

Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974

Patricia I. Hansen

I. INTRODUCTION

As the United States trade deficit hits record levels¹ and international trade issues gain new political prominence,² the executive and legislative branches have renewed their long-running battle for control over United States trade policy.³ Currently at the center of that battle is a struggle for control of section 301 of the Trade Act of 1974,⁴ which gives the President discretionary authority to impose retaliatory measures against any foreign

1. At the end of 1985, the United States became a net debtor for the first time since before World War I. 3 Int'l Trade Rep. (BNA) 872 (July 2, 1986). The United States trade deficit reached an annual rate of \$168 billion in the first six months of 1986, compared with \$148.5 billion in 1985. Office of Trade & Investment Analysis, Int'l Trade Admin., U.S. Dept. of Commerce, *U.S. Trade Outlook*, Bus. AM., Aug. 18, 1986, at 3.

2. Seven hundred eighty two trade bills and resolutions were pending before the 99th Congress at the end of June 1986. According to one study, 248 of these contained explicit protectionist provisions, while one out of every four proposed trade restrictions for political rather than economic purposes. Only 184 were aimed at liberalizing trade. See 3 Int'l Trade Rep. (BNA) 1047 (Aug. 13, 1986); see also 3 Int'l Trade Rep. (BNA) 69-77 (Jan. 8, 1986) (describing major trade bills pending before Congress). Trade legislation continues to be a top priority with the 100th Congress. See *Democrats Make Passage of Trade Bill This Year Top Priority, Floor Votes Seen in Spring*, 4 Int'l Trade Rep. (BNA) 49 (Jan. 14, 1987); *Bentsen To Make Omnibus Trade Bill High Priority in 1987, Tough Measures Expected*, 3 Int'l Trade Rep. (BNA) 1359 (Nov. 12, 1986).

3. While the Constitution grants Congress the power to "regulate commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, the Supreme Court has held that the President possesses certain inherent powers over the conduct of foreign relations. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This ambiguous distribution of power has led to the same struggle over foreign economic affairs that exists over foreign affairs generally. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 37-65 (1972); F. WILCOX, *CONGRESS, THE EXECUTIVE, AND FOREIGN POLICY* (1971); Koh, *Congressional Controls on Presidential Trade Policy-making After I.N.S. v. Chadha*, 18 INT'L LAW & POL. 1191 (1986).

4. 19 U.S.C. §§ 2411-2416 (1982 & Supp. III 1985). 19 U.S.C. § 2411(a) provides:

If the President determines that action by the United States is appropriate —

(1) to enforce the rights of the United States under any trade agreement; or

(2) to respond to any act, policy, or practice of a foreign country or instrumentality that —

(A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;

the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

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governmental act, policy, or practice⁵ that “burdens or restricts United States commerce” and either violates international obligations or is determined by the President to be “unjustifiable, unreasonable, or discriminatory.”⁶

Section 301 is unusual not only because of the broad powers it confers upon the President,⁷ but also because it gives private individuals a statutory right to petition the government to espouse their claims in the international arena.⁸ While section 301 has not been used aggressively in the past,⁹ a renewed surge of activity under the statute¹⁰ has heightened its

5. The terms “act,” “policy” and “practice” refer to three different categories of governmental action, but will be used interchangeably in the text of this Note.

6. 19 U.S.C. § 2411(a) (1982 & Supp. III 1985).

7. 19 U.S.C. § 2411(b) (1982 & Supp. III 1985) authorizes the President to:

(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved; and

(2) impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

Section 301 also reaches farther than other United States trade laws: (1) Section 301 can be used against foreign government practices that harm U.S. exporters in third country markets; (2) Section 301 deals with a greater array of trade-distorting commercial policies, including those affecting services and investment; (3) Section 301's requirement that foreign government practices “burden[] or restrict[]” United States commerce is much lower than the “material injury” requirement of other United States trade laws; and (4) Section 301 gives the President a broader choice of remedies than other trade laws. *See infra* notes 63–64.

8. 19 U.S.C. § 2412(a) (1982 & Supp. III 1985) provides that:

Any interested person may file a petition with the United States Trade Representative (U.S.T.R.) . . . requesting the President to take action under section 2411 of this title and setting forth the allegations in support of the request. The Trade Representative shall review the allegations in the petition and, not later than 45 days after the date on which he received the petition, shall determine whether to initiate an investigation.

9. Although § 301 gives the President sweeping powers to use at his discretion, it has been used far less than other United States laws dealing with unfair foreign trade practices. During 1984, for example, three petitions for action under § 301 were filed with U.S.T.R. compared with 126 petitions filed with the Department of Commerce and the International Trade Commission under the antidumping and countervailing duty laws. *See Hearings on Section 301 of the Trade Act of 1974 Before the Senate Committee on Finance*, 99th Cong., 2d Sess. (1986) (statement of Allan I. Mendelowitz, Senior Assoc. Dir., Nat'l Sec. and Int'l Aff. Div., U.S. Gen. Accounting Off.) [hereinafter *Hearings*]. Less than fifty § 301 investigations were initiated during 1974–1985, while more than 500 antidumping and countervailing petitions were filed during 1980–1985. *See Holmer & Bello, A Remedy to Unfair Trade Practices Gets Results*, Nat'l L.J., Sept. 22, 1986, at 24.

Of the 58 § 301 investigations that have been undertaken since 1975, only 27 have been terminated or suspended pursuant to bilateral agreements or satisfactory foreign response. *See OFFICE OF U.S. TRADE REPRESENTATIVE, SECTION 301 TABLE OF CASES* (Feb. 1987) (available from U.S.T.R.) [hereinafter *SECTION 301 TABLE*]. Four petitions were withdrawn by petitioners; three resulted in negative determinations, *see infra* note 36; seven were dropped in favor of action under other U.S. trade laws. *SECTION 301 TABLE, supra*. Eleven investigations are still involved in international dispute settlement proceedings (including one case which has been pending since 1975), and three cases remain part of continuing bilateral negotiations. *Id.* Only three investigations have actually resulted in retaliatory action by the United States:

(1) Canada Border Broadcasting, 43 Fed. Reg. 39,610 (Off. U.S. Trade Rep. 1978) (initiation), 45 Fed. Reg. 51,173 (1980) (presidential determination) (President proposed legislation to mirror Canada's “unreasonable” practice of denying tax deductions to Canadian taxpayers for advertising time purchased from United States broadcast stations but directed at Canadian market; enacted by Trade

political importance. The statute has also attracted attention because of President Reagan's unprecedented decision in September 1985 to begin initiating section 301 investigations on his own motion rather than waiting for a private petitioner to trigger action under the statute.¹¹

and Tariff Act of 1984, § 232, Pub. L. No. 98-573);

(2) EC Citrus Tariff Preferences, 41 Fed. Reg. 52,567 (Off. U.S. Trade Rep. 1976) (initiation), 50 Fed. Reg. 26,143 (1985) (presidential determination), 50 Fed. Reg. 26,143 (1985) (presidential action), 51 Fed. Reg. 30,146 (1985) (termination) (President imposed substantially increased duties on European Community (EC) pasta products in response to EC preferential tariffs on citrus products from certain Mediterranean countries; EC reacted by raising duties on lemons and walnuts imported from United States; after month of negotiations, retaliatory duties were terminated pursuant to bilateral agreement). *See also* EC Pasta Export Subsidies, 46 Fed. Reg. 59,675 (1981) (initiation) (alleging that EC pasta export subsidies violate international trade agreements);

(3) Argentina Hides, 46 Fed. Reg. 59,353 (Off. U.S. Trade Rep. 1981) (initiation), 47 Fed. Reg. 49,625 (1982) (presidential determination), 47 Fed. Reg. 52,989 (1982) (termination) (President terminated United States-Argentina hides agreement and increased United States tariff on leather imports in response to Argentine hide export controls that allegedly violated that agreement).

10. Ten § 301 investigations have been initiated since September 1985, compared to two in the previous year. *See* SECTION 301 TABLE, *supra* note 9. The Administration has also been more aggressive about resolving § 301 cases: Since September 7, 1986, U.S.T.R. has reached settlements in three investigations. *See* EC Canned Fruit Production Subsidies, SECTION 301 TABLE, *supra* note 9, at 13; Japan Non-Rubber Footwear Import Restrictions, 51 Fed. Reg. 9,435 (1985); Japan Semiconductors, 51 Fed. Reg. 27,811 (1986) (discussed *infra* Section IV.C.). The United States has also settled all but one of the eight cases it has "self-initiated" since September 1985, *see infra* note 11, and reached a negotiated settlement of the Japan Semiconductor petition. *See Japan-United States: Agreement on Semi-Conductor Trade*, 26 I.L.M. 1409 (1986). *See generally* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REPORT TO CONGRESS REQUIRED BY SECTION 306 OF THE TRADE ACT OF 1974 (Jan.-June 1986) [hereinafter SECTION 306 REPORT]; Holmer & Bello, *supra* note 9.

11. A decision to initiate a § 301 "investigation" triggers a process of domestic consultation and international negotiation. *See infra* note 40. The President is also authorized to take immediate retaliatory action without such an "investigation." *See* 19 U.S.C. § 2411(d)(1) (1982 & Supp. III 1985).

Investigations under § 301 may be initiated either upon the President's own motion or upon the petition of a private party. 19 U.S.C. §§ 2411(c)(1)-(2), 2412 (1982 & Supp. III 1985). *See infra* Section II.B. Until September 1985, all investigations were initiated pursuant to petitions by private parties, usually trade associations and labor groups. *See* SECTION 301 TABLE, *supra* note 9. On September 7, 1985, however, the President announced that he would direct U.S.T.R. to initiate three § 301 investigations: an investigation of South Korean laws that block competition from American fire and life insurance companies, *see* Korea Insurance, 50 Fed. Reg. 37,609 (1985) (initiation), 51 Fed. Reg. 29,443 (1986) (terminating investigation following agreement to allow United States firms to underwrite both life and non-life insurance in Korea), an investigation of Brazilian restrictions on United States exports of computers, *see* Brazil Informatics, 50 Fed. Reg. 37,608 (1985) (initiation), 51 Fed. Reg. 35,993 (1986) (determining Brazilian practices unreasonable and directing U.S.T.R. to suspend tariff concessions to Brazil when appropriate), 52 Fed. Reg. 1619 (1987) (suspending investigation of Brazil's informatics policy and import restrictions, extending negotiations on intellectual property protection and investment restrictions); and an investigation of allegedly prohibitive Japanese tariffs on American tobacco products, *see* Japan Tobacco, 50 Fed. Reg. 37,609 (1985) (initiation), 51 Fed. Reg. 35,995 (termination pending implementation of Japanese agreement to reduce its cigarette tariff to zero and terminate discriminatory distribution practices). *See also* Korea Intellectual Property, 50 Fed. Reg. 45,883 (1985) (initiation), 51 Fed. Reg. 29,445 (1986) (terminating investigation following agreement to improve protection of intellectual property rights in South Korea) (discussed *infra* Section IV.C.); EC Enlargement, 51 Fed. Reg. 18,294 (1986) (initiation) (terminated after EC agreed to compensate United States for losses resulting from agricultural restrictions imposed after Portugal and Spain acceded to EC); Taiwan Customs Valuation, 51 Fed. Reg. 28,219 (1986), 51 Fed. Reg. 37,527 (1986) (terminated after Taiwan abolished its duty paying system); Taiwan Beer, Wine & Tobacco, 51 Fed. Reg. 39,639 (1986) (initiation), 51 Fed. Reg. 44,958 (1986) (terminated after Taiwan ceased challenged distribution practices); Canada Softwood Lumber, 52 Fed. Reg. 229 (1987) (imposing temporary duty on imports of Canadian lumber products), 52 Fed. Reg. 1311 (1987) (ter-

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Despite the Reagan Administration's increased use of section 301, a persistent belief that the executive branch should be making even greater use of the economic leverage provided by the statute¹² has led both the House and the Senate to consider new legislation to reduce Presidential discretion under the statute.¹³ These new bills include proposals to give private petitioners greater control over the resolution of their cases;¹⁴ to make initiation of section 301 investigations mandatory under specified circumstances;¹⁵ to set tighter deadlines for decisions regarding initiation

minated after Canada implemented provisions of earlier agreement). *See generally* SECTION 301 TABLE, *supra* note 9.

12. *See Yeutter Asserts Proposed Changes in Section 301 Are Unnecessary, Would Harm U.S. Interests*, 3 Int'l Trade Rep. (BNA) 940 (July 23, 1986) (citing comments by various Senators that legislation is necessary to ensure Administration will use statute more aggressively); *see also Dingell Asserts Reaction to Trade Problems by Administration Is "Naive," "Indifferent,"* 3 Int'l Trade Rep. (BNA) 1198 (Oct. 1, 1986).

13. In January, 1987, Congressman Richard Gephardt reintroduced the House "Omnibus Trade" bill (Trade & International Economic Policy Reform Act of 1986), H.R. 3, 100th Cong., 1st Sess. (1987) (originally passed as H.R. 4800, 99th Cong., 2d Sess. (1986)). Sections 112-119 of H.R. 3 contain amendments to § 301. *Id.* In February, 1985, Senator Bentsen introduced the Senate "Omnibus Trade" bill, S. 490, 100th Cong., 1st Sess., 132 CONG. REC. S1851-79 (1987). Sections 301-305 of S. 490 contain amendments to § 301. *Id.* at S1863-65; *see also* S. 1862, *incorporated as* Title II of S. 1860, 99th Cong., 1st Sess., 131 CONG. REC. S15987-88 (1985) (prior Senate attempt to amend section 301). In addition, President Reagan is planning to send a new trade bill to Congress in early 1987. *See Pine, Reagan To Seek New Power To Retaliate Against Curbs to Overseas Market Access*, WALL ST. J., Jan. 28, 1987, at 3 col. 2.

14. Section 5(b) of S. 1862 would have required that an affirmative finding of violation be followed by retaliation unless a settlement is reached that is acceptable to the petitioner and/or the domestic industry. *See* 131 CONG. REC. S15988 (1985). This provision is repeated in § 301 of S. 490; however, S. 490 would also allow the President to avoid retaliation by certifying that it would not be in the national economic interest. *See* 132 CONG. REC. S1864 (1987).

15. Section 303 of S. 490 would require U.S.T.R. to initiate § 301 cases against practices identified in its annual report on trade barriers that are (a) likely to be found to violate § 301, and (b) constitute a significant barrier to, or distortion of, trade. U.S.T.R. would be required to take into account the potential increase in United States exports were the unfair practice eliminated, the extent to which elimination of the practice would establish a precedent that is beneficial to United States exports generally, and whether initiation of an investigation would be detrimental to other efforts being made to eliminate such practices. *See* 132 CONG. REC. S1863-64 (1987). In addition, § 302 of S. 490 would require U.S.T.R. to initiate investigations of practices that are found to be part of a "consistent pattern" of market-distorting practices by a foreign government. *Id.* at S1863.

Section 115 of H.R. 3 would require initiation of an investigation when (a) consultation with affected domestic interests indicates that § 301 proceedings will likely result in expanded export opportunities, (b) other United States exports would not suffer, and (c) self-initiation is in the United States' economic interest. Section 112 would require self-initiation under the same conditions as in § 115. In addition, § 119 of H.R. 3 would require the President to achieve a reduction of at least 10% per year in the trade surpluses of countries that maintain both large surpluses with the United States and a pattern of unfair trade practices. *See* H.R. 3, 100th Cong., 1st Sess. (1987).

and retaliation;¹⁶ and to expand the statute's illustrative list of "unreasonable" practices.¹⁷

This Note criticizes each of these proposals, and argues that legislative attempts to make section 301 more effective must be based on a clear understanding of the complex right that the statute was intended to establish. Section II analyzes that right, and concludes that the statute requires a careful balancing of economic, legal, and political considerations. Section III criticizes recent legislative attempts to reduce presidential discretion, and argues that Congress should instead *restructure* the President's discretion in light of the statute's underlying economic, legal, and political goals.¹⁸ In order to ensure that executive action under section 301 is consistent with these goals, Section IV proposes that Congress amend section 301 to incorporate emerging international legal notions of unreasonableness in international trade.¹⁹

16. Section 304 of S. 490 would require a decision on unfairness within nine months of initiation, and mandatory retaliation within fifteen months of an affirmative determination, provided no settlement is reached. *See* 131 CONG. REC. S15988 (1985). The President could postpone action for 60 days beyond this deadline if he certifies to Congress that progress is being made toward eliminating the challenged practice, and could avoid retaliation entirely by certifying that retaliation would not be in the national economic interest. *Id.* President Reagan's trade bill is expected to include a proposal for a two-year limit on negotiations to settle trade disputes. *See* Pine, *supra* note 13.

17. Section 4 of S. 1862 explicitly expands § 301's list of "unreasonable" practices to include industrial targeting, restrictions on technology transfer, toleration of cartels, discriminatory government procurement, and export performance requirements. *See* 132 CONG. REC. S1865 (1987). Sections 112 and 113 of H.R. 3 expand "unreasonable" practices to include industrial targeting, denial of internationally recognized worker rights, and toleration of cartels. *See* H.R. 3, 100th Cong., 1st Sess. (1987). President Reagan's trade bill is expected to cite failure to grant "reciprocal" trade access as a ground for retaliation. *See* Pine, *supra* note 13.

18. Congressional efforts to structure presidential discretion under § 301 are reflected in two major amendments of the statute since 1974: Title IX of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (creating new Presidential authority to use section 301 to enforce United States rights under trade agreements and to respond to government practices that are inconsistent with trade agreement obligations; requiring use of trade agreement dispute settlement in trade agreement cases; changing definition of "commerce" to include all United States services explicitly; and giving President discretion to decide to retaliate against all United States trading partners on nondiscriminatory basis or solely against products or services of country engaging in unfair practice) and the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984) (adding procedural refinements; clarifying standards for action under § 301; and pronouncing Congressional intent that § 301 be used to deal with "new" trade issues such as investment barriers and adequate protection of intellectual property rights). *See* 19 U.S.C. § 2411(e)(3)-(5) (1982 & Supp. III 1985).

Section 301 is the most recent in a series of expansions of Presidential authority to retaliate against discriminatory foreign trade policies that unduly burden United States commerce. *See* J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 839-41 (1977); Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y IN INT'L BUS. 569, 573-74 & nn.14-20 (1982). Section 301 was derived from section 252(c) of the Trade Expansion Act of 1974, 19 U.S.C. § 1882 (1962), but expanded Presidential authority beyond cases involving United States agricultural exports to all cases affecting United States "commerce." It also introduced a new administrative process by which the private sector could petition the U.S.T.R. to investigate complaints of unfair practices. *See infra* notes 32-36 and accompanying text.

19. This Note will focus on § 301's provision against "unreasonable" foreign government practices, because this provision offers both the greatest potential for eliminating unfair trade barriers and the greatest need for statutory definition. *See infra* Section III.B.1.

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II. THE RIGHT ESTABLISHED BY SECTION 301

A. *Economic, Legal, and Political Elements*

Section 301 was intended to provide the President with “negotiating leverage” to “insure fair and equitable conditions for United States commerce” and “to eliminate [trade] barriers . . . and . . . distortions . . . on a reciprocal basis.”²⁰ At bottom, the right protected by section 301 is thus the *nation’s* right to take political action in pursuit of national economic interests, by negotiating international agreements that will *enforce* and *expand* the current international legal framework governing international trade.²¹ The statute’s principal provisions authorize the President to negotiate bilateral agreements with foreign governments to reduce trade barriers.²² The power to take retaliatory action was granted only in order to increase the President’s negotiating power.²³

Section 301 pursues domestic economic goals, but respects international legal and political restraints. Congress provided the President with economic leverage in order to reduce trade barriers and to advance the economic interests of the United States as an exporting nation.²⁴ But the statute also explicitly recognizes that the United States must pursue its economic goals in a way that takes account of the current international legal framework governing international trade.²⁵ Of the statute’s four categories of violations,²⁶ two are aimed at the enforcement of the nation’s

20. S. REP. NO. 1298, 93d Cong., 2d Sess. 164, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7302 [hereinafter S. REP. NO. 1298].

21. Section 301 *enforces* the international legal framework by challenging practices that are determined to be inconsistent with existing trade agreements. *See* 19 U.S.C. § 2411(a)(1)–(2)(A). Section 301 *expands* the international framework by triggering negotiation of new bilateral agreements in areas where no multilateral legal agreement has yet been reached. *See infra* note 29 and accompanying text.

22. For a general discussion of the limits on presidential authority to negotiate international agreements, *see* Koh, *supra* note 3, at 1195 n.13.

23. *See* S. REP. NO. 1298, *supra* note 20, at 7302–03 (credible threat needed to give President negotiating leverage).

24. Section 301 is flexible enough to provide import relief, but was primarily designed to promote United States exports. The primary purposes of § 301 are:

(1) to foster the economic growth of, and full employment in, the United States by expanding competitive United States exports through the achievement of commercial opportunities in foreign markets substantially equivalent to those accorded by the United States;

(2) to improve the ability of the President —

(A) to identify and to analyze barriers to (and restrictions on) United States trade and investment, and

(B) to achieve the elimination of such barriers and restrictions. . . .

Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 302, 98 Stat. 2948, 3000–01 (1984).

25. *See* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1306 (D.C. Cir. 1980) (Congress presumed to avoid conflict with international law unless plain intention appears to contrary).

26. Substantive violations of § 301 are divided into four categories. Action may be taken under § 301 against practices that are (1) contrary to international agreements; (2) unjustifiable; (3) unreasonable; or (4) discriminatory. 19 U.S.C. § 2411(a) (1982 & Supp. III 1985).

rights under existing international agreements,²⁷ while a third involves well understood international legal concepts.²⁸ The fourth category, aimed at "unreasonable" foreign practices, was included in order to authorize the negotiation of *new* agreements that establish *new* international legal norms in areas of emerging importance to the United States economy.²⁹

The statute's underlying threat of unilateral action by the United States government also makes political considerations extremely important. On the international level, the United States must recognize that foreign practices and policies reflect delicate political balances that a foreign government may be unable or unwilling to disturb. On a domestic level, the United States government must respond to its own set of political pressures from Congress, labor unions, and United States industry. In recognition of the need to accommodate these political realities, Congress granted the President broad discretion to consider political factors when deciding what action is "appropriate and feasible" to pursue statutory goals.³⁰ In order to enhance presidential discretion, the statute provides no congressional or judicial review of presidential decisions under the statute; the President is free to sacrifice the private interests at stake in an investigation in order to pursue national political, economic, or legal goals.³¹

B. *The Right of Private Petition*

Section 301 authorizes the President to take action on his own initiative³² or upon the request of a petition filed by "any interested party" with the United States Trade Representative (U.S.T.R.).³³ Unlike private

27. The most frequently cited basis for a § 301 investigation, involving foreign acts, practices and policies that are "inconsistent with" or "den[y] benefits to the United States under" any trade agreement, depends entirely on the provisions of the relevant international agreement. See 19 U.S.C. § 2411(a)(2)(A) (1982 & Supp. III 1985). "Unjustifiable" is defined as "any act, policy or practice which is in violation of, or inconsistent with, the international legal rights of the United States," 19 U.S.C. § 2411(e)(4) (1982 & Supp. III 1985), and refers primarily to agreements that provide for national or most-favored-nation treatment (such as treaties of Friendship, Commerce, and Navigation), the right of establishment, or protection of international property rights. *Id.*

28. The term "discriminatory" is defined as including "where appropriate, any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services or investment." See 19 U.S.C. § 2411(e)(5) (1982 & Supp. III 1985).

29. Section 302 of the Trade and Tariff Act of 1984 states that the statute's purposes include encouraging "the expansion of . . . international trade in services *through the negotiation of agreements* . . . which reduce or eliminate barriers to international trade in services," and enhancing "the free flow of foreign direct investment *through the negotiation of agreements* . . . which reduce or eliminate the trade distortive effects of certain investment-related measures." See Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 302, 98 Stat. 2948, 3000-01 (emphases added). The role of the unreasonableness provision is discussed *infra*, Section III.B.1.

30. 19 U.S.C. § 2411(a) (1982 & Supp. III 1985).

31. See S. REP. NO. 1298, *supra* note 20.

32. 19 U.S.C. § 2411(c)(1) (1982 & Supp. III 1985).

33. 19 U.S.C. §§ 2411(c)(2), 2412 (1982 & Supp. III 1985). The Office of the United States Trade Representative (U.S.T.R.) was established within the Executive Office of the President by 19 U.S.C. § 2171 (1982). The head of the Office (the U.S.T.R.) is appointed by the President, by and

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rights of action under other statutes,³⁴ however, section 301's right of petition does not provide a separate enforcement mechanism. The right of private petition is merely a subsidiary legal mechanism designed to enhance the executive branch's information regarding the nation's actual economic problems. Rather than providing a private right of action, section 301 merely provides an administrative procedure by which private parties can petition the United States government to act on their behalf.

Section 301's provisions for private petitions were included "in order to . . . expedite the process by which burdensome foreign restrictions can be brought to the attention of . . . the United States Government."³⁵ Given the economic, legal, and political considerations that underlie section 301, a private petitioner can thus claim little more than the right to present its case before U.S.T.R.; to have the government determine whether his complaint is in the national interest; and to give information and advice regarding any international negotiations resulting from his petition.³⁶

III. THE NEED FOR STRUCTURED PRESIDENTIAL DISCRETION

A. *The Case for Discretion*

1. *Private Petitions*

The broad national economic and foreign policy interests at stake in section 301 investigations suggest that recent proposals to give private par-

with the advice and consent of the Senate, and is removable at the pleasure of the President. *Id.* The U.S.T.R. holds the rank of Ambassador Extraordinary and Plenipotentiary and is the chief representative of the United States for all trade negotiations authorized by Congress, including those authorized by § 301. *Id.* He reports directly to the President and to Congress, advises the President and Congress on trade-related matters, and chairs the interagency trade policy committee. *Id.*

An "interested party" must have a "significant interest," and includes "a producer of a like or directly competitive product or a commercial importer or exporter of an [affected] product . . . or any person representing a significant economic interest affected by the practice complained of in the petition." 15 C.F.R. §2006.0(b) (1986). No § 301 petition has yet been rejected on grounds of inadequate interest. See Archibald, *Section 301 of the Trade Act of 1974*, in *MANUAL FOR THE PRACTICE OF INTERNATIONAL LAW* 4 (W. Ince & L. Glick, eds. 1984).

34. See, e.g., Clean Air Act, 42 U.S.C. § 7604 (1982).

35. S. REP. NO. 1298, *supra* note 20, at 7305.

36. If U.S.T.R. decides not to initiate an investigation, it is currently required only to provide the petitioner (and the public) with a written notice of its determination and the reasons behind it; petitioners have no right of appeal. See 19 U.S.C. § 2412 (a)(2)-(b)(1) (1982 & Supp. III 1985). In most cases, however, petitioners choose to withdraw in order to avoid a negative determination. See SECTION 306 REPORT, *supra* note 10 (semi-annual report describing petitions that have been withdrawn or rejected in past six months); SECTION 301 TABLE, *supra* note 9 (listing only three negative determinations: EC and Japan Diversion of Steel to U.S., 41 Fed. Reg. 45,628 (1976) (initiation), 43 Fed. Reg. 3952 (1978) (termination) (due to "insufficient justification for claim that EC-Japan agreement created unfair burden on U.S.); Taiwan Non-Rubber Footwear Import Restrictions, 47 Fed. Reg. 56,428 (1982) (initiation), 48 Fed. Reg. 58,561 (1983) (presidential determination) (finding Taiwan does not impose unfair barriers on U.S. imports); and European Space Agency Satellite Launching Services, 49 Fed. Reg. 28,643 (1984) (initiation), 50 Fed. Reg. 29,631 (1984) (termination) (finding ESA's practices not unreasonable)).

ties greater control over the resolution of investigations initiated pursuant to their petitions³⁷ are fundamentally misguided. The purpose of section 301 is to open markets and eliminate trade-distorting measures.³⁸ The government should be free to pursue settlements that optimize the interests of the United States, even if these settlements compromise an individual petitioner's interests. No single industry or petitioner should have a veto over settlements that affect diverse interests throughout the nation.

The conduct of section 301 investigations is governed by the nation's trade policy interests rather than by the individual interests of a particular private party. In order to ensure that section 301 investigations will optimize national interests, U.S.T.R. should base its decision to initiate an investigation on an *economic* evaluation of the extent to which United States trade is "burden[ed] or restrict[ed]" by the challenged practices; a *legal* evaluation of the arguments that can be raised in international negotiations and dispute settlement procedures; and a *political* evaluation of an investigation's likely effect on foreign relations and domestic politics.³⁹ In devising a negotiable solution, U.S.T.R. should again make all three evaluations.⁴⁰

Like claims espoused by the State Department,⁴¹ section 301 investiga-

37. See *supra* note 14.

38. See *supra* notes 20-24 and accompanying text.

39. Currently, U.S.T.R. is given sole authority to decide whether it has a sufficient basis for initiating an investigation under § 301. See 15 C.F.R. § 2006.0-2006.2 (1986). Petitions are evaluated in terms of the sufficiency of the information provided, as well as the likelihood of success in international negotiations and the policy implications of initiating or not initiating an investigation. See Archibald, *supra* note 33.

40. U.S.T.R. is also given broad discretion over the conduct of § 301 investigations and negotiations. U.S.T.R. is directed to "seek advice" from the petitioner, but must also consult with other sectors of society. See 19 U.S.C. § 2412(c)(2) (1982 & Supp. III 1985). U.S.T.R. must solicit written comments, hold public hearings, and consult with the members of the interagency 301 committee. 19 U.S.C. §§ 2412-13 (1982 & Supp. III 1985). Typically, the 301 committee is made up of representatives from the Departments of State, Treasury, Commerce, Agriculture, Labor, and Justice, the Office of Management and Budget, and the Council of Economic Advisers. Archibald, *supra* note 33. U.S.T.R. must also request immediate consultations with the foreign government or instrumentality named in a petition before initiating an investigation. 19 U.S.C. §§ 2412-13 (1982 & Supp. III 1985). If the petition raises issues which are covered by an international legal agreement, section 303 requires U.S.T.R. to follow the dispute settlement procedures of the agreement. *Id.* Before recommending retaliation, U.S.T.R. is expected to solicit public comments or hold public hearings and to obtain advice from private sector groups; U.S.T.R. may also request the views of the International Trade Commission as to the probable impact of the proposed action on the United States economy. 19 U.S.C. § 2414(b) (1982 & Supp. III 1985).

41. The State Department may "espouse" at the diplomatic level claims of United States citizens who have been harmed by a foreign government. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 246-49 (3d ed. 1986). For example, a United States company that has been expropriated by a foreign government may submit its claim for compensation to the State Department. The State Department, however, has complete discretion over whether to initiate negotiations and how to conduct those negotiations. The judiciary traditionally invokes the Act of State doctrine to avoid deciding expropriation cases, instead deferring to negotiations by the executive branch. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963), *on remand* 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967). *But see* *Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (Act of State doctrine not applied to cases where expropriation is

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tions should rest entirely under presidential discretion. Section 301 gives United States citizens a statutory right to request the United States government to protect their interests when market entry is denied or discouraged in a manner that the President considers unreasonable or unjust,⁴² but forces those citizens to accept their government's judgment regarding political realities and the current international legal framework. Section 301 provides a mechanism through which a private claim can percolate into the public sphere; in doing so, however, the claim must lose its individual character and become a national claim.

2. *Whether and When To Take Action*

The broad national interests at stake in section 301 investigations also counsel against recent legislative proposals seeking to establish tight deadlines and mandatory criteria for initiation or retaliation.⁴³ As Justice Sutherland argued in *United States v. Curtiss-Wright Export Corp.*,⁴⁴ "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."⁴⁵

The President must have the discretion to balance the goal of obtaining relief for a particular group or industry against other goals such as maintaining positive relations with a given country, preserving a basis for compromise in the next round of Multilateral Trade Negotiations (MTN),⁴⁶

alleged to be in violation of treaty between United States and foreign government); *see also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 712 (Tent. Draft No. 7, 1986) (final version forthcoming summer 1987) [hereinafter RESTATEMENT] (expropriation must be accompanied by "just" compensation).

42. Although § 301 is primarily designed to remove barriers to United States exports, it can also be used to provide import relief. *See supra* note 24.

43. *See supra* notes 15-16.

44. 299 U.S. 304 (1936).

45. *Id.* at 320. While there has recently been much concern that too much discretion can result in unwanted foreign entanglements, complete removal of discretion in international negotiations under § 301 could increase, rather than reduce, frictions with foreign governments.

46. The principal international legal agreement governing international trade relations is the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; *see* J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 141 (1984). GATT, which has 91 members, requires each signatory to treat the trade of all other signatories equally, prohibits most forms of protection other than customs tariffs, prohibits export subsidies on manufactured products, and limits the use of export subsidies on primary products. GATT has resulted in a series of tariff reductions, and gives its signatories the right to demand compensation if another signatory unilaterally raises its tariffs above negotiated levels. The current version of GATT is contained in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS & SELECTED DOCUMENTS (Supps. I-XXX).

GATT has also sponsored seven rounds of Multilateral Trade Negotiations (MTN) for the purpose of negotiating reductions in tariff and nontariff barriers to international trade. The last such round (the "Tokyo Round", 1973-79) resulted in a significant number of multilateral agreements

and avoiding foreign retaliation against other sectors of the American economy—especially in sectors where the United States condones practices similar to those which form the basis of a petition.

Section 301's underlying strategy of negotiation requires an acute sensitivity to the delicate political balances that lie behind the trade practices of foreign governments. Legislation setting out criteria for mandatory retaliation could very easily make United States trading partners less, not more, willing to negotiate. The threat of retaliation, not retaliation itself, has produced results in section 301 negotiations.⁴⁷ The establishment of unrealistically short deadlines for mandatory retaliation could undermine existing procedures for international dispute settlement under the General Agreement on Tariffs and Trade (GATT),⁴⁸ and could also interfere with flexible consideration of such variables as the timing of the petition, the state of the President's relations with Congress, and foreign policy developments. Presidential discretion gives the Administration the flexibility to act when the timing is right.

The President should have the same type of discretion in administering section 301 that is afforded the Attorney General in the administration of domestic laws.⁴⁹ The executive branch should retain sole discretion over decisions to initiate and resolve section 301 investigations. Its decisions should not be subject to challenge by private parties or to detailed statutory requirements. Like the Attorney General, the President must be free

covering nontariff barriers such as customs valuation, discriminatory government procurement, import licensing, technical standards, domestic subsidies, and antidumping laws. See AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 (1979). The agreements were implemented into United States law by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144. A new round of MTN negotiations (the "Uruguay Round") was formally launched on September 20, 1986. See *GATT Launches Uruguay Round as Consensus Reached on Services, Agricultural Trade*, 3 Int'l Trade Rep. (BNA) 1150 (Sept. 24, 1986); *Decision To Launch New GATT Round Is Victory for U.S., USTR Yeutter Tells Ways and Means*, 3 Int'l Trade Rep. (BNA) 1182 (Oct. 1, 1986).

47. See *Hearings*, *supra* note 9, (statement of Allan I. Mendelowitz summarizing results of 1986 General Accounting Office study on the effectiveness of actions under § 301).

48. GATT and the MTN codes negotiated under its auspices set up mechanisms to settle any disputes that arise under those agreements. See Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 1967 PROC. AM. SOC'Y OF INT'L L. 144.

49. The Attorney General, who is entrusted with enforcing the domestic laws written by Congress, is not required to answer to individuals adversely affected by his decisions. He has full discretion to select the cases the Department of Justice will bring. He may seek to expand the law to cover new situations, and may drop any specific case in favor of another case that may raise certain issues more sharply. He is also authorized to devise settlements that will advance the public interest without the expense of litigation. For a general discussion of the constitutional and policy underpinnings of the Attorney General's prosecutorial discretion in the antitrust area, see Sullivan, *Judicial Oversight of Antitrust Enforcement: Questions of Power; Questions of Wisdom*, 52 ANTITRUST L.J. 943 (1983); see also Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

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to consider the vast range of factors which determine whether a given action under section 301 is actually in the public interest.⁵⁰

B. *The Case for Structure*

1. *The Need for Statutory Guidance*

Section 301's authorization of action against "unreasonable" foreign government practices may be the statute's most powerful weapon for achieving the elimination of "unfair" distortionary commercial policies. Whereas the statute's three other categories of action⁵¹ are limited to enforcing existing international legal concepts, the "unreasonable" language in section 301 involves the negotiation of new international agreements in unsettled areas of international trade law, and thus the making of new foreign commercial policy. The "unreasonable" provision has become a central feature of the Administration's aggressive new policy under section 301,⁵² and a central focus of recent legislative proposals to amend section 301.⁵³

Despite the importance of section 301's unreasonableness provision, Congress has provided the President with no substantive direction for determining which foreign governmental practices should be found "unreasonable." A foreign practice or policy may be deemed "unreasonable" even if it is consistent with the international rights of the United States, so long as the President determines that it is "otherwise . . . unfair and inequitable."⁵⁴ The standard of fairness and equity places virtually no restrictions on what the President may consider "unreasonable,"⁵⁵ and al-

50. Factors which U.S.T.R. is uniquely competent to evaluate include the likelihood of successful negotiations, which priorities to emphasize given the limited capacities of the interagency process, and the limited tolerance of such disputes by the international community.

51. See *supra* notes 26-28 and accompanying text.

52. Of the twelve § 301 investigations initiated since 1984, nine have included claims of "unreasonable" foreign governmental practices. See SECTION 301 TABLE, *supra* note 9. All six affirmative determinations under § 301 include determinations of unreasonableness. *Id.* While the absence of statutory definitions prior to 1984 creates some difficulty in classifying pre-1984 § 301 investigations, see *supra* note 18, only twelve of the forty-five pre-1984 § 301 investigations appear to fit under the category of unreasonableness. See SECTION 301 TABLE, *supra*. Six pre-1984 investigations included allegations of unreasonableness in addition to more central allegations of treaty violation. *Id.*

53. See *supra* note 17.

54. 19 U.S.C. § 2411(e)(3) (1982 & Supp. III 1985).

55. The 1984 definitional amendments to the Trade Act of 1974 were intended to clarify the standards for action under § 301, but unfortunately have failed to do so. In addition to the "fairness and equity" language, the statute provides only an illustrative list of practices that could come within the statute, including "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) (1982 & Supp. III 1985).

The standard of unreasonableness originally suggested in the Senate report accompanying the 1974 Trade Act applied to trade practices which are "not necessarily inconsistent with trade agreements, but which nullify or impair benefits accruing to the United States under trade agreements, or which otherwise restrict or burden United States commerce." S. REP. NO. 1298, *supra* note 20. This stan-

lows the President to shape foreign commercial policy independently of Congress. It also feeds foreign perceptions that United States actions under the statute are arbitrary unilateral assaults on legitimate governmental policies, increasing the likelihood that actions under the statute will provoke foreign resistance and counter-retaliation rather than constructive negotiations.

This lack of statutory guidance is especially problematic in the context of "self-initiated" actions under the statute. In contrast with the complex procedural requirements that must be satisfied in order for private petitions to trigger executive action under the statute, section 301 authorizes the President to act on his own motion with minimal procedural requirements. The statute requires no preliminary period of consultation between private industry and U.S.T.R.,⁵⁶ no period of review during which U.S.T.R. can mediate among conflicting interests, and imposes only a limited obligation to provide an opportunity for public comments.⁵⁷ In fact, the decision to initiate an investigation may be based almost entirely on political reasons.⁵⁸ Section 301's lack of procedural safeguards for "self-initiated" investigations thus poses a significant danger that the Administration's desire to maximize political mileage may deflect negotiations away from the economic and legal considerations implicit in section 301.

dard was at once too narrow and too broad. Reference to the GATT concept of "nullification and impairment" suggested that the provision only applied to practices which clearly conflict with specific benefits such as tariff concessions, which involve reliance-inducing behavior or "bad faith" motivation. See generally Hudec, *Retaliating Against "Unreasonable" Foreign Trade Practices*, 59 MINN. L. REV. 461 (1975). Reference to practices which "otherwise restrict or burden United States commerce," on the other hand, suggests that the President may retaliate against any foreign trade practice that in some sense injures United States commerce, even though the practice is legal under international law. *Id.*

The 1984 language of "fairness and equity" implies a congressional rejection of the narrower reading of "unreasonable," but gives little guidance as to how broadly that language may be read. Actions that are specifically authorized under a trade agreement to which the United States is a party are considered *per se* reasonable. See Archibald, *supra* note 33 (citing the President's determination regarding Japanese quotas on leather imports, 45 Fed. Reg. 51,171 (1980)). But see Japan Tobacco Products, 50 Fed. Reg. 37,689 (1985) (Off. U.S. Trade Rep. initiation), 51 Fed. Reg. 35,995 (1986) (Off. U.S. Trade Rep. termination). Aside from this general rule, however, there has been little effort to give substantive legal content to the concept of unreasonableness in international trade.

56. 19 U.S.C. § 2412(c) (1982 & Supp. III 1985) (U.S.T.R. required only to consult with Section 301 Committee before deciding to "self-initiate" an investigation, and to publish notice of its decision in Federal Register).

57. 19 U.S.C. § 2411(d)(1) (1982 & Supp. III 1985) (President required to "provide an opportunity for the presentation of views" before taking action on his own motion, but allowed to waive this requirement if "he determines that expeditious action is required"). Cf. *supra* note 40.

58. For example, the first four cases initiated by U.S.T.R. on its own motion, see *supra* note 11, were clearly intended to deflect attention away from protectionist measures. See Cooper & Stokes, *Buying Time on Trade*, NAT'L J., Nov. 9, 1985, at 2524, 2528; Koh, *supra* note 3, at 1221-25. They appear to have been chosen partly on the basis of their targets—South Korea and Japan are among the most frequent targets of protectionist legislation—and partly because they addressed congressional concern with "new" trade issues (protection of intellectual property and barriers to investment) that were specifically singled out in the 1984 Trade and Tariff Act. See 19 U.S.C. § 2411 (e)(3)-(4) (1982 & Supp. III 1985).

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2. *Advantages of a Standard*

Although the President should retain ultimate discretion over his decisions under section 301, Congress should not hesitate to exercise its constitutional authority to define statutorily the way in which the President should use the tools provided by section 301.⁵⁹ In order to increase the effectiveness of section 301, Congress can and should amend the statute to include an explicit legal standard for determining when a foreign practice is sufficiently “unreasonable” to justify initiating a section 301 investigation.

Like judicial standards defining “reasonableness” in other contexts,⁶⁰ a statutory standard would guide Presidential action, apprise concerned parties of their rights, and facilitate enforcement of these rights. A clearly enunciated domestic legal standard of unreasonableness would make it more difficult for political considerations to dominate the economic and legal goals against which those political considerations must be balanced. The standard would also allow Congress to retain greater control over the development of new foreign commercial policy. Finally, the standard would enhance the President’s negotiating position at the international level, increasing the likelihood of successful settlements and decreasing the likelihood that the President will be forced to resort to costly retaliation.

The increased use and visibility of section 301 pose a significant danger that political considerations may dominate the economic and legal aspects of the investigatory process and dictate the outcome of particular cases, particularly when such cases are “self-initiated.”⁶¹ The President’s broad discretion allows him to make policy decisions without the safeguards of administrative rulemaking proceedings or the careful appellate review of a court. While Presidential discretion should not be eliminated, a statutory standard would at least provide explicit criteria for judging Presidential action, and place upon the President the burden of explaining his actions when they deviate from that standard. A statutory standard would also allow Congress to state its policy goals and exert greater influence over agreements negotiated under the “unreasonable” provision.

Finally, an amendment giving greater legal content to the concept of

59. See Koh, *supra* note 3 (discussing history and constitutional limits of congressional ability to limit President’s negotiating authority).

60. The Fourth Amendment, for example, protects United States residents from “unreasonable” search and seizure. The executive branch is not, however, left free to determine “reasonableness” on its own. It must generally obtain a court warrant certifying the reasonableness of a particular search, or demonstrate circumstances which render the warrantless search reasonable. See, e.g., *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 321 (1978) (holding that reasonableness of warrantless search depends on “specific enforcement needs and privacy guarantees” of statute being enforced). Similarly, § 301’s use of the term “unreasonable” clearly mandates that the executive should undertake a balancing of federal interests against the need for adequate notice and consistent application.

61. See *supra* notes 53–55 and accompanying text.

unreasonableness in international trade would make section 301 a more effective negotiating tool and further the provision's goal of expanding international legal agreement to new areas of international trade. A clear statement of the direction of United States trade policy would advance the current international dialogue on trade law, and would allow the President to guide his actions in a way that will most effectively use the statute in the service of consistent trade policy goals. The standard would also allow foreign governments to structure their commercial policies in ways calculated to avoid triggering United States action under section 301. To the extent that a standard of unreasonableness incorporates international legal norms,⁶² it will reduce the sting of unilateral action under section 301, reducing the likelihood of retaliation and increasing the potential for constructive negotiations.⁶³

IV. DEFINING UNREASONABLENESS

Current legislative proposals to structure section 301's provision against "unreasonable" foreign practices simply make ad hoc additions to the statute's illustrative list of "unreasonable" practices.⁶⁴ In order to ensure that executive action under section 301 is consistent with the statute's underlying goals, Congress should instead enact a statutory amendment that reinforces the statute's economic and legal objectives. The amendment should define as "unreasonable" those foreign practices that: (1) distort patterns of comparative advantage; and (2) contradict legal criteria for "reasonable" exercises of international jurisdiction. Political considerations should not enter the decisionmaking process until each of these requirements has been met.

A. *Economic Requirements: Distortion of Comparative Advantage*

In the field of international trade, the economic elements of unreasonableness should be evaluated in terms of the theory of comparative advantage, which holds that *all* countries benefit if *each* country specializes in producing the goods in which it is relatively more efficient.⁶⁵ If 1 unit of labor produces 15 tons of wheat in country A and only 10 tons of wheat

62. See *infra* Section IV.B.

63. Faced with the equally broad language of the Sherman Act, 15 U.S.C. §§ 1-7 (1982), and the Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (1982), the Department of Justice Antitrust Division published guidelines disclosing how it will decide whether or not to challenge a merger. While similar guidelines setting out U.S.T.R.'s criteria for unreasonableness would also impose greater discipline and integrity on the use of § 301, congressional dissatisfaction with the Administration's performance under § 301 suggests that a statutory amendment is more likely to serve Congress's aim of ensuring active use of the § 301 program.

64. See *supra* note 17.

65. See P. SAMUELSON, *ECONOMICS* 832-40 (12th ed. 1985).

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in country B, but produces 20 tons of steel in both countries, country A should specialize in wheat and country B should specialize in steel. If country A adopts a policy which causes it to produce more steel than it would without the policy, *both* countries will be worse off, because there will be less goods to trade.

The theory of comparative advantage suggests that the first test of unreasonableness should examine whether a foreign government practice encourages global inefficiency by denying access to goods and services that could in fact be provided more cheaply and efficiently by American firms.⁶⁶ This theory has been incorporated in other areas of United States trade law,⁶⁷ which implicitly assume that American firms are entitled to the market outcome that would result from a relatively "fair" and undistorted competitive process.⁶⁸ Like these other areas of United States trade law, section 301 should seek to neutralize the external effects of trade-distorting foreign practices or policies. The statute should be used to negotiate "fair" international legal agreements reducing the trade-distorting impact of domestic policies that are not currently regulated by international law.⁶⁹

While this test advances the United States' economic interest in promoting its exports, it also poses two significant problems. First, short-term

66. In this respect, § 301 is supplementary to United States antidumping (AD) and countervailing duty (CVD) laws. *See supra* note 7.

67. The Trade Agreements Act of 1979, for example, authorizes the imposition of a countervailing duty equal to any "net subsidy" provided by the country of origin "with respect to . . . manufacture, production or exportation" of the goods. *See* 19 U.S.C. §§ 1303, 1671-1677(g) (1982). Similarly, antidumping law imposes duties to offset sales at "less than fair value." *See* 19 U.S.C. §§ 1673-1677(g) (1982 & Supp. III 1985); *see also* Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 549-50 (1987) (characterizing antidumping and countervailing duty laws as "market-corrective," but arguing that market ideal cannot be fully implemented by such laws). Similar rules prevail in other countries as well. *See, e.g.,* Sherliker, *The Antidumping and Anti-Subsidy Regime in the EEC*, 4 THE COMPANY LAW. 25, 26 (1983); *see also* Agreement on Interpretation of Articles VI, XVI, and XXIII of the GATT ("Subsidies Code"), Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, implemented into United States law by the Trade Act of 1979, 93 Stat. 144, 147-48, 150-93 (Signatories agree to "seek to avoid . . . adversely affect[ing] the conditions of normal competition.").

68. For further discussion of the "entitlement" rationale, *see* Goetz, Granet & Schwartz, *The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17, 18 (1986).

69. The principal international legal agreements governing international trade, GATT and the MTN codes negotiated pursuant to GATT, contain no provisions dealing with two primary areas of Congressional concern: trade in services and international investment. In addition, they contain very little guidance regarding domestic economic policies which distort trade but make no distinction as to the origin or destination of goods. *See generally* F. ROESSLER, *THE SCOPE, LIMITS AND FUNCTION OF THE GATT LEGAL SYSTEM* 1, 6-7 (n.d.; available from GATT Secretariat, Geneva, Switzerland) (arguing that GATT action in this regard has largely been limited to establishment of rules governing countervailing duties to offset production subsidies abroad, and compensation due to a signatory party that has lost commercial benefit of a tariff concession as result of another party's domestic policy measures). The new Uruguay Round, however, may address many of these issues. *See General Agreement on Tariffs and Trade: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations*, 26 I.L.M. 1623 (1986).

distortions of comparative advantage may in fact be efficiency-enhancing in the longer term.⁷⁰ GATT, for example, includes a limited exception allowing governments to undertake policies which encourage the development of inefficient "infant" industries.⁷¹ This exception allows governments to compensate new firms for the external economies involved in developing new areas of efficiency, and permits nations to change their areas of comparative advantage over time.

Second, economic efficiency is not the only goal that may legitimately be pursued by sovereign nations. If there is a demand for certain other social values, governmental action which gives effect to such demands is ultimately efficiency-enhancing. For reasons of social preference, a nation may want to keep a certain portion of the population engaged in traditional sectors, even if pure private competition would result in a smaller number of persons remaining in such activities.⁷² Similarly, it may be thought desirable to maintain a level of domestic production that would assure self-sufficiency and independence from foreign suppliers.⁷³ As one pair of critics has pointed out: "These [goals] . . . can be deplored as misguided by those who disagree with them, but there is no way in principle to reject them as less legitimate than others"⁷⁴

70. The eventual gains from establishing a new industry cannot always be recouped by those who make the initial investments in the industry. For example, if labor skills are transferrable to other industries, a firm may not obtain full return on its investment in training its workers. Tariff protection is one way of compensating businesses for these external economies. See R. CAVES & R. JONES, *WORLD TRADE AND PAYMENTS* 223-24 (1981).

Market distortions can produce efficient results even in the short run, if there are short-run externalities (such as the dissemination of useful technical information to other firms), public goods by-products (such as alleviation of regional disparities), or if the industry is suffering negative effects from other kinds of legislation. See Goetz, Granet & Schwartz, *supra* note 68, at 17-18.

71. GATT article XVIII provides that developing countries may impose quantitative restrictions that are "required to promote the establishment of a particular industry with a view to raising the general standard of living of its people" provided that "no measure consistent with other provisions of this Agreement is practicable to achieve that objective." GATT, *supra* note 46, art. XVIII, paras. 2, 3, 7, 13, 22 & annex I. GATT article XVIII also permits import restrictions to be imposed by developing countries where such restrictions are "necessary" to "forestall the threat of, or to stop, serious decline in monetary reserves" or "to achieve a reasonable rate of increase in [inadequate] reserves." *Id.* at para. 9.

72. Free trade typically hurts groups that stand to lose their jobs or market share to more efficient foreign competition. Optimally, the best solution to this problem is to design a policy that will compensate these groups for their losses: the gains from trade (access to a wider range of goods and services; more efficient reallocation of productive resources; lower consumer prices) should be large enough to fully compensate for any such losses. See R. CAVES & R. JONES, *supra* note 70, at 27.

Strong political support for protectionism is often attributed to the disproportionate political influence of producer interests. People earn their income in one area, but spend it in many; thus, people are more likely to allocate their resources to influencing policies affecting them in their role as income-receivers. See F. ROESSLER, *supra* note 69, at 13-14. On the other hand, a society that is fully informed of the costs of protection might still wish to preserve forms of traditional activity such as an agricultural way of life, even at an economically inefficient cost. See Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 846 (1972).

73. See, e.g., GATT, *supra* note 46, art. XXI (establishing national security exception).

74. Schwartz & Harper, *supra* note 72, at 846.

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The entitlement of private firms to an undistorted market outcome may thus be counterbalanced by a parallel entitlement on the part of rival firms to the benefits of domestic policies that pursue public goals other than economic efficiency.⁷⁵ While the comparative advantage test may advance the United States' interest in promoting free trade, it does not address the question of whether the United States can raise section 301 challenges to the trade-distorting practices or policies of a foreign sovereign in a manner consistent with international law. That question can only be answered by looking at current international legal norms and customs regarding the proper way to balance global economic efficiency against conflicting national goals.⁷⁶

B. *Legal Requirements: Reasonable Exercise of Jurisdiction*

An effective legal standard for judging unreasonableness in the area of international trade must defer to the legitimate political and economic goals of independent national sovereigns.⁷⁷ The standard should establish a narrow goal and sense of discipline in a process that might otherwise produce a spiral of expanding political demands.⁷⁸ In order to ease the tension created by a unilateral assault on foreign trade policies and to decrease the dangers involved in initiating a section 301 investigation, the standard should incorporate international legal norms and customs.⁷⁹

Section 403 of the draft *Restatement of Foreign Relations Law*⁸⁰ lists

75. See Goetz, Granet & Schwartz, *supra* note 68, at 19.

76. While there is no single mechanism for enforcing international law, four generally accepted sources of law govern international disputes: international conventions expressly recognized by the disputing parties; international custom, "as evidence of a general practice accepted as law;" the "general principles of law recognized by civilized nations;" and, as a subsidiary means, the "teachings of the most highly qualified publicists of the various nations." STATUTE OF THE INT'L COURT OF JUSTICE, art. 38, 59 Stat. 1055, T.S. No. 993 (1945); see also RESTATEMENT, *supra* note 41, § 102. See generally L. HENKIN, R. PUGH & O. SCHACTER, INTERNATIONAL LAW: CASES & MATERIALS 35-136 (2d ed. 1987).

77. The doctrines of nonintervention and of the equality of national sovereigns support the right of independent nation-states to decide matters essentially within their domestic jurisdiction. See, e.g., U.N. CHARTER art. 2, para. 7.

78. Politics enters the § 301 process through the network of interagency committees that works with U.S.T.R. to make decisions under the statute. See *supra* note 40 and accompanying text. Each agency in this process represents different interests: foreign policy concerns (Department of State); trade policy concerns (Department of Commerce); domestic economic concerns (Office of Management and Budget, Council of Economic Advisers, Department of the Treasury); and other domestic policy concerns (Department of Agriculture, Department of Labor). The ensuing process of interagency bargaining creates a danger that negotiating demands will "spiral," seeking to solve domestic problems unrelated to the issue of the unreasonableness of a given foreign practice. For a general discussion of the role of domestic politics in international trade policy, see Destler, *United States Trade Policymaking During the Tokyo Round*, in THE POLITICS OF TRADE: UNITED STATES AND JAPANESE POLICYMAKING FOR THE GATT NEGOTIATIONS 16-19, 23-24 (M. Blaker ed. 1978).

79. Incorporation of international legal norms is also consistent with § 301's general legislative intent to respect international law. See *supra* notes 23-29.

80. RESTATEMENT, *supra* note 41, § 403 (a)-(h).

eight factors to be considered in determining whether a nation's exercise of jurisdiction is "unreasonable."⁸¹ Although these factors are primarily intended to define the permissible scope of a nation's exercise of prescriptive jurisdiction,⁸² this Note suggests that they can also be used to delimit the permissible scope of a nation's *challenges* of foreign practices. Any country should have the right to challenge a foreign policy that is implemented in a manner that is an "unreasonable" exercise of prescriptive jurisdiction, so long as negotiations are limited to seeking modifications in foreign regulations or practices to eliminate their "unreasonable" external effects. Section 301 can be viewed as merely establishing the domestic statutory framework through which the United States will exercise this international legal right.

The eight *Restatement* factors suggest that a nation has exercised "unreasonable" jurisdiction if (1) its practice or policy has "substantial, direct and foreseeable" external effects harming United States citizens or United States policies,⁸³ and (2) the practice violates or threatens the international

81. The eight factors are:

- (a) the extent to which the activity (i) takes place within the regulating state or (ii) has substantial, direct and foreseeable effect upon or in the regulating state;
- (b) the connections between the regulating state and the persons principally . . . [affected by] the law or regulation . . . ;
- (c) . . . the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of the regulation in question to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by other states.

Id.

82. Section 403 sets forth limitations on a nation-state's exercise of jurisdiction to prescribe law. Nation-states may claim either prescriptive jurisdiction (the right to project policies regulating actors and activities), jurisdiction to adjudicate, or jurisdiction to enforce. *See* RESTATEMENT, *supra* note 41, § 401; *see also* *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 921-22 (D.C. Cir. 1984) (summarizing bases of concurrent prescriptive jurisdiction); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F. 2d 597, 608-15 (9th Cir. 1976) (summarizing principles used in determining extraterritorial jurisdiction under U.S. antitrust laws).

83. At least two of the factors listed in § 403 emphasize the *effects* of an activity as a basis for asserting prescriptive jurisdiction: there must be "substantial, direct and foreseeable" effects in the state asserting jurisdiction (factor a), and strong connections to the principal affected parties (factor b). *See* RESTATEMENT, *supra* note 41, § 403. Section 403 also suggests a balancing of an activity's internal effects against its external effects. Factors a and b emphasize internal effects. Factors g and h, on the other hand, emphasize the "extent to which another state may have an interest in regulating the activity" and the "likelihood of conflict with regulation by other states." *Id.* In addition, factor c takes into account the "importance of the regulation to the regulating state." *Id.*

Some United States courts have adopted a similar "balancing" approach to determine whether they can appropriately assert prescriptive jurisdiction. *See, e.g., Timberlane*, 549 F.2d at 614 (plaintiff alleged conspiracy in both United States and Honduras to drive plaintiff's Honduran subsidiaries out of business of exporting lumber to United States). This approach to extraterritorial jurisdiction has

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legal, political, or economic system.⁸⁴ Thus, in addition to demonstrating a substantial impact on American interests, U.S.T.R. must be able to argue that a challenged practice significantly departs from either the international agreements or accepted practices of countries with similar economic systems and at similar levels of economic development.⁸⁵ Even hortatory international agreements, which are not legally binding, can be used to demonstrate an emerging international legal principle and to support “justified expectations” on the part of American firms.⁸⁶

In cases in which U.S.T.R. can establish the unreasonableness of a foreign trade practice by demonstrating both substantial external effects and significant departure from international legal norms, the United States should have the right to negotiate changes in a foreign practice to minimize its harmful external effects. While an activity’s internal effects in a foreign country may justify that country’s initial assertion of jurisdiction

been heavily criticized as requiring courts to weigh sensitive political and diplomatic concerns that are traditionally considered nonjusticiable. *See, e.g., Laker Airways*, 731 F.2d at 949–50 (affirming court order restraining defendants from seeking in English courts an injunction against plaintiff’s United States antitrust suit); Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 *YALE L.J.* 1693, 1699–1706 (1985) (criticizing interest-based approach to extraterritorial jurisdiction in antitrust law and proposing alternative approach based on *forum non conveniens*). While it may be inappropriate for domestic courts to base their assertions of extraterritorial jurisdiction on their own “balancing” of the domestic and foreign interests involved, this Note argues that such balancing is appropriate for the political branches of government when determining whether it is appropriate to assert a right to influence the implementation of a foreign regulation. The executive branch is better equipped than the judiciary to procure necessary information and to make judgments regarding political, social, and economic conditions. Moreover, the role of national bias is reduced in the context of bilateral negotiations.

84. The final factors weighed by § 403 are “the extent to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted” (factor c); the “existence of justified expectations that might be protected or hurt by the regulation” (factor d); the “importance of the regulation “to the international political, legal or economic system” (factor e); and the “extent to which such regulation is consistent with the traditions of the international system” (factor f). *See* RESTATEMENT, *supra* note 41, § 403. Practices or regulations that are widespread in the international community create “customary international law,” and must be respected in order to preserve predictability in international relations. *See supra* note 76; *infra* note 85. On the other hand, practices that diverge greatly from accepted practices or principles do not enjoy a presumption of “reasonableness.” If these practices threaten the predictability of international relations (“justified expectations”), or undermine established international institutions (such as the GATT), they may well be “unreasonable” and subject to challenge under § 301.

85. Whether a customary norm of international law practiced by a large number of states is binding on all other states is a matter of debate. *See* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 *CALIF. L. REV.* 419, 426–29 (1961). However, to the extent that nations with similar problems and similar social systems do adhere to a norm, a foreign government will find it more difficult to justify a deviant policy with harmful external effects.

86. *See* RESTATEMENT, *supra* note 41, §403(d). These agreements, while not binding, lend broader international legal support to unilateral United States actions under § 301. Reliance on such agreements allows the United States to strike a balance between the goal of establishing agreements that go *beyond* existing international law, *see supra* note 27 and accompanying text, and the need to respect the international legal principles of national sovereignty and noninterference, *see supra* notes 76–77 and accompanying text; *see also* Fisher & Steinhardt, *supra* note 18, at 577–78 (arguing that right protected by § 301 is combination of national and international norms, and listing various non-binding international agreements that could form basis of § 301 petitions).

to regulate that activity,⁸⁷ the activity's external effects on the United States can also justify the United States' assertion of a right to *influence* that regulation through international negotiations. Thus, section 301 does not directly involve assertion of United States jurisdiction; instead, it reflects the United States' assertion of a right to influence "unreasonable" exercises of foreign jurisdiction through negotiated settlements.⁸⁸ U.S.T.R. should give proper deference to the policy objectives of foreign governments and limit its negotiating objectives to obtaining changes that will significantly reduce the "unreasonable" external effects of a challenged practice.

C. *Applying the Standard: Recent Cases*

Analysis of the complex right established by section 301 suggests that investigations of "unreasonable" foreign government practices under section 301 should be evaluated under a two-part test that examines (1) whether the challenged practice distorts comparative advantage, and (2) whether the practice creates both a substantial effect on the United States economy and a significant departure from international legal norms. This two-part test can be used to evaluate two interpretations of unreasonableness that have emerged in recent section 301 investigations. The first interpretation, adopted by the petition of the Semiconductor Industry Association (SIA) in *Japan Semiconductors*,⁸⁹ measures unreasonableness in terms of "reciprocity"⁹⁰ in market shares. The second interpretation, adopted in the government's investigation of *Korea Intellectual Property*,⁹¹ seeks "reciprocity" in the context of international legal norms. *Application of the two-part standard to each of these cases shows that only the latter meets the economic and legal requirements of unreasonableness under section 301.*

1. Japan Semiconductors: "Reciprocity" Measured by Market Shares

The *Japan Semiconductors* petition argued that Japanese government policies that encouraged specialization and cooperation among domestic

87. See *supra* note 83.

88. Assertions of jurisdiction are implicated under section 301 only indirectly, as a measure of the unreasonableness of a challenged foreign trade practice.

89. *Japan Semiconductors*, 50 Fed. Reg. 28,866 (Off. U.S. Trade Rep. 1985) (initiation), 51 Fed. Reg. 27,811 (Off. U.S. Trade Rep. 1986) (suspension).

90. The concept of "reciprocity" is a recurring theme of proposed trade legislation. See, e.g., § 105(b) of S. 490, 132 CONG. REC. S1853 (1987) (negotiations should seek "competitive opportunities for United States exports in foreign markets equivalent to the competitive opportunities afforded foreign exports in United States markets). "Reciprocity" is also expected to be featured in President Reagan's trade bill. See Pine, *supra* note 13.

91. *Korea Intellectual Property*, 50 Fed. Reg. 45,883 (Off. U.S. Trade Rep. 1985) (initiation), 51 Fed. Reg. 29,445 (Presidential Memorandum 1986) (terminating investigation).

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producers and pressured Japanese semiconductor consumers to “buy Japanese,” have created a market structure that unreasonably restricts the sale of American-made semiconductors in Japan.⁹² SIA based its claim of unreasonableness on the alleged lack of “reciprocity” evinced by the disparity between the share of the Japanese market held by American semiconductor manufacturers and the share of the United States market enjoyed by Japanese manufacturers.⁹³

This measure of unreasonableness fails each of the two prongs of the unreasonableness standard outlined above. First, SIA’s petition failed to show that the inability of United States exporters to obtain reciprocal market shares directly resulted from trade-distorting Japanese policies. In fact, the poor performance of SIA companies was largely caused by differences in productive efficiency⁹⁴ and product quality,⁹⁵ by the competitive impact of misalignments or fluctuations of currency exchange rates,⁹⁶ or by differences in specialization and consumption patterns in the two markets.⁹⁷ Second, the SIA petition failed to show that Japanese policies directly created “substantial effects” on the United States economy, or that these policies significantly departed from any international legal norm.⁹⁸

SIA’s failure to understand the economic and legal dimensions of unreasonableness under section 301 is demonstrated by its proposed remedy: a guaranteed share of the Japanese market for United States manufactur-

92. See Japanese Market Barriers in Microelectronics, Memorandum in Support of the Semiconductor Industry Association’s Petition Pursuant to Section 301 of the Trade Act of 1974 (June 14, 1985) (available in U.S.T.R. public file, docket no. 301-48) [hereinafter Japanese Market Barriers in Microelectronics]. Prior to 1975, the Japanese government formally protected the semiconductor industry by imposing restrictions on foreign imports of integrated circuits for computers and on foreign investment in Japanese companies that produce integrated circuits. *Id.* at 12 & n.19. Although these restrictions were officially lifted in 1975, SIA argued in its petition that the Japanese government then instituted a series of “counter-measures” which undermined this liberalization. *Id.* at 17.

93. *Id.* at 92-99.

94. See *Foreign Goods Made at Home*, *ECONOMIST*, July 6, 1985, at 65.

95. Differences in product quality and services between United States and Japanese firms have been well-documented. See, e.g., D. Sanger, *Pentagon Study Urges U.S. Aid for Embattled Chip Industry*, *N.Y. Times*, Feb. 13, 1987, at A1, col. 1; *RAM Parts We Watch Are Better from Japan*, *ELECTRONICS*, Mar. 8, 1984; *Why U.S. Chips Don’t Sell in Japan*, *San Jose Mercury News*, July 29, 1985, at C1, C4.

96. The high value of the dollar relative to the yen has also created difficulties for United States exports. See generally Kubarych, *Trade Policy and the Dollar*, 18 *N.Y.U. J. INT’L L. & POL.* 1100 (1986).

97. In its reply brief to the SIA petition, the Electronics Industry Association of Japan argued that “U.S. companies do not emphasize the types of semiconductors most in demand in Japan, namely, those used in consumer products.” Brief of the Electronics Industry Association of Japan at 2 (Aug. 26, 1985) (available in U.S.T.R. public file, docket no. 301-48). While consumer electronic products accounted for 47% of the Japanese semiconductor market in 1984, they accounted for only 8% of end-uses in the United States. *Id.*

98. SIA’s allegations of Japanese dumping violations were filed separately from their section 301 petition. While SIA also argued that Japan’s semiconductor policies were “unreasonable” because they established a market structure that allegedly violated United States antitrust laws, Japanese Market Barriers in Microelectronics, *supra* note 92, at 94-98, international comity requires nations to respect diversity in each other’s domestic laws. See *supra* note 73.

ers.⁹⁹ Far from advancing the multiple goals of section 301, the resolution of *Japan Semiconductors* created both a distortion of trade and a possible violation of international legal norms.¹⁰⁰ SIA's petition failed to meet the economic and legal prongs of the unreasonableness standard, and should not have been accepted by U.S.T.R.

2. Korea Intellectual Property: "Reciprocity" in the Context of International Law

The *Korea Intellectual Property* investigation, self-initiated by U.S.T.R. in November 1985, sought to change South Korean copyright and patent laws, which allegedly restricted American sales and investment in South Korea by denying effective protection to the intellectual property of United States firms.¹⁰¹

The *Korea Intellectual Property* case, unlike *Japan Semiconductors*, meets both the test of trade distortion and the test of legal unreasonableness. South Korea's intellectual property laws skew the relationship between price and cost by forcing firms to forego compensation for the full costs of their research and development. Lack of compensation distorts patterns of trade, discouraging foreign sales and focusing indigenous research and development on inventing new processes for producing old products, rather than on inventing new products.

Korea Intellectual Property also involved an "unreasonable" exercise of jurisdiction. While the implementation and enforcement of domestic intellectual property law is a matter of domestic jurisdiction, South Korea's laws were implemented in a manner that unreasonably affected outside interests. Intellectual property regulation has a "substantial, direct, and

99. See Japanese Market Barriers in Microelectronics, *supra* note 92, at 99-101.

100. The United States and Japan reached a vaguely worded agreement in which the United States agreed to suspend its section 301 and anti-dumping investigations of the Japanese semiconductor industry, and Japan agreed to increase market access and eliminate dumping. See *Japan-United States: Agreement on Semi-Conductor Trade*, 26 I.L.M. 1409 (1986) (text of agreement); *Japan Semiconductors*, 51 Fed. Reg. 27,811 (1986) (notice of suspension). The Japanese Government promised to encourage Japanese producers and users of chips to take advantage of the increased availability of foreign-made products in their market; to establish an organization to help foreign producers to increase sales in Japan and to promote joint product development between Japanese semiconductor purchasers and foreign manufacturers. *Id.* In February, the Japanese government asked Japanese semiconductor makers to cut their chip production by 10%. See *Japan Asks 10% Cut in Chip Output*, N.Y. Times, Feb. 19, 1987, at D1, col. 3. The EC has called for formal consultations within the GATT, claiming that the agreement will result in arbitrary increases in the price of semiconductors on the EC market and will result in privileged access to the Japanese market for United States firms. See 3 Int'l Trade Rep. (BNA) 1244 (Oct. 15, 1986).

101. See *Korea Intellectual Property*, *supra* note 91. South Korea's copyright law, which only protects works first published in Korea, allows the works of American authors and computer software designers to be copied and sold in Korea without payment of royalties or license fees. *Id.* South Korean patent law also expressly excludes from patentability inventions concerning foods, beverages, medicines and chemical substances, and extends most patents only to methods of manufacture rather than to end products. *Id.*

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foreseeable” effect on American authors and inventors.¹⁰² Moreover, South Korean intellectual property laws were inconsistent with emerging international legal norms. American companies have “justified expectations” that their intellectual property will not be appropriated without any compensation, since such expropriation is inconsistent with the “traditions of the international system.”¹⁰³ International agreements such as the Universal Copyright Convention¹⁰⁴ are more specific symptoms of a growing international consensus that intellectual property *is* property, and as such, entitles its owners to some form of compensation. Although South Korea is not a signatory to any of these conventions, it was “unreasonable” for the government to continue holding out from this consensus.¹⁰⁵ A major trade partner¹⁰⁶ cannot ignore widely-accepted international legal rules without threatening the international trading system.¹⁰⁷

V. CONCLUSION

Implementation of section 301 must be premised on a clear understanding of the international legal right that is protected by the statute. Current proposals to amend section 301 fail to recognize the complex nature of this right. In order to preserve the statute’s economic, legal, and political objectives, Congress should reject current legislative proposals that seek to

102. See RESTATEMENT, *supra* note 41, § 403.

103. *Id.*; see, e.g., *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975). The Charter recognizes a right to expropriate foreign property and a concomitant obligation to pay “appropriate compensation . . . provided that all relevant circumstances call for it.” *Id.* at ch. II, art. 2(c); see also RESTATEMENT, *supra* note 41, § 712.

104. Universal Copyright Convention, Sept. 6, 1952, Geneva, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, revised July 24, 1971, Paris, 25 U.S.T. 1341, T.I.A.S. No. 7868; see also Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication, Oct. 29, 1971, 26 U.S.T. 309, T.I.A.S. 7808. See generally J. PHILLIPS, INTRODUCTION TO INTELLECTUAL PROPERTY LAW 290-97 (1986).

105. See Tunkin, *supra* note 85 (discussing whether customary international law practiced by large number of states is binding on other states).

106. For example, South Korean imports from the Western industrialized countries (United States, Canada, Australia, New Zealand, Japan, and Western Europe) rose from \$14,724 million in 1979 to \$19,424 million in 1985; during the same period, South Korean exports to these countries rose from \$11,052 million to \$20,243 million. INTERNATIONAL MONETARY FUND, DIRECTION OF TRADE STATISTICS YEARBOOK 248-50 (1986).

107. This argument presents an alternative interpretation of the concept of “reciprocity” advanced in the Japan Semiconductors petition, *supra* note 89. When deviation from an emerging international legal norm has substantial external effects, it is “reasonable” to require third countries to accede to the rules of international trade accepted by other major trading partners. This interpretation of “reciprocity” avoids the problems inherent in using “reciprocity” as a basis for requesting equivalent market shares or equivalent market rules. See *supra* notes 94-99 and accompanying text.

In July of 1986, the Korean government agreed to present comprehensive copyright bills to the National Assembly; to take steps to join the Universal Copyright Convention and the Geneva Phonograms Convention in 1987; and to present the legislature with a bill to amend the patent law that will reportedly provide coverage for chemical and pharmaceutical products. See Presidential Memorandum, 51 Fed. Reg. 29,445 (1986). The United States and Korean government each agreed to establish consultative mechanisms to discuss matters covered under the agreements. *Id.*

expand the rights of private petitioners, mandate a minimum number of actions under the statute, or make ad hoc additions to a list of practices that are to be considered "unreasonable."¹⁰⁸ Instead, Congress should restructure Presidential discretion in a manner that reinforces the statute's economic and legal objectives. Congress should enact a statutory amendment defining as "unreasonable" any foreign government practice that (1) creates clear economic distortions, and (2) produces substantial adverse effects on the United States economy in a manner that violates emerging international legal norms. Enactment of this two-pronged standard would increase the effectiveness of section 301 and ensure a proper balancing of the statute's underlying economic, legal or political goals.

108. As this issue goes to press, the House Ways and Means Committee has just passed a trade bill that significantly softens prior proposals to reduce Presidential discretion. See J. Fuerbringer, *Trade Bill Passed by House Unit*, N.Y. Times, Mar. 26, 1987, at D1, col. 6. Like the Bentsen bill, discussed *supra* notes 13-17, the House bill would preserve Presidential discretion to forego retaliatory action if the President certifies to Congress that retaliation is not in the national *economic* interest. Both bills, however, contain provisions for mandatory retaliation that would unduly hamper the President's ability to consider *legal* and *political* factors when deciding whether and when to retaliate. In addition, neither bill makes any attempt to incorporate international legal norms into a definition of unreasonableness.