement of Rep. Rostenkowski).

273. 133 CONG. REC. H275 (daily ed. Apr. 29, 1987). The Gephardt amendment required the reduction of 10% of the surplus for each of the next four years. It did permit an exception to the mandatory reduction requirement if reductions would harm the United States economy or the economy of the country in question. *Id.* at H2756. There was, however, a provision granting Congress the power to override the President's use of the exception with a two-thirds vote. *Id.*

274. 133 CONG. REC. H2778 (daily ed. Apr. 29, 1987) (statement of Rep. Stenholm); *id.* at H2784 (statement of Rep. Weber); *id.* at H2788 (statement of Rep. Michel).

explained why most farm organizations opposed the amendment.[275]

The debate was flamboyant at times, with references to the amendment as "mean-spirited."[276] Despite the heated debate, the Gephardt amendment passed by a narrow margin of 218 to 214.[277]

b. The Senate alternative: reciprocity based

The Senate's efforts to deal with unfair trade barriers centered around the principle of reciprocity.[278] In 1982 Senator Danforth introduced a bill based on the concept of "reciprocal market access" for United States markets.[279] Senator Danforth was not alone in his interest in reciprocal trade bills; dozens of similar bills were introduced.[280]

Reciprocity has been the basis for American trade agreements since the 1780s.[281] The definition of "reciprocity" has traditionally meant equality of concessions received in negotiations. The Danforth-type proposals, however, intended a slightly different interpretation of the term. "Reciprocity" in the 1980s apparently means "equality of the remaining restrictions"[282] or "equivalent competitive opportunities" for United States exports.[283] The focus, then, is on trade barriers and equal market access.

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275. *Id.* at H2784 (statement of Rep. Weber) (referring to the American Farm Bureau, the National Grange, the American Soybean Association, the National Corn Growers Association, the National Association of Wheat Growers, and the National Cattlemen's Association).

276. *Id.* at H2782 (statement of Rep. Frenzel). Congressman Frenzel went on to say that the amendment "had been described as the 'Pull-up-the-gangplank-I'm-on-board' amendment. It puts on board a few relatively highly paid union groups, some noncompetitive companies and one presidential aspirant. It leaves on shore all the rest of the people and companies of the United States." *Id.*

277. *Id.* at H2789. Gephardt was only able to garner minimal support from the business community, but he did receive support from some agriculture and labor associations. *Id.* at H2763.

278. *See* Gadbaw, *supra* note 10, at 693-94 (Historically, reciprocity meant the "approximate equality of concessions accorded and trade benefits received among or between participants in a negotiation.").

279. S. 2094, 97th Cong., 2d Sess., 128 CONG. REC. S678 (daily ed. Feb. 10, 1982).

280. *See* Gadbaw, *supra* note 10, at 692 n.4 (list of reciprocal trade bills introduced in 1981 and 1982).

281. *Id.* at 702. Gadbaw cites a 1782 trade treaty between the United States and the Netherlands based upon reciprocity of concessions. He also cites treaties with Sweden and Prussia as well as the Tariff Acts of 1890 and 1897, all of which included the reciprocity principle. *Id.*

282. *Id.* at 694.

283. 128 CONG. REC. S680 (daily ed. Feb. 10, 1982) (statement of Sen. Danforth); *see also* Gadbaw, *supra* note 10, at 719.

Senator Danforth's original bill was based on a comparison of market access in the respective markets on a product-by-product basis.[284] The Senate Finance Committee replaced that concept with a standard of fair and equitable market opportunities.[285] Several of the Danforth-type provisions were enacted in 1984, but not the reciprocity provisions.[286]

On November 20, 1985, Senators Danforth, Moynihan, and thirty others introduced S. 1860,[287] which was based on the reciprocity concept. That bill, which was to become the Trade Enhancement Act, contained the first version of the precursor of Super 301. It provided for the initiation of investigations, based on the NTE report, for practices that violated section 301 and constituted a barrier to a "significant portion" of United States goods.[288] The bill, however, contained no trigger of mandatory cuts in trade surpluses.[289] Although that bill died in committee, it was the basis for the Senate's 1987 bill, S. 490.[290]

The Senate Finance Committee's 1987 bill, also based on the NTE report, required the USTR to initiate investigations of practices identified in the report that were "most likely to result in the greatest expansion of U.S. exports."[291] The bill contained a waiver of mandatory initiation if a majority of the domestic industry felt such action would be detrimental. This waiver left the USTR substantial discretion in identifying which practices to investigate. But once the USTR decided to investigate, the mandatory action section took effect.[292]

The adversarial trade provision, as the Senate provision was originally called, also required the President to initiate comprehensive negotiations regarding the practices identified in the NTE report.[293] However, the Finance Committee's proposal provided no automatic sanctions, as did the Gephardt amendment, if the negotiations failed. The Senate Finance

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284. S. 2094, 97th Cong., 2d Sess., 128 CONG. REC. S678 (daily ed. Feb. 10, 1982).

285. S. REP. No. 483, 97th Cong., 2d Sess. § 4(a)(e)(2) (1982). Gadbaw, *supra* note 10, at 740. The Committee bill retained other Danforth provisions that required an annual report of significant barriers to United States exports, *id.* § 3, imposed time limits, *id.* § 4(d), and allowed self initiation of section 301 petitions. *Id.* § 4(c).

286. For example, the National Trade Estimate report became law in 1984. 19 U.S.C.A. § 2241 (West Supp. 1989).

287. S. 1860, 99th Cong., 1st Sess., 131 CONG. REC. S32,763 (daily ed. Nov. 20, 1985).

288. *Id.* § 202(2)(A)(ii).

289. *Id.* § 202(2)(B). One of the factors to be considered was the potential increase in United States exports that could occur from the elimination of the practice. *Id.*

290. S. 490, 100th Cong., 1st Sess., 133 CONG. REC. S1915 (daily ed. Feb. 5, 1987).

291. 1987 SENATE REPORT, *supra* note 114, at 330.

292. *Id.* at 78.

293. *Id.* at 77.

Committee bill was weak compared to the Gephardt amendmednt, and many Senators realized that a push could come for something tougher.[294]

Therefore, Senators Riegle and Danforth worked on an amendment that would toughen the Committee language and be milder than the Gephardt amendment.[295] Drafting an acceptable compromise proved a difficult task. A business-labor coalition eventually formed.[296] Senator Riegle negotiated with Senator Danforth until they agreed on a compromise package. The two Senators then worked feverishly to win the support of key Senators Byrd and Dole. After much late night negotiating, the Senators reached a compromise, thus giving birth to the Super 301 amendment.[297] The sponsors made clear that this was not a "son of Gephardt" amendment,[298] and the Super 301 amendment passed by a surprising 87 to 7 vote.[299] This gave the Senate leverage to negotiate with the House on the Gephardt amendment.

The original Senate Super 301 provision required the following: First, the USTR was to identify countries with a consistent pattern of trade barriers; second, the USTR was to determine for each such country major barriers likely to have the most significant potential to increase United States exports; third, the USTR was to estimate the total amount United States exports would have increased if such barriers did not exist; fourth, the USTR was to initiate section 301 action for each identified barrier; fifth, the USTR was to negotiate the elimination of or compensation for such barriers; and finally, if no agreement was reached, the USTR was to pursue the section 301 action chosen to its conclusion, subject to any waiver.[300]

The original Super 301 measure contained a provision allowing the Committees on Finance and Ways and Means to initiate "consistent pattern" actions if they were displeased with the Administration's implementation of Super 301.[301] During debate, many questions arose over

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294. S. 490 was reported out of the Senate Finance Committee on May 7, 1987 by a vote of 19 to 1 and was included in the Omnibus Trade Act of 1987. S. 1420, 100th Cong., 1st Sess., 133 CONG. REC. S8631 (daily ed. June 24, 1987).

295. *See* Beck, *Riegle Gains a New Image in the Senate*, Jackson Citizen Patriot, Aug. 9, 1987, at C1.

296. *Id.* The coalition was referred to as the "Reigle coalition" since Senator Reigle was the point man.

297. 133 CONG. REC. S9637 (daily ed. July 10, 1987).

298. *Id.* at S9638 (statement of Sen. Byrd); *id.* at S9652 (statement of Sen. Danforth).

299. *Id.* at S9650.

300. 133 CONG. REC. S9639-40 (daily ed. July 10, 1987).

301. *Id.* at S9637; *see* Wehr & Cranford, *supra* note 7, at 877. Even this was a

the wisdom of allowing the Committees to meddle in the 301 process.[302] This provision was eventually dropped in conference.

The most controversial debate during the conference on the trade bill centered on the Gephardt-Super 301 issue, making it one of the last issues resolved by the conferees.[303] One reason for the controversy was Gephardt's presidential bid. Some said his poor showing on Super Tuesday resulted in Gephardt's amendment being dropped in conference.[304]

In the end, Super 301 prevailed in conference with only a few amendments. The first amendment based the reports and investigations on United States trade liberalization priorities instead of the NTE report.[305] Second, the conferees changed the identification of "barriers" to identification of "priority practices."[306] The conferees also changed identifying countries with a "consistent pattern" of barriers to priority countries with "numerous and pervasive practices."[307] The conference report stated that the changes were not intended to limit the scope of the original version nor reduce the number of practices identified.[308] The reason instead was to emphasize the prioritization of practices and to simplify the process of identifying priority countries. Finding "numerous and pervasive" practices is easier than proving a "consistent pattern" of barriers. Furthermore, the Administration wanted to avoid finger-pointing language.[309]

Hence, the final version will operate similarly to the original version: the USTR identifies priority countries with numerous and pervasive practices, identifies priority practices, initiates actions, negotiates agreements and continues the action to term if no agreement is reached.

2. Evaluation of the End Product

The Gephardt and Super 301 measures were symbolic of two differing approaches to the same trade problem. The Gephardt amendment

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compromise on an earlier version that would have allowed the Congress to second guess the USTR's estimates of the monetary value of the foreign trade barriers. *Id.* at S9648.

302. *Id.* at S9648, S9661.

303. Wehr, *Conferees Seek to Finish Trade Bill by April 1*, CONG. Q., Mar. 26, 1988, at 798.

304. Wehr, *Negotiations on Trade Bill Gain Momentum*, CONG. Q., Mar. 19, 1988, at 732

305. 1988 CONF. REPORT, *supra* note 117, at 578; *see* 19 U.S.C.A. § 2420(a) (West Supp. 1989).

306. 1988 CONF. REPORT, *supra* note 117, at 578; *see* 19 U.S.C.A. § 2420(a)(2)(A).

307. *Id.*

308. *Id.*

309. 133 CONG. REC. S10,300 (daily ed. July 21, 1987); *see infra* appendix A.

focused on reducing trade surpluses by an automatic enforcement trigger: a ten percent mandatory reduction in the surplus if negotiations failed. Many overlooked the fact that the Gephardt measure required a quantitative determination of the "commercial value" of the barriers and required an increase in trade equal to one hundred percent of the commercial value.[310] This would be impossible. Furthermore, it required elimination of all unfair trade practices; ninety-nine percent was not enough.[311]

The Gephardt amendment also left to the foreign country the decision how to reach the required ten percent reduction. The country could choose to reduce exports to the United States instead of removing the trade barrier to United States imports. This would cause trade contraction instead of expansion.[312] Furthermore, since Gephardt's unilateral action was based solely on the existence of a trade surplus, it would have violated most United States trade agreements—including the GATT—thus making the United States vulnerable to counter-retaliation.[313] Gephardt's amendment was intended to force the Administration to take action and to bring foreign nations to negotiate the reduction of barriers. However, any benefit of leverage that the Gephardt amendment provided was outweighed by the risks to United States trade relations, its economy, and the global economy in general.

The Gephardt amendment took an extremely protectionist approach. Some claimed that it made the mere fact of having a trade surplus an unfair trade practice, regardless of whether it was linked to actual unfair practices.[314] The Gephardt amendment was appropriately labeled a market closing measure or, as one congressman put it, "protectionism in reciprocity's clothing."[315]

The Senate's approach with Super 301 focused on unfair trade barriers, not trade balances. Super 301 was promoted as an export-oriented and results-based measure that would help open markets to United States products.[316] Super 301 required dollar-for-dollar retaliation for unfair practices maintained by countries with a pattern of such practices. But it did not take the extra step of mandating a ten percent reduction of the foreign countries' trade surplus, as did the Gephardt amendment.

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310. 133 CONG. REC. H2756 (daily ed. Apr. 29, 1987).
311. *Id.* at H2781 (statement of Rep. Frenzel).
312. Bello & Holmer, *supra* note 115, at 32.
313. *February Hearings*, *supra* note 44, at 278.
314. 133 CONG. REC. H2758 (daily ed. Apr. 29, 1987) (statement of Rep. Gibbons); *id.* at H2781 (statement of Rep. Frenzel).
315. *Id.* at H2777 (statement of Rep. Schumer).
316. 134 CONG. REC. S4683 (daily ed. Apr. 25, 1988) (statement of Sen. Danforth).

The final version of Super 301 is, however, far from perfect. Under Super 301, the USTR must identify "priority practices," including major trade barriers that have the "most significant potential to increase United States exports."[317] This rather vague language requires subjective determinations by the USTR as to what constitutes a priority practice. Senator Riegle indicated that he considered a major barrier one that keeps out at least ten to fifteen million dollars worth of exports.[318] Quantifying the dollar value of a foreign trade barrier will be more difficult than Senator Reigle apparently believes.

The Super 301 section contains some ambiguous language. It requires that any agreement reached must provide for the elimination or phasing out of the barrier "with the *expectation* that United States exports to the foreign country will, *as a result*, increase."[319] This "expectation" language sounds like a requirement. This issue was the subject of some intense questions from Senator Evans.[320] He asked what would happen if the unfair practice were eliminated and exports from the United States did not increase because other countries were more competitive or the dollar value had changed. Senator Danforth replied that "nothing" would happen, and Senator Riegle stated that Senator Evan's hypothetical example would not arise because the United States can sell more if the barriers are eliminated.[321] Danforth also explained that Super 301 does not require the attainment of a certain "market share."[322] The objective of the increased exports language was to fight the "onion peeling effect" whereby one negotiates the elimination of one barrier merely to find a different kind of barrier erected in its place.[323] Despite these assurances, it is still possible that United States exports might not increase even after the foreign country has eliminated the barrier; but Super 301 would require the USTR to continue with an investigation and possible retaliation. Senator Evan's hypothetical may not be so far-fetched, as demonstrated by the bat case in the introduction. Super 301 could require retaliation where exports do not increase after the barrier is removed, even though the foreign country is not at fault.

Super 301 requires the negotiation of agreements, but if no agreement

317. 19 U.S.C.A. § 2420(a)(1)(A) (West Supp. 1989).

318. 133 CONG. REC. S9648 (daily ed. July 10, 1987).

319. 19 U.S.C.A. § 2420(c)(1)(B) (emphasis added); *see* 1988 CONF. REPORT, *supra* note 117, at 578.

320. 133 CONG. REC. S9650-53 (daily ed. July 10, 1987).

321. *Id.* at S9651.

322. *Id.* at S9652.

323. *Id.* (statement of Sen. Danforth); *id.* at S9640 (statement of Sen. Bensten); *id.* at S9639 (statement of Sen. Byrd).

is reached or if an agreement is breached, section 301 requires mandatory retaliation.[324] Basing mandatory retaliation on unfair practices, however, does not solve all the problems with retaliation. Unilateral sanctions could violate trade agreements.[325] Furthermore, counter-retaliation, mirror legislation, negotiating flexibility, and domestic political situations remain major concerns. The saving grace of Super 301, if one can find any at all, is that all the waivers applicable to the mandatory action provision apply equally to Super 301.[326]

The final Super 301 is only marginally better than the Gephardt amendment. It is still a rather drastic measure once the priority practices are identified. Super 301 does, however, leave a skillful USTR some discretion in identifying priority practices and countries. As with most of the other provisions of section 301, the final version is a substantially watered-down version of what Congress started out with—twenty-five percent tariffs across the board.[327]

3. Implementation of Super 301 and Performance Assessment

Once the 1988 Trade Act was signed into law, the USTR staff focused on the various reports the Act required. The first step in the Super 301 process was the formulation of the NTE report, which lists the major foreign trade barriers. The NTE report was released on April 31, 1989, and was discussed at Senate hearings on May 3 by the new USTR, Carla Hills.[328]

The second step was the identification of priority practices and priority countries through an interagency process. The interagency process resulted in the usual sharp differences of opinion among Cabinet officials.[329] The Cabinet debate pitted USTR Hills and Commerce Secretary Mosbacher, who favored listing Japan, against OMB Director Richard Darman and Economic Council Chairman Michael Boskin.[330] Other possible priority countries included India, Brazil, Korea, Taiwan,

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324. 19 U.S.C.A. § 2411(a); *see also* 1988 CONF. REPORT, *supra* note 117, at 577.

325. *See supra* Part IV, section A.2.c.; *see also supra* notes 159-62 and accompanying text.

326. *See supra* Part IV, section B.2.b; *see also infra* appendix A.

327. *See supra* notes 257-58 and accompanying text.

328. *Oversight of the Trade Act of 1988: Hearings Before the Senate Committee on Finance*, 101st Cong., 1st Sess., pt. 3, at 4, 61 (1989) [hereinafter *June Hearings*]; *see Unfair Foreign Trade Practices: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989).

329. Wash. Post, May 26, 1989, at A1, col. 1.

330. *Id.*; Wash. Post, June 8, 1989, at A15, col. 1.

and the European Community.[331] Capitol Hill exerted pressure on the Administration to list several countries to demonstrate that it was serious about enforcing the new trade law.[332]

After a "fierce debate," the Cabinet decided to list Japan, India, and Brazil as priority countries.[333] In the end, Secretary of State James Baker and Treasury Secretary Nicholas Brady, who initially opposed listing Japan, sided with USTR Hills and Secretary Mosbacher, fearing political fallout if Japan were not listed.[334]

That the European Community was not included in the final list is perplexing inasmuch as the Administration had identified thirteen unfair trade barriers in Europe.[335] Many speculated that the President did not want to offend Europe on the day before he left on a European tour.[336]

South Korea and Taiwan were also able to stay off the priority list. South Korea feared being labelled an "unfair" country and thus embarked on an aggressive campaign to negotiate an acceptable package of trade concessions. At the last minute, the Korean Government agreed to cut tariffs on many items, including agricultural products, to phase out import restrictions on seventy food items, and to allow trade and advertising agencies to do business in Korea.[337] Similarly, Taiwan set forth a plan to increase consumption and imports.[338]

The listing of Japan, India, and Brazil as priority countries did not cause as much outcry as expected. The Japanese and others did express their disappointment and argued that the Super 301 process was illegal under the GATT.[339] After several weeks, the controversy subsided—at least temporarily.

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331. Wehr, *Six Countries Are Likeliest Candidates for Inclusion on Trade "Priority" List*, CONG. Q., May 20, 1989, at 1172.

332. *Id.* at 1175; Wash. Post, May 26, 1989, at A14; *see* U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON ECONOMIC POLICY AND TRADE PRACTICES: REPORT SUBMITTED TO THE HOUSE COMM. ON FOREIGN AFFAIRS AND COMM. ON WAYS AND MEANS AND THE SENTATE COMM. ON FOREIGN RELATIONS AND COMM. ON FINANCE, 101st Cong., 1st Sess. (1989).

333. Wall St. J., May 26, 1989, at A7; *see also* Wehr, *Japan, India, Brazil Cited for Import Barriers*, CONG. Q., May 27, 1989, at 1242.

334. Wash. Post, June 8, 1989, at A15; Wehr, *supra* note 333, at 1242.

335. Wall St. J., May 26, 1989, at A7; Wehr, *supra* note 333, at 1243.

336. Wall St. J., May 26, 1989, at A7; Wehr, *supra* note 333, at 1243.

337. *June Hearings*, *supra* note 328, at 63; Wehr, *supra* note 333, at 1243. The import liberalization plan will eliminate tariffs over a three year period. *Id.*

338. *June Hearings*, *supra* note 326, at 62-63; Wehr, *supra* note 333, at 1243. Taiwan set tariffs on 378 industrial items, simplified licensing procedures, and liberalized insurance and banking laws. *Id.*

339. Wash. Post, May 26, 1989, at A16; Wall St. J., May 26, 1989, at A1.

The Administration also announced plans to seek wide-ranging talks with Japan on its "structural impediments to trade."[340] The Structural Impediments Initiative (SII) is not set up within the framework of section 301. Rather, SII was proposed allegedly to reduce the number of Japanese products listed under Super 301 and to provide a broad-based approach to resolving trade problems.[341]

It is too early to make an overall assessment of Super 301. Although it appears to have produced some fruits, the real test will come when the USTR must decide whether to retaliate if negotiations fail.

D. *The New Coverage of Section 301: Additional Practices*

1. Export Targeting

The practice of export targeting by certain foreign countries has been a problem for many years.[342] Targeting practices are the new sophisticated version of the old direct subsidies practice. Targeting is a combination of actions by a foreign government directed at a particular industry in that country in order to give the industry a competitive advantage.[343] Targeting practices are market distorting. The government protects an industry by creating a risk-free environment so that the industry can more readily obtain a market share in a domestic or foreign market.[344]

Most targeting practices consist of some form of direct or indirect government assistance.[345] But while the Subsidies Code of the GATT proscribes certain export subsidies, it does not prohibit domestic subsidies.[346] Many targeting practices would not be actionable under the Subsidies Code because they would be considered domestic subsidies.

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340. *June Hearings*, *supra* note 328, at 65; Wall St. J., May 26, 1989, at A7, col. 7.

341. *Id.*; *see also* Sterngold, *U.S. Softens Its Position in Talks on Opening Up Japan's Markets*, N.Y. Times, Oct. 15, 1989, at A8, col. 1.

342. Japan targeted its steel industry in the 1950s. UNITED STATES INTERNATIONAL TRADE COMMISSION, FOREIGN INDUSTRIAL TARGETING AND ITS EFFECT ON U.S. INDUSTRIES, PHASE I: JAPAN 139 (Report to the Subcomm. on Trade of the House Comm. on Ways and Means, No. 332-162, 1983).

343. 1987 HOUSE REPORT, *supra* note 116, at 64.

344. *Id.*

345. Note, *Foreign Industrial Targeting: Section 301 of the Trade Act of 1974 as a Remedy*, 25 VA. J. INT'L L. 483, 489 (1985).

346. *Id.* at 489-91; GATT, *supra* note 71, art. XVI, para. 4 (export subsidies); *cf.* General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI and XXIII (Subsidies Code), *done* Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 18 I.L.M. 579 (1979). The Subsidies Code provides examples of permissible government assistance, including loans, research and development financing, and supplying support services or facilities. *Id.* art. 11.

Section 301 provides the appropriate mechanism by which a victim of targeting may counter targeting practices that restrict its competition in a foreign market. The 1988 Trade Act includes a new provision making "injurious export targeting actionable as an unfair practice."[347] Under the targeting section, the USTR must determine whether the practice meets the definition of export targeting.[348] The definition contains three elements. First, the USTR must find that a government scheme or plan exists, which involves a combination of coordinated actions.[349] Second, the USTR must find that targeting practices actually exist. The House report cites examples of targeting, including cartels, direction of capital to a particular industry, and protection of the home market.[350] Third, the targeting must have the actual effect of helping a particular industry become more competitive.[351] Interestingly, the final bill does not require any proof that the practice actually causes significant adverse impact on United States commerce,[352] making targeting more easily proven.

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347. 19 U.S.C.A. § 2411(d)(3)(E) (West Supp. 1989). The Act defines export targeting as "any government plan or scheme consisting of a combination of coordinated actions . . . that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise." *Id.*

348. 1988 CONF. REPORT, *supra* note 117, at 65. There must be more than mere advice provided by the government. *Id.*

349. *Id.* The 1987 Senate bill placed the targeting practice under the definition of unreasonable practices and added an illustrative list of actionable targeting practices. 1987 SENATE REPORT, *supra* note 114, at 326. The list includes protection of the home market, cartels, restrictions on technology transfer, discriminatory government procurement, export performance requirements, and subsidization. The Administration objected to the list because the list included practices that were not GATT violations. The list was dropped in conference. *Id.*

350. 1987 SENATE REPORT, *supra* note 114, at 326. This does not require a showing of intent to improve competitiveness, merely effect.

351. The 1986 House bill had provided that the President could take action against an export targeting practice if he found that a foreign country maintained such a practice and if the International Trade Commission (ITC) determined that the country's imports cause material injury. 1986 HOUSE REPORT, *supra* note 112, at 262. However, there were some objections to requiring an injury determination by the ITC because it was hard enough to prove targeting. Thus, the 1987 House bill eliminated the injury test and replaced it with a requirement that the practice place a significant burden on United States commerce. 1987 HOUSE REPORT, *supra* note 116, at 63, 360. The House bill added a provision allowing the USTR to take action whenever the targeting threatened to burden United States commerce, provided the USTR has determined there is targeting. The provision was dropped in conference. *Id.*

352. In the 1986 House bill, the USTR was required to take action unless action was not in the national economic interest and the President so reported to Congress. 1986 HOUSE REPORT, *supra* note 112, at 63. The 1987 Senate bill required mandatory retali-

Contrary to the prior House and Senate proposals, the final Act gives the USTR discretion whether to take action.[353] If action is taken, the USTR may select from the full range of options available in response to other practices,[354] provided the action selected reflects "the full benefit level of the export targeting."[355]

If the USTR determines that a targeting practice exists but nevertheless decides not to take action, the USTR must convene a panel of experts to recommend how best to promote competitiveness for that industry.[356] Based on the recommendations, the President may take administrative action, including proposing legislation.[357]

Many believed that section 301 already covered targeting practices.[358] Several cases have addressed practices that were considered targeting, including a semiconductor case against Japan,[359] a cigar case against Japan,[360] a computer case against Brazil,[361] and a steel case against Korea.[362] Hence, section 301 practice proves that targeting is actionable under 301 without modification.

The Administration opposed making targeting a specific actionable practice for several reasons. First, it asserted that singling out targeting would mean that certain practices permitted by international agreements would be unlawful.[363] This concern was vitiated somewhat when the

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ation subject to the waivers in the Senate bill for other unreasonable practices, namely, that elimination is impossible and not in the national economic interest. 1987 SENATE REPORT, *supra* note 114, at 326.

353. 1988 CONF. REPORT, *supra* note 117, at 65. He could retaliate, enter into an agreement, or take administrative action, which could include proposing legislation to improve an industry's competitive position.

354. *Id.* at 66.

355. *Id.* at 71.

356. *Id.*

357. *Id.*

358. *March Hearing, supra* note 130, at 45-46.

359. Petition of Semiconductor Ind. Ass'n. No. 301-48, 50 Fed. Reg. 28, 866 (U.S.T.R. 1985); Pres. Memo. of July 31, 1986, 3 C.F.R. 263 (1987) (approving United States-Japan semiconducter agreement); Proclamation No. 5631, 3 C.F.R. 41 (1988) (raising duties on certain Japanese imports).

360. Petition of Cigar Ass'n of America, Inc., No. 301-17, 44 Fed. Reg. 14,083 (U.S.T.R. 1979).

361. Initiation of Investigation, 50 Fed. Reg. 37,608 (U.S.T.R. 1985) (self-initiated investigation of Brazilian practices of targeting computer industry); Pres. Memo. of Oct. 6, 1986, 3 C.F.R. 270 (1987) (determining practices were unreasonable).

362. Petition of Comm. of Domestic Steel, Wire, Rope, and Speciality Cable Manufacturers, No. 301-39, 48 Fed. Reg. 20,529 (U.S.T.R. 1983).

363. *March Hearing, supra* note 130, at 45-46 (statement of Alan Holmer).

conference bill dropped the illustrative list of targeting practices.[364] The Administration was also concerned with singling out a particular practice over others.[365] But some industries that had been subject to foreign targeting felt a need to define targeting and to state specifically that targeting was actionable.[366] Many other industry groups, however, stood against affording targeting special attention.[367]

Congress eventually eliminated mandatory retaliation for targeting practices and gave the USTR discretion whether to take action. However, the risk of mirror legislation remains. A foreign country could argue that the United States has targeted its tobacco, rice, wheat, oil, and gas industries and accordingly enact mirror legislation to confound the United States.[368] The United States may find that specifically identifying targeting practices is not worth this risk.

2. Workers' Rights

The 1988 Trade Act makes it an "unreasonable" practice for foreign countries to deny workers certain enumerated rights.[369] The main sponsor of this provision was Congressman Pease, who had been advocating workers' rights for several years. In fact, he was able to attach a provision to the 1984 trade law that required countries to recognize workers' rights in order to qualify for the Generalized Systems of Preferences.[370]

The objective was to label as an unfair trade practice a country's attempts to achieve a competitive trade advantage by systematically denying basic workers' rights.[371] Thus, a section 301 action can now be brought against a country that denies these workers' rights. Congressman Pease explained that some countries are able to produce cheap exports by violating workers' rights through such means as maintaining

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364. 1988 CONF. REPORT, *supra* note 117, at 563.

365. 133 CONG. REC, S10,300 (daily ed. July 21, 1987).

366. *March Hearing*, *supra* note 130, at 57 (statement of machine tool industry); *id.* at 86 (statement of semiconductor industry).

367. *Id.* at 193 (statement of Emergency Comm. for American Trade); *id.* at 135 (statement of National Foreign Trade Council).

368. *Id.* at 46.

369. These rights include the right to associate and organize, to be free from forced labor, and to have provided standards for minimum wages, hours of work, and occupational safety. 19 U.S.C.A. § 2411(d)(3)(B)(iii) (West Supp. 1989); *see* 134 CONG. REC. H2308 (statement of Rep. Frenzel).

370. 19 U.S.C.A. §§ 2461-66; *see* Pressman, *Connecting Trade Policy to Foreign Labor Rules*, CONG. Q., Apr. 19, 1986, at 853.

371. 1987 HOUSE REPORT, *supra* note 116, at 67.

low wages and poor working conditions.[372] He felt it unfair to require United States workers to compete with Koreans who are paid far less than the average United States manufacturing wage.[373]

Many of the workers' rights listed are covered by conventions of the International Labor Organization (ILO). The United States, however, is party to only seven of the 159 ILO conventions.[374] Requiring that foreign countries comply with these standards when the United States has not ratified them may appear hypocritical. Furthermore, many believe that trade is not an appropriate vehicle for the accomplishment of such social objectives.[375]

The provision does provide exceptions for countries making overall advancement in providing workers' rights, or for a practice "not inconsistent with the level of economic development of the foreign country."[376] This waiver will give the USTR discretion to avoid taking action against developing countries. As with many provisions, this section was diluted enough so that it should not be too onerous in practice.

3. Toleration of Private Practices

The 1988 Trade Act expanded the definition of unreasonable practices to include the denial of market opportunities. This specifically includes "toleration by a foreign government of systematic anticompetitive activities by private firms or among private firms . . . that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms."[377] This calls for a novel application of section 301; it permits for the first time the application of section 301 to the toleration by a foreign country of private practices of foreign companies. In the past, section 301 had applied only to unfair trade practices of a foreign government.

This provision aims at the cartel and closed procurement practices of foreign companies that keep United States goods out of the foreign market. The new provision requires proof of three elements. First, there must be "systematic anticompetitive" behavior by a private firm that is "pervasive or egregious."[378] The practice must be shown inconsistent

372. Pressman, *supra* note 370, at 852.
373. *Id.*
374. *Id.* at 855.
375. *Comprehensive Trade Leg. Hearings, supra* note 199, at 313 (statement of Emergency Comm. for American Trade).
376. 19 U.S.C.A. § 2411(d)(3)(C)(i)(II).
377. 19 U.S.C.A. § 2411(4)(3)(B)(i)(II).
378. 1988 CONF. REPORT, *supra* note 117, at 570.

with commercial considerations, which requires a comparison of the practice to the prevailing custom and laws of that country.[379] Second, the United States must prove toleration by the foreign government of the practice.[380] Specifically, the foreign government must have failed to intervene and force the firm to stop the offensive practice. The government in such a case becomes a silent partner to the offending firm.[381] Third, there must be a burden on United States commerce, such as restricting access of United States goods to the foreign market. The USTR must consider the "degree of the effect" that the practice has on United States commerce.[382]

The committee report cites the types of sectors in which United States goods have been kept out, such as automobile parts, soda ash, and semiconductors.[383] These foreign markets have closed purchasing policies or cartels that preclude United States companies from competing.

Although this provision may open some markets to United States companies, making a foreign government's toleration of private practices actionable under section 301 is bad precedent. The United States should not attempt to regulate foreign business practices. Moreover, the new law is based on the assumption that the foreign government has such control over a company that it could require the company to change the practice. This may not be correct in all cases. In any event, the United States overlooks the existence of its own "buy American" program[384] that is likely offensive to this provision.

V. CONCLUSION

The 1988 Trade Act—which started out as a protectionist, pork barrel proposal—wound up being a fairly surprisingly coherent piece of legislation. Considering the widely divergent approaches to this legislation, the substantive content of the final product is remarkable. Congress was frustrated with large trade deficits and numerous unfair trade practices, but it was able to translate that frustration into policy. Primarily, Congress enacted accountability through the new section 301 provisions. It also succeeded in limiting the Administration's discretion in deciding whether to take action against unfair trade practices. Under the

379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.* at 569.
384. *See, e.g.*, 41 U.S.C. § 10a (1982) (materials manufactured in the United States to be acquired for public use).

mandatory retaliation section, the Administration must initiate a least some action. The new section 301 is also more regimented, because decisions now must be made under relatively strict procedures and deadlines.

Congress overhauled section 301 and transformed it into a stronger tool to open foreign markets. The mandatory action provision adds credibility to United States threats and demonstrates that it is serious about seeking the elimination of foreign trade barriers. But resentment is already growing in Japan, Korea and other countries over United States efforts to reduce barriers. They feel that these new threats of retaliation unnecessaily strain trade relations. Furthermore, having so many section 301 retaliation cases in the long run may have the opposite effect intended by Congress. Such actions will no longer be the exception but the rule, and the frequency of the actions could dilute the potency of section 301 actions while jeopardizing United States trade relations. As a result of the new procedures and the Super 301 section, dozens of cases will be initiated. A very skilled USTR staff will be needed to avoid the pitfalls in the controversial cases which doubtless will arise.

It is essential to realize that a tougher section 301 is not a panacea for our trade deficit problems. As several reports have shown, unfair trade practices account only for five to fifteen percent of the trade deficit.[385] The other eight-five percent results from macroeconomic factors and policies such as the high value of the dollar, low savings rates, and federal budget deficits that experts say alone accounts for fifty percent of the deficit.[386] Congress must spend as much time and effort addressing the budget deficit problem and other economic policies as it spent on the trade bill.

The field of international economic competition is forever changing, and the United States must adapt in order to stay competitive. While it is true that the United States must increase its productivity and reduce its budget deficit, it must also aggressively seek international markets for United States products. The United States cannot accomplish this if other countries arbitrarily deny it access to their markets. In enacting the 1988 Trade Act, Congress reasserted the principle of reciprocity of market opportunity and the notion that free trade should mean fair trade.

The new section 301 is a powerful tool that is very much a double-edged sword—it can cut down trade barriers and open markets, or it can torture United States trade relations and cause trade wars. The USTR must tread carefully on this fine line.

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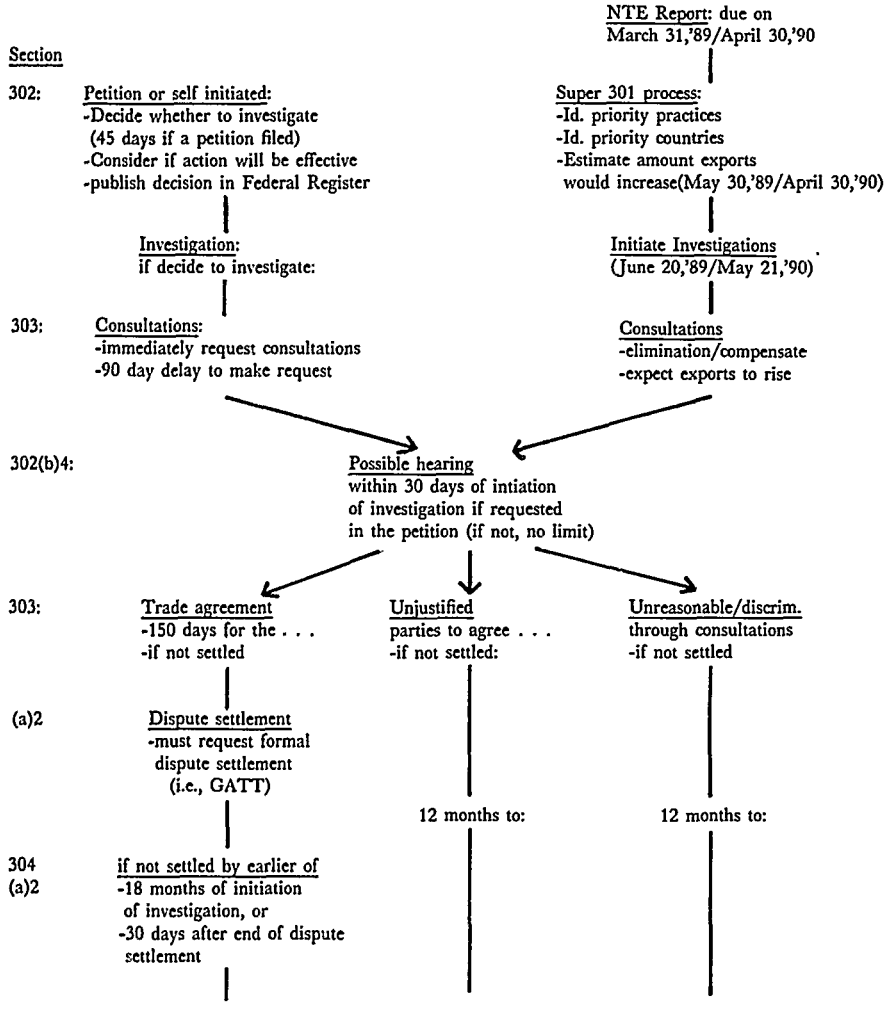
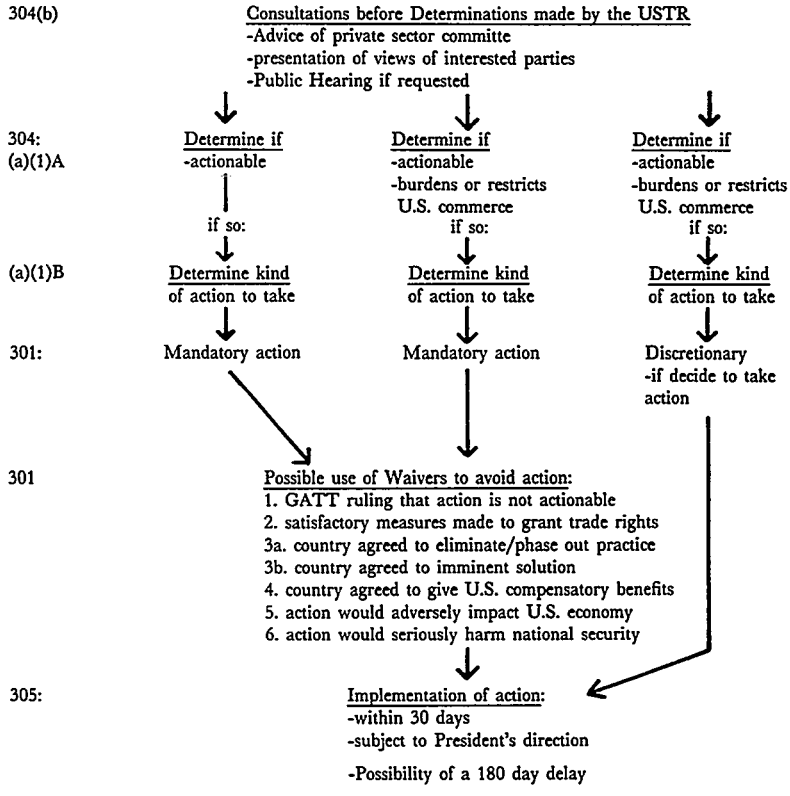
385. *See supra* notes 47, 49.
386. *Id.*

Appendix A
Section 301 Flowchart



(Flowchart continued on next page.)


304(b)
Consultations before Determinations made by the USTR
-Advice of private sector committe
-presentation of views of interested parties
-Public Hearing if requested
304:
(a)(1)A
Determine if
-actionable
Determine if
-actionable
-burdens or restricts U.S. commerce
Determine if
-actionable
-burdens or restricts U.S. commerce
if so:
if so:
if so:
(a)(1)B
Determine kind of action to take
Determine kind of action to take
Determine kind of action to take
301:
Mandatory action
Mandatory action
Discretionary
-if decide to take action
301
Possible use of Waivers to avoid action:
1. GATT ruling that action is not actionable
2. satisfactory measures made to grant trade rights
3a. country agreed to eliminate/phase out practice
3b. country agreed to imminent solution
4. country agreed to give U.S. compensatory benefits
5. action would adversely impact U.S. economy
6. action would seriously harm national security
305:
Implementation of action:
-within 30 days
-subject to President's direction
-Possibility of a 180 day delay

Appendix B
Table 1

U.S. Exports, Imports, and Merchandise Trade Balance, 1970-1986 (c.i.f. basis)
($ millions)

Year	Exports f.a.s. value	Imports c.i.f. value	Trade Balance c.i.f. basis
1970	43,176.3	42,388.6	+787.7
1971	44,086.6	48,342.0	-4,255.4
1972	49,854.0	58,862.2	-9,008.2
1973	71,865.2	73,199.4	-1,334.2
1974	99,436.9	110,874.9	-11,438.0
1975	108,855.6	105,880.1	+2,975.5
1976	116,794.1	132,497.5	-15,703.4
1977	123,181.5	160,410.8	-37,229.3
1978	145,846.9	186,044.5	-40,197.6
1979	186,362.7	222,227.5	-35,864.8
1980	225,566.1	256,984.2	-31,418.1
1981	238,715.0	273,352.2	-34,637.2
1982	216,441.6	254,884.5	-38,442.9
1983	205,638.6	269,878.2	-64,239.6
1984	223,975.8	346,364.4	-122,388.6
1985	218,814.9	352,462.9	-133,648.0
1986	227,158.5	382,295.4	-155,136.9
1987	254,121.9	424,442.1	-170,320.2

Source: G. HARRISON, TRADE AND CURRENT ACCOUNT BALANCES: STATISTICS 11 (Congressional Research Service, Issue Brief No. 1B87112, 1988).

Table 2

Balances on U.S. Trade, Services, Unilateral Transfers, and Current Account
($ billions)

Calendar year	Merchandise trade balance a/	Services balances b/	Net unilateral transfers c/	Current account balance d/
1970	2.6	3.2	-3.4	2.3
1971	-2.3	4.7	-3.9	-1.4
1972	-6.4	4.7	-4.1	-5.8
1973	0.9	10.3	-4.1	7.1
1974	-5.5	14.9	-7.4	2.0
1975	8.9	14.1	-4.9	18.1
1976	-9.5	19.0	-5.3	4.2
1977	-31.1	21.6	-5.0	-14.5
1978	-33.9	24.1	-5.6	-15.4
1979	-27.5	32.7	-6.1	-1.0
1980	-25.5	34.9	-1.6	-1.6
1981	-28.0	42.3	-7.4	6.8
1982	-36.4	36.7	-9.0	-8.7
1983	-67.1	30.3	-9.5	-46.2
1984	-112.5	17.7	-12.2	-107.0
1985	-122.1	21.1	-15.3	-116.4
1986	-144.3	18.6	-15.7	-141.4
1987	-159.2	12.0	-13.5	-160.7

a/ On a balance-of-payments basis.

b/ Includes travel, transportation, fees and royalties, insurance payments, other government and private services, and investment income.

c/ International transfers of funds, such as private gifts, pension payments and government grants for which there is no quid pro quo.

d/ The trade balance plus the service balance plus net unilateral transfers, although conceptually equal to the current account balance, may differ slightly as a result of rounding errors.

Source: G. HARRISON, TRADE AND CURRENT ACCOUNT BALANCES: STATISTICS 14 (Congressional Research Service, Issue Brief No. 1B87112, 1988).

Table 3

U.S. Exports, Imports, and Merchandise Trade Balance, 1970-1988 (Customs basis) ($ billions)

Year	Exports f.a.s. value	Imports Customs value	Trade Balance Customs basis
1970	43.2	40.0	3.2
1971	44.1	45.6	-1.5
1972	49.9	55.6	-5.7
1973	71.9	69.5	2.4
1974	99.4	102.6	-3.1
1975	108.9	98.5	10.4
1976	116.8	123.5	-6.7
1977	123.2	150.4	-27.2
1978	145.8	174.8	-28.9
1979	186.3	209.5	-23.1
1980	225.6	244.9	-19.3
1981	238.7	261.0	-22.3
1982	216.4	244.0	-27.5
1983	205.6	258.0	-52.4
1984	223.1	325.7	-101.7
1985	219.2	345.3	-126.5
1986	227.5	365.4	-138.3
1987	254.1	406.2	-152.1
1988	322.4	441.0	-118.5

Source: W. MORRISON, TRADE AND CURRENT ACCOUNT BALANCES: STATISTICS 9 (Congressional Research Service, Issue Brief No. IB87112, 1989).

Table 4

Balances on U.S. Trade, Services, Unilateral Transfers, and Current Account
($ billions)

Calendar year	Merchandise trade balance a/	Services balances b/	Net unilateral transfers c/	Current account balance d/
1970	2.6	3.2	-3.4	2.3
1971	-2.3	4.7	-3.9	-1.4
1972	-6.4	4.7	-4.1	-5.8
1973	0.9	10.3	-4.1	7.1
1974	-5.5	14.9	-7.4	2.0
1975	8.9	14.1	-4.9	18.1
1976	-9.5	19.0	-5.3	4.2
1977	-31.1	21.6	-5.0	-14.5
1978	-33.9	24.1	-5.6	-15.4
1979	-27.5	32.7	-6.1	-1.0
1980	-25.5	34.9	-7.6	-1.9
1981	-28.0	42.3	-7.5	6.8
1982	-36.4	36.7	-9.0	-8.7
1983	-67.1	30.3	-9.5	-46.2
1984	-112.5	17.7	-12.1	-107.0
1985	-122.1	21.0	-15.0	-116.4
1986	-144.5	21.0	-15.3	-138.8
1987	-160.3	19.8	-13.4	-154.0
1988	-127.2	15.3	-14.7	-126.5

a/ On a balance-of-payments basis.

b/ Includes travel, transportation, fees and royalties, insurance payments, other government and private services, and investment income.

c/ International transfers of funds, such as private gifts, pension payments and government grants for which there is no quid pro quo.

d/ The trade balance plus the service balance plus net unilateral transfers, although conceptually equal to the current account balance, may differ slightly as a result of rounding errors.

Source: W. MORRISON, TRADE AND CURRENT ACCOUNT BALANCES: STATISTICS 12 (Congressional Research Service, Issue Brief No. IB87112, 1989).

Appendix C
List of Priority Practices and Priority Countries

QUANTITATIVE IMPORT RESTRICTIONS, IMPORT BANS, AND RESTRICTIVE LICENSING

Brazil: Import Bans and Other Licensing Restrictions

Brazil maintains an import prohibition list which covers approximately 1000 items, barring U.S. exports of agricultural items and manufactured goods, including meat, dairy products, plastics, chemicals, textiles, leather products, electronic items, motor vehicles, and furniture. Brazil also uses its licensing regime to implement company and sectoral import quotas, which impede many important U.S. export items, including office machine parts, internal combustion engine parts, and electrical machinery.

The lack of transparency of Brazil's licensing system inhibits market access and creates uncertainty for U.S. exporters to Brazil. Brazil maintains these restrictions despite GATT requirements with respect to restrictive import measures imposed for balance-of-payments purposes, including the principle that such measures should not be used to protect a particular industry or sector.

EXCLUSIONARY GOVERNMENT PROCUREMENT

Japan: Ban on Government Procurement of Foreign Satellites

As part of a "long range vision on space development" Japan prohibits the procurement of foreign satellites by government entities if such a purchase interferes with "indigenous development objectives." Japan's policy of promoting indigenous production capability by prohibiting government procurement of foreign satellites applies to the entire range of satellites (broadcast, communications, earth resource, weather). The United States has long been the world leader in satellite production, and is thus denied significant market opportunities by this policy.

Japan: Exclusionary Procurement of Supercomputers

The United States supercomputer industry has been effectively denied access to the Japanese public sector market despite a 1987 agreement with Japan on supercomputers. The Government of Japan has engaged in a variety of exclusionary practices that have the effect of thwarting the open procurement process, in order to ensure purchase of supercomputers by indigenous producers.

TECHNICAL BARRIERS TO TRADE

Japan: Restrictive Standards on Wood Products

Access to Japan's market for forest products is impeded by a variety of tariff and non-tariff measures, including technical standards which favor Japanese producers. These practices include wood grading requirements which discriminate against U.S. wood products, as well as a variety of testing standards which impede U.S. exports. Japan maintains these practices despite its obligation, under the GATT Agreement on Technical Barriers to Trade, to ensure that technical regulations and standards are not adopted or applied in a way which creates unnecessary obstacles to international trade.

TRADE-RELATED INVESTMENT MEASURES

India: Trade-Related Investment Measures

Government approval is required for all new or expanded foreign investment in India. Approval is conditioned upon a number of criteria, including requirements for foreign equity participation. Where approval is granted, the Indian Government often requires investors to use locally-produced goods in the items they produce in India, rather than allowing them to import the best quality and most cost-effective products. Some investors are also required to meet export targets. Such "performance requirements" burden foreign investors, and result in significant trade distortions.

BARRIERS TO TRADE IN SERVICES

India: Insurance Market Practices

Private insurance companies are not permitted to sell insurance in India. The state-owned General Insurance Company of India and its four subsidiaries have a monopoly on sales of general insurance, and the Life Insurance Corporation of India has a monopoly on the sale of life insurance. Liberalization of India's insurance market would create significant market opportunities for U.S. insurance companies, which are competitive worldwide.

Source: Office of the United States Trade Representative.

Appendix D
Section 301 Table of Cases

Country and Product Concerned	Complaint	Disposition or Present Status
Guatemala Cargo Preference (301-1)	Delta Steamship Lines, Inc. filed a petition on July 1, 1975, alleging that Guatemala's requirement "mandating certain cargo to Guatemala or associated line carriers' constituted a discriminatory shipping practice (40 FR 29134).	STR completed public hearings on Sept. 26, 1975. Following bilateral negotiations between petitioner and National Shipping Line of Guatemala, petitioner withdrew the petition. STR terminated the investigation on June 29, 1976 (41 FR 26758).
Canada Egg Quota (301-2)	United Egg Producers and American Farm Bureau Federation filed petitions on July 17 and 21, 1975, alleging that a Canadian quota on the importation of US eggs constituted an unfair trade practice (40 FR 33749).	As a result of bilateral negotiations, Canada approximately doubled its quota for imports of US eggs. STR terminated the investigation on March 14, 1976 (41 FR 9430).
EC Supplementary Levies on Egg Imports (301-3)	Seymour Foods, Inc. filed a petition on Aug. 7, 1975, alleging that changes in the EC's supplimentary levies on imports of egg albumin impaired the ability of US exporters to contract for sales in the EC (40 FR 34649).	Following informal consultations, supplementary levies were replaced with increased import charges. However, since US exports of egg albumin steadily increased, the Section 301 Committee determined that no further action was necessary. STR terminated the investigation on July 21, 1980 (45 FR 48758).
EC Minimum Import Price & License/Surety Deposit Systems on Canned Fruits, Juices and Vegetables (301-4)	The National Canners Association filed a petition on Sept. 22, 1975, alleging that the EC's minimum import prices and an import license/surety deposit system with respect to canned fruits, juices and vegetables constituted an unfair trade practice (40 FR 44635).	STR initiated an investigation and held public hearings on Nov. 17, 1975. Consultations under GATT Art. XXIII:1(c) were held March 29, 1976. A GATT panel was appointed under Art. XXIII:2. As a result of the panel's report, the EC discontinued use of minimum import price mechanism. STR terminated the investigation on Jan. 5, 1979 (44 FR 1504).
EC Subsidies of Malt Exports (301-5)	Great Western Malting Company filed a petition on Nov. 13, 1975, alleging EC subsidies on malt to third countries (40 FR 54311).	In 1976, the EC reduced the subsidy. STR terminated the investigation on the advice on the Section 301 Committee and with petitioner's agreement on June 19, 1980 (FR 41558).
EC Export Subsidies on Wheat Flour (301-6)	Millers' National Federation filed a petiton on Dec. 1, 1975, alleging violation by the EC of GATT Art. XVI:3 in using export subsidies to gain more than an equitable share of world export trade in wheat flour (40 FR 57249).	STR initiated an investigation on Dec. 8, 1975. Consultations under GATT Art. XXII:1 were held in 1977 and 1980, and technical discussions folowed in 1981. On Aug. 1, 1980, the President directed USTR to pursue dispute settlement (45 FR 51169). The Subsidies Code dispute settlement process was initiated on Sept. 29, 1981. The Subsidies Code panel

		(established on Jan. 22, 1982) issued its conclusions on Feb. 24, 1983. The Code Committee considered the panel report on April 22, May 19, June 10, and Nov. 17, 1983. The issues raised by the panel report are the subject of Uruguay Round negotiations.
EC Variable Levy on Sugar Added to Canned Fruits and Juices (301-7)	The National Canners Association filed a petition on March 30, 1976, alleging that sudden changes in the variable levy assessed on sugars added to canned fruits and juices by the EC constitute unjustifiable and unreasonable import restrictions and impair the value of GATT-bound tariff rates to the US (41 FR 15384).	Following consultations during the MTN, the parties reached an agreement on July 11, 1979, which changed the variable levy to a fixed 2% levy on sugar added, USTR terminated the investigation with the advice of the Section 301 Committee and petitioner's agreement on June 18, 1980 (45 FR 41254).
EC Livestock Feed Mixing Requirement (301-8)	The National Soybean Processors Association and the American Soybean Association filed a petition on March 30, 1976, alleging that the EC's requirement that livestock feed be mixed with domestic nonfat milk constituted an unfair trade practice since it displaced other protein sources such as soybeans and cake imported primarily from the US (41 FR 15384).	STR initiated an investigation, and held a public hearing on June 22, 1976. The GATT panel appointed under Art. XXIII:2 met in February and March 1977. In the interim, the EC terminated its system. STR terminated the investigation on Jan. 5, 1979 (44 FR 1504).
Republic of China Tariffs on Major Home Appliances (301-9)	Charles C. Rehfeldt, Executive Vice-President of Lai Fu Trading Co., Ltd., filed a petiton on March 15, 1976, alleging unfair trade practices by the Republic of China, in the from of confiscatory tariff levels on imports of major home appliances (41 FR 15452).	STR held public hearings on May 18, 1976. The Republic of China reduced subject duties. STR terminated the investigation on Dec. 1, 1977 (42 FR 61103).
EC and Japan Diversion of Steel to US (301-10)	The American Iron and Steel Institute filed a petition on Oct. 6, 1976, alleging that the EC and Japan had engaged in an unfair trade practice by agreeing to divert significant quantities of Japanese steel exports to the US (41 FR 45628).	STR held public hearings on Dec. 9, 1976. STR terminated the investigation on Jan. 30, 1978, on the ground that there was not sufficient justification to the claim that the EC-Japan agreement created an unfair burden on the US (43 FR 3962).
EC Citrus Tariff Preferences for Certain Mediterranean Countries (301-11)	Florida Citrus Commission et al. filed petitions on Nov. 12, 1976, alleging that the EC's preferential tariffs on orange and grapefruit juices and fresh citrus fruits from certain Mediterranean countries have an adverse effect on US Citrus exports to the EC (41 FR 52567).	STR initiated an investigation on Nov. 30, 1976, and held public hearings on Jan. 25, 1977. During the MTN, the US obtained duty reductions on fresh grapefruit only. GATT Art. XXII:1 consultations were held in October 1980, followed by informal discussions. Formal consultations under GATT Art. XXIII:1 were held April 20, 1982. Conciliation efforts in Sep-

tember 1982 failed. On Nov. 2, 1982, the GATT Council agreed to establish a panel. The panel composition and terms of reference of the panel took some months to resolve. The panel met on Oct. 31 and Nov. 29, 1983, and Feb. 13 and Mar. 12, 1984. The factual portion of the panel report was submitted to the parties on Sept. 27. The full report was submitted on Dec. 14, 1984. The GATT Council considered the panel's findings and recommendations on March 12 and April 30, 1985, but the EC blocked any action. On April 30, the US considered the dispute settlement concluded. On May 10 USTR held a public hearing on the substance of our recommendations to the President (50 FR 15266). USTR transmitted his recommendation on May 30, and on June 20 the President determined that the EC practices deny benefits to the US arising under the GATT, are unreasonable and discriminatory, and consititute a burden on US commerce (50 FR 26143).

Effective July 6, the President imposed a 40% ad valorem duty on pasta products not containing egg and a 25% ad valorem duty on pasta products containing egg (50 FR 26143). The EC reacted by raising duties on lemons and walnuts imported from the U.S. effective July 8.

On July 19, USTR announced that in return for the US suspension of increased duties on imported pasta, the EC would drop its proposed duty increases, reduce EC pasta export subsidies by 45%, and take steps to increase access to the EC market for US citrus exports by Oct. 31. Because the EC did not increase our access to its citrus market by Oct. 31 as promised, the US imposed the substantially higher duties on pasta imported from the EC on Nov. 1. The EC then counter-retaliated and imposed higher duties on lemons and walnuts imported from the U.S.

		On August 10, 1986, the US and EC reached an agreement that resolved this case. The US obtained tariff concessions from the EC on citrus products. In addition, the agreement provides for EC tariff concessions on almonds and peanuts, in return for certain US tariff reductions. After negotiating this agreement, both the US and EC terminated their retaliatory duties (51 FR 30146). Subsequently the US increased the EC cheese quota (52 FR 8439) and the EC lowered its tariffs on some products. Authority to reduce US tariffs is included in the Omnibus Trade and Competitiveness Act of 1988, and was implemented by Presidential Proclamation on December 21, 1988. Finally, the US and EC agreed to negotiate a prompt settlement to the pasta dispute (see Docket No. 301-25).
Brazil, Korea and PRC Thrown Silk Agreements with Japan (301-12)	George F. Fisher, Inc. filed a petition on Feb. 14, 1977, alleging that Japanese agreements with Brazil, Korea and the PRC permitting imports of thrown silk effectively prevented the entry of such imports from the United States, and that this constituted discriminatory conduct (40 FR. 11935).	STR held a public hearing on March 29, 1977. Following the failure of accelerated discussions with Japan, the US filed a complaint under GATT XXIII:2. A dispute settlement panel heard the case in the fall, 1977. Before the GATT panel issued its report, Japan adjusted the restrictions. STR terminated the investigation on March 3, 1978 (43 FR 8876).
Japan Leather (301-13)	The Tanners Council of America filed a petition on Aug. 4, 1977, alleging violation by Japan of GATT Art. XI in imposing quantitative restrictions on imports of leather from the U.S., and excessively high tariffs (42 FR 42413).	STR initiated an investigation on Aug. 23, 1977. The US consulted with Japan under GATT Art. XXIII:1 in January 1979, which resulted in an understanding to expand the quota on imported leather. In light of this understanding, the President decided not to take retaliatory action; however, on Aug. 1, 1980 (45 FR 51171), he directed USTR to monitor implementation of the understanding. Since the results of the 1979-82 bilateral leather understanding were unsatisfactory, USTR pursued GATT dispute settlement. The US and Japan consulted under GATT Art. XXIII:1 on Jan. 27-28, March 30 and April 12, 1983. A dispute

		settlement panel under GATT Art. XXIII:2 was authorized on April 20, 1983. That panel heard the case in the fall and winter of 1983-84. In February 1984, the panel found that Japan's leather quotas violated GATT Art. XI and caused nullification or impairment of US GATT benefits. The GATT Council adopted the panel report on May 16, 1984. The US rejected as inadequate Japan's mid-1985 proposal to replace the quota by a high tariff. On Sept. 7, 1985, the President directed USTR to recommend retaliation unless the leather and leather footwear restrictions were satisfactorily resolved by Dec. 1. (See also Docket No. 301-36). In December 1985 Japan agreed to provide about $236 million in compensation through reduced (or bound) Japanese tariffs. The US raised tariffs on an estimated $24 million in imports of leather and leather goods from Japan, effective March 31, 1986 (51 FR 9435).
USSR Marine Insurance (301-14)	The American Institute of Marine Underwriters filed a petition on Nov. 10, 1977, alleging that the USSR unreasonably required that marine insurance on all trade between the US and the USSR be placed with a Soviet state insurance monopoly (43 FR 3635).	In June 1978, the President determined that the Soviet practice is unreasonable (43 FR 25212). On July 12, 1979, USTR suspended the investigation pending review of the operation of the U.S.-Soviet agreement (44 FR 40744). The suspension remains in effect (45 FR 49428).
Canada Border Broadcasting (301-15)	Certain US television licensees filed a petition on Aug. 29. 1978, alleging that certain provisions of the Canadian Income Tax Act were unreasonable in denying tax deductions to any Canadian taxpayer for advertising time purchased from a U.S. broadcaster for advertising aimed at the Canadian market, when deductions were granted for the purchase of advertising time from a Canadian broadcaster (43 FR 39610).	STR held public hearings in November 1978 and July 1980. The President determined on Aug. 1, 1980, that the most appropriate response was legislation to mirror in US law the Canadian practice (45 FR 51173). That proposal was sent to Congress on Sept. 9, 1980, and again in November 1981. Legislation was enacted on Oct. 30, 1984. Trade and Tariff Act of 1984, Sec. 232, Pub. L. No. 98-573.
EC Wheat Export Subsidies (301-16)	Great Plains Wheat, Inc. filed a petition on Nov. 2, 1978, alleging that EC export subsidies were enabling exports of wheat from the EC to displace US exports in third country markets (43 FR 59935).	STR held public hearings in February 1979, and consulted with the EC in July 1979. Both parties agreed to monitor developments in the wheat trade, exchange information, and consult further to address any problems

		that might arise. USTR terminated the investigation on Aug. 1, 1980 (45 FR 49428).
Japan Cigars (301-17)	The Cigar Association of America, Inc. filed a petition on March 14, 1979, alleging that Japan imposes unreasonable import restrictions, internal taxes or charges on imports in excess of those placed on domestic products, and discriminatory restrictions on the marketing, advertising, and distribution of imported cigars (44 FR 19083).	During panel deliberations under GATT Art. XXIII:2 in March 1980, Japan repealed its internal tax on imported cigars and applied an import duty of 60% ad valorem. Prior to completion of panel action, the US and Japan reached agreement that liberalized market restrictions and reduced the import duty. USTR terminated the investigation on Jan. 6, 1981 (46 FR 1389). GATT proceedings terminated in April 1981.
Argentina Marine Insurance (301-18)	The American Institute of Marine Underwriters filed a petition on May 25, 1979, alleging that Argentina's requirement that marine insurance on trade with Argentina be placed with an Argentine insurance firm is unreasonable and burdens US commerce (44 FR 32057).	STR initiated an investigation on July 2, 1979, and held a public hearing on Aug. 29, 1979. Upon Argentina's commitment to participate in multilateral negotiations, a goal of which was the elimination of restrictive practices in the insurance sector, USTR suspended the investigation on July 25, 1980 (45 FR 49732).
Japan Pipe Tobacco (301-19)	The Associated Tobacco Manufacturers filed a petition on Oct. 22, 1979, alleging that Japan set unreasonable prices for imported pipe tobacco and restricted its distribution and advertising (44 FR 64938).	In November 1979, USTR consolidated this case with 301-17 alleging identical practices with respect to cigars. USTR terminated the investigation on Jan. 6, 1981 (46 FR 1388).
Korea Insurance (301-20)	The American Home Assurance Company filed a petition on Nov. 5, 1979, alleging that the Republic of Korea was discriminating against petitioner by failing to issue a license permitting petitoner to write insurance policies covering marine risks; not permitting petitioner to participate in joint venture fire insurance; and failing to grant retrocessions from Korea Reinsurance Corp. to petitioner on the same basis as Korean insurance firms (44 FR 75246).	On Dec. 19, 1979, USTR initiated an investigation. On Nov. 26, 1980, USTR invited public comments on, inter alia, proposals for retaliation (45 FR 78850). Beginning in June 1980, several rounds of consultations were held, resulting in Korea's commitment to promote more open competition in the insurance market. Upon withdrawal of the petition on Dec. 19, USTR terminated the investigation on Dec. 29, 1980 (45 FR 85539). See Docket No. 301-51.
Switzerland Eyeglass Frames (301-21)	Universal Optical Co., Inc. filed a petition on Dec. 6, 1979, alleging that the Swiss Customs Service enagaged in unreasonable practices by requiring an assay to be done to determine the gold content of the trim in eyeglass frame examples before their importation (45 FR 7654).	Petitioner withdrew its petition on Nov. 10, 1980. USTR terminated the investigation on Dec. 11, 1980 (45 FR 81703).

EC Sugar Export Subsidies (301-22)	Great Western Sugar Company filed a petition on Aug. 20, 1981, alleging EC violation of GATT Art. XVI and the Subsidies Code in using export subsidies to obtain more than an equitable share of world export trade in sugar (46 FR 49697).	USTR intitiated an investigation on Oct. 5, 1981, and held a public hearing on Nov. 4, 1981. The US consulted with the EC under Art. 12:3 of Subsidies Code on Feb. 16, 1982. The conciliation phase was completed by April 30, 1982. USTR submitted a recommendation to the President on June 7, 1982. On June 28, 1982, the President directed USTR to continue international efforts to eliminate or reduce EC subsidies (47 FR 28361). On, July 29, 1987 the petitioners requested that the investigation be reactivated. USTR denied their request; agricultural export subsidies are being addressed in the Uruguay Round negotiations.
EC Poultry Export Subsidies (301-23)	The National Broiler Council filed a petition on Sept. 17, 1981, alleging EC violation of GATT Art. XVI and the Subsidies Code in using export subsidies that displace US poultry exports to third country markets (46 FR 54831).	USTR initiated an investigation on Oct. 28, 1981. Consultations with the EC under Art. 12:3 of the Subsidies Code were held Feb. 16, 1982. On June 11, the US submitted requests for information under Art. 17 of the Code to the EC and Brazil. USTR submitted a recommendation to the President on June 28, 1982. On July 12, the President directed expeditious examination of Brazilian subsidies (47 FR 30699). The US informally consulted with Brazil on Aug. 30, 1982, and additionally consulted with the EC on Oct. 7, 1982. Formal Art. 12 consultations with Brazil were held April 1, 1983, and the US met again with EC and Brazil on June 23. Since these consultations did not resolve the problem, the US requested conciliation. The Subsidies Code Committee held the first conciliation meeting on Nov. 18, 1983. Conciliation continued on April 4, May 4, June 20, and Oct. 16, 1984. No further action has taken place in the Subsidies Code Committee; agricultural export subsidies are being addressed in the Uruguay Round negotiations.
Argentina Hides (301-24)	The National Tanners' Council filed a petition on Oct. 9, 1981, alleging breach by Argentina of a U.S.-Argentina hides agreement, and unreasonable restrictions on commerce imposed by Argentine	USTR initiated an investigation on Nov. 24, 1981. The US consulted with Argentina on Feb. 23 and April 15, 1982. USTR held a public hearing on Oct. 6, 1982, on a proposed recommendation to

	hide export controls (46 FR 59353).	the President concerning termination (47 FR 40959). The US terminated the hides agreement effective Oct. 29, 1982, and the President increased the US tariff on leather imports effective Oct. 30 (47 FR 49625). Petitioner withdrew its petition on Nov. 9, 1982. USTR terminated the investigation on Nov. 16, 1982 (47 FR 52989).
EC Pasta Export Subsidies (301-25)	The National Pasta Association filed a petition on Oct. 16, 1981, alleging EC violation of GATT Art. XVI and the Subsidies Code in using pasta export subsidies, resulting in increased imports into the US (46 FR 59675).	USTR initiated an investigation on Nov. 30, 1981. Beginning on Dec. 2, 1981, the US consulted with the EC several times. On March 1, 1982, the US referred this matter to the Subsidies Code Committee for conciliation. The US later requested a dispute settlement panel, and on April 7 the Committee authorized its establishment. The panel began its work on July 12. On July 21, the President directed USTR expeditiously to complete dispute settlement (47 FR 31841). The panel met again on Oct. 8 and issued factual findings on Jan. 20, 1983. At the EC's request, an additional panel meeting was held March 29. The panel report (3-1 in favor of the U.S.) was submitted to the Subsidies Code Committee May 19. The Committee considered the report on June 9 and Nov. 18, but deferred decision on adoption of the report. In 1985 and 1986, the US increased duties on pasta imports in retaliation against the EC's discriminatory citrus tariffs (50 FR 26143, 33711; 51 FR 30146). The EC counter-retaliated by raising its duties on lemons and walnuts. See the Circus case, Docket No. 301-11. Under the agreement reached in that case on Aug. 10, 1986, both parties agreed to terminate their retaliatory duties (51 FR 30146) and to settle the pasta dispute through prompt, good faith negotiations. A tentative agreement was reached on Aug. 5, 1987, under which the EC agreed to reduce its pasta export subsidies by 27.5%, which is intended to eliminate all

		export subsidies on half the pasta exported to the US. The Agreement was signed Sept. 15, 1987. On Sept. 30, 1987, the President directed the Customs Service to exclude from entry into the US any EC pasta unless accompanied by appropriate documentation determined by USTR to be necessary to enforce the Agreement (52 FR 36897).
EC Canned Fruit Production Subsidies (301-26)	The California Cling Peach Advisory Board et al. filed a petition on Oct. 23, 1981, alleging violation by the EC of GATT Art. XVI in granting production subsidies on EC member states' canned peaches, canned pears and raisins, that displace sales of non-EC products within the EC and impair tariff bindings on those products (46 FR 61358).	USTR initiated an investigation on Dec. 10, 1981. The US consulted with the EC under GATT Art. XXIII:1 on Feb. 25, 1982. The US requested a dispute settlement panel under Art. XXIII:2 on March 31, 1982. On Aug. 17, 1982, the President directed USTR to expedite dispute settlement (47 FR 36403). The panel met on Sept. 29 and Oct. 29, 1982. The panel report was submitted to the US and EC on Nov. 21, 1983. The panel met again with the parties on Feb. 27, 1984. A revised panel report was submitted to both parties on April 27, 1984. An additional panel meeting was held on June 28. A final panel report was issued on July 20. The US requested adoption of the panel report in GATT Council metings of April 30, May 29, June 5 and July 16, but Council action was deferred because the EC was not yet ready to act on the report. On Sept. 7, 1985, the President directed USTR to recommend retaliation unless this case was resolved by Dec. 1, 1985. In December 1985 the US and the EC reached a settlement under which, in addition to subsidy reductions already implemented on canned pears, the EC agreed to phase out processing subsidies for canned peaches. In October and November 1988 USTR consulted with the EC regarding its failure to fully implement the settlement agreement. Technical talks continued in 1989 regarding EC calculation of its subsidies, and the matter was raised at Ministerial level on February 18, 1989. Since the matter remained unresolved as of

		May 1989, a new investigation was initiated. See Docket 301-71.
Austria Specialty Steel Domestic Subsidies (301-27)	The Tool and Stainless Steel Industry Committee et al. filed a petition on Dec. 2, 1981, and refiled on Jan. 12, 1982, alleging that domestic subsidies for specialty steel industries in Belgium, France, Italy, U.K., Austria, Brazil and Sweden violate the GATT and Subsidies Code, and that imports from those countries adversely affect the US industry (47 FR 10107).	USTR initiated an investigation on Feb. 26, 1982, with respectto allegations against Austria, France, Italy, Sweden, and the U.K. The US consulted informally with those governments in March 1982. USTR held a public hearing on April 14, 1982. Consultations under the Subsidies Code were held in October 1982. On Nov. 16, 1982, the President directed USTR to: (1) request the ITC to conduct an expedited investigation under section 201 of the 1974 Trade Act; (2) initiate multilateral and/or bilateral discussions aimed at eliminating all trade distortive practices in the specialty steel sector; and (3) monitor US imports of specialty steel products subject to the Sec. 201 investigation (47 FR 51717). The ITC found injury. USITC Pub. 1377 (May 1983). Effective July 20, 1983, the President imposed a combination of tariffs and quotas (48 FR 33233).
France Specialty Steel Domestic Subsidies (301-28)	See 301-27.	See 301-27.
Italy Specialty Steel Domestic Subsidies (301-29)	See 301-27.	See 301-27.
Sweden Specialty Steel Domestic Subsidies (301-30)	See 301-27.	See 301-27.
U.K. Specialty Steel Domestic Subsidies (301-31)	See 301-27.	See 301-27.
Canada Railcar Export Subsidies (301-32)	The AFL-CIO et al. filed a petition on June 3, 1982, alleging that the Canadian Government's export credit financing for subway cars to be exported to the US violates the Subsidies Code and is unreasonable and a burden on US commerce (47 FR 31764).	USTR initiated an investigation on July 19, 1982. The US had already consulted with Canada under the Subsidies Code on July 5, 1982. USTR terminated the investigation on Sept. 23, 1982, because the same allegations were the subject of a countervailing duty investigation (47 FR 42059).
Belgium Specialty Steel Domestic Subsidies (301-33)	The Tool and Stainless Steel Industry Committee et al. filed a petition on June 23, 1982, alleging that domestic subsidies for Belgian steel production violate the GATT and Subsidies Code, and that imports of Belgian steel adversely affect the US industry (47 FR 35387).	USTR initiated an investigation on Aug. 9, 1982. The US consulted under the Subsidies Code in October 1982. The Presidential determination on Nov. 16, 1982 (see 301-27 above), covers this petition as well.
Canada Front-End Loaders Duty Remissions (301-34)	The J.I. Case Company filed a petition on July 27, 1982, alleg-	USTR initiated an investigation on Oct. 28, 1982, and held public

	ing that Canada's regulations allowing remission of customs duties and sales tax on certain front-end loaders violate the GATT and Subsidies Code, are unreasonable and discriminatory and burden and restrict US commerce. Petitioner amended and refiled a petition on Sept. 13, 1982 (47 FR 51029).	hearing on Dec. 14, 1982. The US consulted with Canada under GATT Art. XXII on Dec. 21, 1982.
Brazil Non-rubber Footwear Import Restrictions (301-35)	The Footwear Industries of America, Inc. et al. filed a petition on Oct. 25, 1982, alleging that import restrictions on non-rubber footwear by the EC and the governments of France, Italy, the United Kingdom, Spain, Brazil, Japan, Taiwan and Korea deny US access to those markets, are inconsistent with the GATT, and are unreasonable and/or discriminatory and a burden on US commerce (47 FR 56428).	On Dec. 8, 1982, USTR initiated investigations of the alleged restrictive practices (other than allegations that GATT-bound tariffs are excessive) made against Brazil, Japan, Korea and Taiwan. Consultations under GATT Art. XXII were held April 4, 1983. In November 1985, Brazil offered to liberalize its import surcharge and to reduce tariffs.
Japan Non-Rubber Footwear Import Restrictions (301-36)	See 301-35	See 301-35. The US consulted on Jan. 27, 1983, and requested GATT Art. XXIII consultations in February 1984. Consultations under Art. XXIII:1 were held in April 1985. In July 1985, the US decided to proceed under Art. XXIII:2 and requested application of the conclusions reached by a dispute settlement panel in 1984 on the leather quota to the Japanese leather footwear quota as well (See 301-13). On Sept. 7, 1985, the President directed USTR to recommend retaliation unless the leather and leather footwear restrictions were satisfactorily resolved by Dec. 1. In December 1985 Japan agreed to provide an estimated $236 million in compensation through reduced (or bound) Japanese tariffs. Also the US has raised tariffs on an estimated $24 million in imports into the US of leather and leather goods from Japan (51 FR 9435).
Korea Non-Rubber Footwear Import Restrictions (301-37)	See 301-35.	See 301-35. The US and Korea consulted on Feb. 5, 1983, and in August 1983. Korea reduced tariffs on footwear items and removed all leather items from the import surveillance list.
Taiwan Non-Rubber Footwear Import Restrictions (301-38)	See 301-35.	See 301-35. The US consulted with Taiwan on Jan. 17, 1983.

		On Dec. 19, 1983, the President determined that Taiwan does not impose unfair barriers on US imports; he nevertheless directed USTR to pursue offers regarding marketing assistance for US exporters (48 FR 56561). The issues raised in the petition are no longer the subject of an investigation.
Korea Steel Wire Rope Subidies and Trademark Infringement (301-39)	The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers filed a petition on March 16, 1983, alleging that production and export of Korean steel wire rope is subsidized, that Korea limits imports of steel wire rope from Japan thereby causing diversion to the US market, and that Korean rope producers are infringing US trademarks (48 FR 20529).	USTR initiated an investigation on May 2, 1983, with respect to claims of production subsidies. USTR held a hearing on June 2, 1983, and requested consultations under the Subsidies Code. Petitioner withdrew its petition on Nov. 29, 1983, and effectice Dec. 15, 1983, USTR terminated the investigation (48 FR 55790).
Brazil Soybean Oil and Meal Subsidies (301-40)	The National Soybean Processors Association filed a petition on April 16, 1983, alleging that the governments of Argentina, Brazil, Canada, Malaysia, Protugal and Spain engage in unfair practices, including export and production subsidies and quantitive restrictions that restrict US exports of soybean oil and meal (48 FR 23947).	On May 23, 1983, USTR initiated an investigation involving Brazil, Portugal, and Spain. USTR held a public hearing on June 29 and 30. The US and Brazil consulted under Art. 12 of the Subsidies Code on Nov. 21. USTR submitted a recommendation to the President on Jan. 23, 1984; on Feb. 13, the President directed USTR to pursue dispute settlement procedures under the Subsidies Code (49 FR 5915). The US has requested additional consultations.
Portugal Soybean Oil and Meal Subsidies (301-41)	See 301-40.	The US and Portugal consulted under GATT Art. XXII on Nov. 29, 1983. In June 1984, Portugal began lifting its restrictions on soymeal imports.
Spain Soybean Oil and Meal Subsidies (301-42)	See 301-40.	The US and Spain consulted under GATT Art. XXII on Dec. 1, 1983.
Taiwan Rice Export Subsidies (301-43)	The Rice Millers Association filed a petition on July 13, 1983, which it withdrew on Aug. 26. It refiled on Sept. 29, 1983, alleging that Taiwan subsidizes exports of rice that restrict US exports and burden the US support program (48 FR 56289).	On Oct. 11, 1983, USTR initiated an investigation. Consultations were held Dec. 8-9, 1983, and Jan. 17-18 and Feb. 20-22, 1984. Based on an understanding reached during those discussions providing for limits on subsidized rice exports from Taiwan, petitioner withdrew its petition on March 9, 1984, and USTR terminated the investigation on March 22 (49 FR 10761).
Argentina Air Couriers (301-44)	The Air Courier Conference of	On Nov. 7, 1983, USTR initiated

	America filed a petition on Sept. 21, 1983, alleging that Argentina has acted unreasonably in granting exclusive control over the international air transportation of time-sensitive commercial documents to the Argentine postal system (48 FR 52664).	an investigation and requested consultations. Consultations were held March 22, 1984. USTR held a public hearing on proposals for action under Sec. 301 on Oct. 24. On Nov. 16, 1984, the President determined that Argentine practices were unreasonable and a restriction on US commerce. He directed USTR again to consult, as requested by Argentina, and to submit proposals for action under Sec. 301 within 30 days. Prior to the 30-day period, Argentina lifted its prohibition for a 90-day period (49 FR 45733). In March 1985, the restrictions were lifted, but were replaced by heavy discriminatory taxes which became the subject of renewed consultations. Following additional consultations on September 1, 1988, Argentina reduced the tax further and improved the transparency of its air courier regulations. However, consultations continued in 1989 regarding the application and level of the tax. On May 25, 1989, the U.S. and Argentina reached an agreement with respect to Argentina's fees and providing for non-discriminatory treatment of foreign air carriers in Argentina.
Taiwan Films (301-45)	The Motion Picture Exporters Association of America filed a petition on Dec. 19, 1983, alleging that Taiwan discriminates against foreign film distributors (49 FR 5404).	On Jan. 30, 1984, USTR initiated an investigation. Petitioner withdrew its petition on April 17, 1984, and USTR terminated the investigation on April 26 (49 FR 18056).
European Space Agency Satellite Launching Services (301-46)	Transpace Carriers, Inc. filed a petition on May 25, 1984, alleging that the member governments of the European Space Agency (ESA)—Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Sweden, Spain, Switzerland and the United Kingdom—and their space-related instrumentalities subsidize satellite launching services offered by Arianespace (49 FR 28643).	On July 9, 1984, USTR initiated an investigation and requested consultations with the Eropean Space Agency. Consultations were held Nov. 12-13 and Dec. 17-18, 1984, and Feb. 21-22 and May 20, 1985. The US consulted with Arianespace on May 21, 1985. On July 9, USTR submitted a recommendation to the President. On July 17, the President found that ESA's practices were not unreasonable, and terminated the investigation (50 FR 29631).
EC Triple Superphosphate	The Fertilizer Institute filed a	On Oct. 1, 1984, USTR initiated

Water Solubility Standard (301-47)	petition on Aug. 17, 1984, alleging that a technical water solubility standard for triple superphosphate adopted by the EC is inconsistent with the Standards Code.	an investigation. The US and EC consulted under the Standards Code on Dec. 5-6, 1984.
Japan Semiconductors (301-48)	The Semiconductor Industry Association filed a petition on June 14, 1985, alleging that the Japanese government has created a protective structure that acts as a major barrier to the sale of foreign semiconductors in Japan (50 FR 28866).	USTR initiated an investigation on July 11, 1985. USTR asked parties to submit comments regarding the petition by Aug. 26, 1985. The US and Japan consulted in August, September, November and December 1985, followed by technical discussions in January and February 1986, and further consultations in March, April, May, June and July. On July 31, 1986, the US and Japan reached agreement ad referendum under which Japan would increase access for US firms to the Japanese semiconductor market, and help prevent dumping of semiconductors in US and third country markets. The President approved this agreement in a determination under Sec. 301 and suspended the investigation (51 FR 27811), and the USTR signed the final agreement Sept. 2, 1986. In March 1987, the Section 301 Committee requested public comment on possible US actions in response to Japan's failure to fulfill its obligations under the semiconductor agreement (52 FR 10275). A hearing was held April 13, 1987. On April 17, the President determined that Japan had not implemented or enforced major provisions of the agreement (52 FR 13419), and in response proclaimed increased duties on imports of certain articles of Japan (i.e., certain televisions, power hand tools, and automatic data processing machines) (52 FR 13412). Effective June 16, 1987, USTR suspended increased duties on imports of 20-inch color televisions because of Japan's improved conformity with its obligations under the agreement (52 FR 22693). Effective Nov. 10, 1987, USTR suspended increased duties on imports of certain power hand tools, 18- and 19-inch color televisions,

		and low performance 16-bit desktop computers the product of Japan because of Japan's complete compliance with its "dumping" obligations under the Agreement (52 FR 216). The other sanctions proclaimed on April 17, 1987, remain in effect.
Brazil Informatics (301-49)*	On Sept. 16, 1985, USTR self-initiated an investigation at the President's direction into all aspects of Brazil's informatics policy, including investment restrictions, subsidies, and import restrictions (50 FR 37608).	After extensive discussions with US industry, the US consulted with Brazil in February, July, August, and Sept. 1986. On Oct. 6, the President determined that Brazil's informatics policy is unreasonable, and continued the case until Dec. 31, 1986. He directed the Trade Representative to notify the GATT of our intention to suspend tariff concessions for Brazil under Art. XVIII, and to effect such suspension when appropriate (51 FR 35993). On Dec. 30, the Trade Representative announced the President's determination to suspend the investigation with respect to Brazil's administration of its informatics policy and import restrictions, in light of improvement in these areas. However, because of insufficient progress to date in negotiations on related intellectual property protection and investment restrictions, the President announced he would determine the appropriate response of the US within six months unless a satisfactory resolution was reached (52 FR 1619). On Feb. 10, 1987, USTR announced a hearing and invited public comment on specified intellectual property and investment issues in this case (52 FR 4207). On June 30, 1987, the President suspended the intellectual property portion of the investigation based upon Brazilian legislative action toward enactment of a bill that would provide adequate copyright protection to computer software (52 FR 24971). He also directed USTR to continue the portion of the investigation regarding investment. On Nov. 13, 1987, the President announced his intention to prohibit imports of Brazilian in-

		formatics products and to raise duties or otherwise restrict imports of about $105 million in other Brazilian products. This action is in response to Brazil's breach of understandings regarding Brazil's market reserve policy, which furnished the basis for the President's suspension of the intellectual property portion of this investigation. Public comments were requested (52 FR 44939, 47071), and a hearing was held Dec. 17 and 18, 1987. On Feb. 29, 1988, retaliation was postponed to provide an opportunity to review Brazil's regulations to implement a software law enacted in December 1987. On June 17, 1988, USTR announced that it did not then propose to pursue retaliation, although it would monitor whether US firms obtained fair and equitable access to the Brazilian market for their software products.
Japan Tobacco Products (301-50)*	On Sept. 16, 1985, at the President's direction, USTR self-initiated an investigation of Japanese practices (including high tariffs, Japan Tobacco Institute's manufacturing monopoly, and distribution restrictions) that act as a barrier to US cigarette exports (50 FR 37609).	After discussions with US industry, on Feb. 3, 1986, USTR requested consultations with Japan. The US presented a lengthy questionnaire on Feb. 11, and held technical discussions Feb. 21. The US raised this case during Sub-Cabinet meetings on Feb. 28, and consulted in Tokyo on March 4 and on April 16-17. The US received answers to its questionnaire on March 21. The US consulted with Japan May 27-28; August 13, 18, and 28-29; Sept. 8, 9, 11, 25, 26, and 29; and Oct. 1-3. On Oct. 3, the US and Japan concluded an agreement under which Japan will reduce its tariff on cigarettes to zero, eliminate the discriminatory deferral in excise tax payment, and terminate discriminatory distribution practices. On Oct. 6, 1986, the President approved this agreement and suspended the investigation, directing that it be terminated when Japan fully implements the agreement (51 FR 35995).
Korea Insurance (301-51)*	On Sept. 16, 1985, at the President's direction, USTR self-initi-	See 301-20. The US consulted with Korea in November and

	ated an investigation of Korean practices that restrict the ability of US insurers to provide insurance services in the Korean market (50 FR 37609).	December 1985 and February, March and July 1986. On July 21, 1986, the White House announced the conclusion of an agreement with Korea that will increase US firms' access to the Korean insurance market by enabling them to underwrite both life and non-life insurance. The President approved the agreement and terminated the investigation on Aug. 14 (51 FR 29443). The final agreement was signed Aug. 28. It was amended on Sept. 10, 1987, setting forth more detailed requirements regarding insurance operations through joint ventures. In January, 1988, the US and ROK further clarified the Sept. 10 amendment to specify the terms under which some Korean firms could participate in joint ventures.
Korea Intellectual Property Rights (301-52)*	On Nov. 4, 1985, USTR self-initiated an investigation of Korea's lack of effective protection of US intellectual property rights (50 FR 45883).	The US consulted with Korea in November and December 1985 and throughout February-July 1986. On July 21, 1986, the White House announced the conclusion of an agreement with Korea that will dramatically imporve protection of intellectual property rights in Korea. The President approved the agreement and terminated the investigation on Aug. 14, 1986 (51 FR 29445). The final agreement was signed Aug. 28, 1986. Implementation of the agreement continues to be monitored, and on June 13, 1988, the Trade Representative formed an interagency task force to examine Korean practices related to obtaining and enforcing patent rights. The task force made a preliminary report to USTR in December 1988. Followup discussions are being held with the Korean Government.
Argentina Soybeans and Soybean Products (301-53)	The National Soybean Processors Association filed a petition on April 4, 1986, alleging that the differential in Argentine export taxes (higher for soybeans than for soybean products) provides Argentine crushers with an unfair cost advantage that burdens US exports in third-country mar-	USTR initiated an investigation on April 25, 1986 (51 FR 16764). Following bilateral consultations with Argentina, the President suspended this investigation on May 14, 1987, based upon Argentina's assurance that it planned to eliminate these export taxes and thus any differen-

	kets.	tial (52 FR 18685). In February 1988, Argentina reduced the export tax differential by 3 percent. However, on July 29, 1988, Argentina established a tax rebate on oil and meal exports to third countries which subsidize these products, so consultations with Argentina resumed in August 1988. The Government of Argentina only provided a few rebates under that scheme before it was suspended in December 1988. USTR continues to consult with Argentina, which is considering other options to aid its soybean crushing and exporting industry.
EC Enlargement (301-54)*	On March 31, 1986, the President announced his intention to (1) impose quotas on EC products if the EC did not remove certain quantitative restrictions on oilseeds and grains in Portugal; and (2) increase tariffs on EC products if the EC did not provide compensation for US losses resulting from the EC's imposition of variable levies on corn and sorghum imports into Spain in breach of prior tariff commitments.	On May 15, 1986, the President imposed quotas on EC imports in response to the EC's quantitative restrictions in Portugal (51 FR 18294). On Oct. 14, 1987, the level of these quota restictions was increased to avoid a more damaging effect on EC trade than is warranted by the current operation of the EC restrictions in Portugal (52 FR 38167). On July 2, 1986, an interim solution was reached with the EC with regard to the import levy restrictions in Spain. That solution provided that any shortfall in US corn, sorghum, and corn gluten feed exports to Spain below a monthly EC average of 234,000 metric tons through the remainder of 1986 would be compensated for through reduced import levy quotas in the EC. On Dec. 30, 1986, the US announced that unless the EC agreed to compensate the US satisfactorily by the end of January for $400 million in lost corn and sorghum exports to Spain, the President would be compelled to impose duties of 200% ad valorem on imports into the US of certain EC cheeses, ham, carrots, endive, white wine, brandy and gin-accounting for $400 million in EC exports to the US. The President proclaimed these tariff increases on Jan. 21, 1987, to take effect Jan. 30 (52 FR 2663).

		On Jan. 30, 1987, the US and EC settled this case. The EC agreed to ensure annual imports of corn and sorghum in Spain of 2 million and 300,000 metric tons, respectively. It also agreed to rescind its requirement in Portugal that 15 percent of the Portuguese grain market (about 400,000 metric tons) be reserved for sales from EC member countries. It further agreed to reduce duties on 26 other products (including plywood, apple and cranberry juices, and certain aluminum products), and to extend all current EC tariff bindings to Spain and Portugal. In light of these developments, the Trade Representative suspended the increased duties proclaimed Jan. 21, 1987 (52 FR 3523).
Canada Fish (301-55)	Icicle Seafoods and nine other seafood processors filed a petition on April 1, 1986, alleging that the Canadian prohibition on the export of unprocessed herring and salmon violates GATT Article XI and provides Canadian processors with an unfair cost advantage that burdens US exports in third country markets.	USTR initiated an investigation on May 16, 1986 (51 FR 19648), and requested comments on certain economic issues relating to the investigation. The US consulted with Canada under Art. XXIII:1 of the GATT Sept. 3 and Oct. 27, 1986, and presented arguments before a GATT dispute settlement panel on June 18 and July 10, 1987. The US won the case, and the favorable panel report was adopted by the GATT Council in February 1988. Canada announced that it would terminate its export restrictions by Jan. 1, 1989, but would adopt some new landing requirements. On August 30, 1988, a Federal Register notice (53 FR 33207) requested comments on the unfairness determination required under the Omnibus Trade and Competitiveness Act of 1988. In 1989 the US and Canada continued to consult on Canada's plans to introduce new landing requirements. On April 25, 1989, Canada announced the replacement of the export prohibitions with landing rquirements that the US considers inconsistent with Canada's obligations under both the GATT and the US-Canada Free Trade Agreement (FTA). On May 23, 1989, the US requested expedited dispute settle-

		ment under the FTA. The panel is expected to issue its report in September 1989.
Taiwan Customs Valuation (301-56)*	On Aug. 1, 1986, the President determined that Taiwan's use of a duty paying system to calculate customs duties violated a trade agreement and was unjustifiable and unreasonable and a burden or restriction on US commerce (51 FR 28219). He directed the Trade Representative to propose an appropriate method for retaliation.	By an exchange of letters dated Aug. 11, the Taiwan authorities agreed to take actions by Sept. 1, 1986, to abolish the duty paying schedule effective Oct. 1, 1986. USTR confirmed that Taiwan did so, and therefore advised the public that no retaliatory action would be proposed as earlier directed by the President (51 FR 37527).

Source: Office of the United States Trade Representative.