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## Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments

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# ARTICLES

## Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments

*Judith Hippler Bello\**  
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### I. INTRODUCTION

The recent dramatic increase in the use of Section 301 of the Trade Act of 1974<sup>1</sup> ("§ 301") and a predecessor provision in the Trade Expansion Act<sup>2</sup> warrants a review of its requirements and procedures. This Article illustrates those requirements and procedures through § 301's application in particular cases. The Article also explains why recent events have led to more frequent resort to § 301 and related legal provisions.

### II. LEGAL CRITERIA UNDER SECTION 301

Section 301 of the Trade Act of 1974, as amended ("Trade Act"), authorizes the President to take any action, including the imposition of or an increase in import fees and restrictions, in response to acts, policies, or practices of foreign governments or their instrumentalities which meet specified criteria.<sup>3</sup> For some practices, only unfairness is statutorily required.<sup>4</sup> For others, the unfair act, policy, or practice must also cause a

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<sup>1</sup> 19 U.S.C. § 2411 (1982).

<sup>2</sup> Trade Expansion Act of 1962, ch. 6, § 252, 76 Stat. 882 (repealed 1974).

<sup>3</sup> 19 U.S.C. § 2411.

<sup>4</sup> Under § 301, the sole requirement is that an act, policy, or practice of a foreign government or instrumentality be inconsistent with, or deny the United States benefits under, a "trade agreement." The Office of the United States Trade Representative ("USTR") has generally interpreted "trade agreement" to mean exclusively the General Agreement on Tariffs and Trade ("GATT"), *opened for signature* Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 27 U.N.T.S. 19, or a trade agreement approved under § 3(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a) (1982). These approved trade agreements include: Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Relating to Customs Valuation), Apr. 12, 1979, T.I.A.S. No.

burden or restriction on United States commerce.<sup>5</sup>

#### A. Application of a Trade Agreement

Foreign governments' or instrumentalities' acts, policies, or practices are actionable under § 301 if they are inconsistent with the provisions of a trade agreement or deny benefits to the United States under a trade agreement.<sup>6</sup> The Office of the United States Trade Representative ("USTR" or "Trade Representative") generally has interpreted "trade agreement" to mean the General Agreement on Tariffs and Trade ("GATT")<sup>7</sup> or any of the GATT codes negotiated during the Tokyo Round of Multilateral Trade Negotiations.<sup>8</sup> The definition does not extend generally to agreements peripherally related to trade.<sup>9</sup>

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10,402 [hereinafter Customs Valuation Code]; Agreement on Government Procurement, Apr. 12, 1979, T.I.A.S. No. 10,403; Agreement on Import Licensing Procedures, Apr. 12, 1979, 32 U.S.T. 1585, T.I.A.S. No. 9788; Agreement on Technical Barriers to Trade (Relating to Product Standards), Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures), Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter Subsidies Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Relating to Antidumping Measures), Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650; and Agreement on Trade in Civil Aircraft, Apr. 12, 1979, 31 U.S.T. 619, T.I.A.S. No. 9620.

The reason for this limited construction—excluding, for example, treaties of friendship, commerce and navigation—is that in any case involving a trade agreement, § 303(a) of the Trade Act, 19 U.S.C. § 2413(a) (1982 & Supp. 1985), requires the Trade Representative to "promptly request proceedings on the matter under the formal dispute settlement procedures provided" in such agreement. *Id.* Some non-GATT agreements relating to trade call for dispute settlement through referral to the International Court of Justice. *See, e.g.*, Convention of Establishment, Nov. 25, 1959, United States-France, art. XVI:2, 11 U.S.T. 2398, T.I.A.S. No. 4625. In the belief that Congress did not intend to require resort to the World Court in trade disputes, the USTR has consistently construed "trade agreement" narrowly, thus limiting § 303(a)'s requirement that an applicant first exhaust international dispute settlement procedures.

Where a violation of a GATT provision is shown, the complaining contracting party is rebuttably presumed to have had its trade concessions nullified or impaired. Where a contracting party complains of nullification or impairment of its concessions by an action that is *not* a violation, then it must demonstrate such effects. The Trade Act of 1974, § 301(a)(1)(B)(ii), 19 U.S.C. § 2411(a)(1)(B)(ii) (1982 & Supp. 1985) [hereinafter Trade Act § 301]. Even trade agreement cases, then, involve an element of burden or restriction on commerce.

<sup>5</sup> Under Trade Act § 301(a)(1)(B)(ii), 19 U.S.C. § 2411(a)(1)(B)(ii), an act, policy, or practice of a foreign government or instrumentality must be not only unjustifiable, unreasonable, or discriminatory, but also a burden or restriction on United States commerce.

<sup>6</sup> Trade Act § 301(a)(1)(B)(1), 19 U.S.C. § 2411(a)(1)(B)(i).

<sup>7</sup> *See supra* note 4.

<sup>8</sup> *See supra* note 4.

<sup>9</sup> *E.g.*, treaties of friendship, commerce and navigation, such as the U.S.-Japan Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863. *But cf.* Memorandum of July 31, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986) [hereinafter July 31, 1986 Memorandum], in which the President characterized the United States-Japan Arrangement concerning Trade in Semiconductor Products as a trade agreement for purposes of Section 301 (in declaring that

The § 301 *Japan Leather*<sup>10</sup> and *Japan Leather Footwear*<sup>11</sup> cases illustrate well a practice inconsistent with a trade agreement. Article XI of the GATT generally prohibits a contracting party from restricting the importation of any product of the territory of another contracting party.<sup>12</sup> Many years ago, however, Japan established quotas on imports of both leather and leather footwear.<sup>13</sup> In 1977 the Tanners' Council of America filed a § 301 petition alleging that the quotas and excessive tariffs on leather imports adversely affected United States exports of leather.<sup>14</sup> The United States filed a GATT complaint under Article XXIII:1,<sup>15</sup> but withdrew it after concluding an agreement with Japan under which Japan was to expand its restrictive quotas, thereby expanding the opportunities for United States tanners.<sup>16</sup> Nonetheless, the

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its breach by the Government of Japan would be an act inconsistent with a trade agreement). See *infra* notes 128-36 and accompanying text.

<sup>10</sup> Docket No. 301-13. The petition is set forth in the notice initiating an investigation, Tanners' Council of America, Inc., 42 Fed. Reg. 42,413, 42,413 (1977)(Special Trade Representative initiation) [hereinafter Notice, Tanners' Council]. The Special Representative for Trade Negotiations, or Special Trade Representative ("STR"), was redesignated the United States Trade Representative by § 1(b)(1) of Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), *reprinted in* 5 U.S.C. app. 1, at 150, submitted to Congress pursuant to § 1109 of the Trade Agreements Act of 1979, 93 Stat. 144, 314 (1979).

<sup>11</sup> Docket No. 301-36. The petition is summarized in the notice initiating an investigation, Footwear Industries of America, Inc., 47 Fed. Reg. 56,428 (USTR 1982) (initiation) [hereinafter Notice, Footwear Indus.].

<sup>12</sup> Article XI of the GATT, *supra* note 4, provides, in part, that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

<sup>13</sup> See Memorandum of July 31, 1980, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 45 Fed. Reg. 51,171, 51,172 (1980) [hereinafter July 31, 1980 Memorandum]. President Carter's determination notes that Japan's restrictions on imports of leather were imposed in 1949. It also notes that although Japan then faced "a serious balance of payments problem" (impliedly perhaps justifying the quotas under other provisions of the GATT), Japan still maintained the restrictions after resolution of the balance of payments problem. *Id.*

<sup>14</sup> Docket No. 301-13. The petition is set forth in Notice, Tanners' Council, *supra* note 10, at 42,414.

<sup>15</sup> Article XXIII:1 of the GATT, *supra* note 4, provides, in part, that:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

<sup>16</sup> See July 31, 1980 Memorandum, *supra* note 13, at 51,172. This memorandum describes the United States-Japan understanding on leather of Feb. 23, 1979. Based on this understanding, the United States not only withdrew its GATT complaint under art. XXIII:1, *supra* note 4, but also cancelled hearings planned on retaliatory measures. *Id.*

agreement failed to result in increased United States imports to Japan.<sup>17</sup> The United States reinstated a GATT complaint<sup>18</sup> that resulted in a panel finding in 1984 that the leather quotas violated Article XI.<sup>19</sup>

In the meantime, Japan limited imports of leather footwear. Footwear Industries of America, Inc. and others filed a petition on October 25, 1982, alleging that import restrictions on nonrubber footwear by Japan and other governments denied United States exporters access to those markets, were inconsistent with the GATT, and also were unreasonable, discriminatory, and a burden on United States commerce.<sup>20</sup> While the GATT panel did not publish a report with respect to the Japanese footwear quotas,<sup>21</sup> the United States felt that such restrictive practices as illegal leather quotas warranted a conclusion of their inconsistency with Article XI. Thus, the basis for action under § 301 in these cases was the inconsistency of these quotas with a trade agreement.<sup>22</sup>

Another recent example of a foreign government act, policy, or practice considered eligible for action under § 301 is the *EC Enlargement* case. On March 1, 1986, the European Communities ("EC") took action

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<sup>17</sup> *Id.* At the time the agreement was concluded, it was expected that United States tanners would sell approximately \$20 to \$30 million in leather in Japan. *Id.* Yet, the volume of United States shipments of leather actually declined during the first year of the agreement. Despite the significant size of the Japanese market for leather, global imports were limited to a *de minimis* level, and the United States share was established at less than 1%. *Id.*

<sup>18</sup> The Presidential Memorandum of July 31, 1980, *supra* note 13, at 51,171, directed the Trade Representative to "seek measures from the Government of Japan to facilitate the implementation" of the United States-Japan leather understanding, and to report back on the results of those efforts within six months. It expressly determined that the quantitative restrictions are inconsistent with the provisions of a trade agreement: art. XI of the GATT. *Id.* at 51,172. The President, however, also determined that petitioner's allegation, that the 20% tariffs were an unfair trade practice under § 301, is "without foundation because the Japanese duty on leather is a bound GATT rate and, therefore, is not inconsistent with the GATT. Similarly, the duty cannot be considered 'unreasonable.'" *Id.* at 51,171-72.

<sup>19</sup> The United States and Japan consulted under art. XXIII:1 on Jan. 27-28, Mar. 30, and Apr. 12, 1983. A dispute settlement panel was authorized under GATT, *supra* note 4, art. XXIII:2 on Apr. 20, 1983. The panel heard the case in the fall and winter of 1983-84. In February 1984, the panel found that Japan's leather quotas violated GATT art. XI and caused nullification or impairment of United States GATT benefits. The GATT Council adopted the panel report on May 16, 1984. Office of the United States Trade Representative, Section 301 Table of Cases (Sept. 1986) [hereinafter Section 301 Table].

<sup>20</sup> See Notice, Footwear Indus., *supra* note 11.

<sup>21</sup> The United States consulted with Japan bilaterally on Jan. 27, 1983, and requested consultations under GATT art. XXIII in February 1984. The two governments consulted under art. XXIII:1 in April 1985. In July 1985, the United States decided to proceed under art. XXIII:2, and requested that the conclusions reached by the dispute settlement panel in 1984 be applied to the Japanese leather footwear quotas. See *supra* note 19.

<sup>22</sup> See *infra* notes 137-45 and accompanying text for a description of the action ultimately taken in both cases.

which effectively: 1) restricted imports of oilseeds and oilseed products into Portugal and of the consumption of certain vegetable oils in Portugal; 2) required that a specified portion of Portuguese imports of grain be reserved for suppliers from other EC member countries; and 3) withdrew Spanish tariff concessions and imposed variable levies on imports of corn and sorghum. The President determined in March 1986 that such acts are inconsistent with the GATT.<sup>23</sup>

A third recent example of acts, policies, or practices of foreign governments which qualify for § 301 enforcement is found in the determination made by the President in August 1986.<sup>24</sup> The President concluded that Taiwan's failure to implement by January 1, 1986, obligations substantially equivalent to those applied to developing countries under the GATT Customs Valuation Code<sup>25</sup> was inconsistent with a 1979 bilateral agreement.<sup>26</sup> The examples given above do not explain the full scope of § 301 powers.

Another basis for action under § 301 is the denial of benefits to the United States under a trade agreement.<sup>27</sup> In this instance, a foreign government or instrumentality need not violate a trade agreement, but only deny benefits to the United States under the agreement by nullifying or impairing concessions. For example, in 1976 the Florida Citrus Commission and others filed a petition alleging that the EC's preferential tariffs on orange and grapefruit juices and fresh citrus fruits from certain Mediterranean countries have an adverse effect on United States citrus exports to the EC.<sup>28</sup> The United States finally obtained a favorable panel report in the *EC Citrus* case in late 1984;<sup>29</sup> however, the EC blocked the

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<sup>23</sup> Memorandum of May 15, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 18,294 (1986); and Proclamation No. 5478, 51 Fed. Reg. 18,296 (1986). Under art. XXIV of the GATT, *supra* note 4, the EC may enlarge its membership, but it is not permitted to impose quotas in connection with such enlargement. The EC may also withdraw bound tariff concessions, but only after negotiating appropriate compensation under art. XXVIII. The President also found that the EC's actions in this regard were unreasonable and constituted a burden or restriction on United States commerce. *Id.* For a description of actions recently taken in this case, see *infra* notes 114-19 and accompanying text.

<sup>24</sup> Memorandum of Aug. 1, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 28,219 (1986) [hereinafter Aug. 1, 1986 Memorandum].

<sup>25</sup> See *supra* note 4.

<sup>26</sup> For a discussion of the Customs Valuation Code, see *supra* note 4. See also *infra* notes 120-27 and accompanying text for a discussion of actions ultimately taken in this case.

<sup>27</sup> Trade Act § 301(a)(1)(B)(i), 19 U.S.C. § 2411(a)(1)(B)(i).

<sup>28</sup> Florida Citrus Commission and California-Arizona Citrus League, Texas Citrus Mutual, Texas Citrus Exchange, 41 Fed. Reg. 52,567, 52,568 (STR 1976) (initiation).

<sup>29</sup> The STR initiated an investigation on Nov. 30, 1976. *Id.* The STR held hearings on Jan. 25, 1977. During the Multilateral Trade Negotiations, the United States obtained duty reductions on fresh grapefruit only. In October 1980, the two governments consulted under art. XXII:1; informal

adoption of the report in the GATT Council.<sup>30</sup> On June 20, 1985, the President determined that the discriminatory EC tariff practices deny benefits to the United States arising under the GATT<sup>31</sup> by reducing the amount of United States exports of citrus products to the EC. It should be noted that the United States did not maintain that the discriminatory tariffs violate the United States right to most-favored-nation treatment under Article I because the tariffs are a special and differential measure for developing countries within the spirit of Article XXXVII.

One further example of a § 301 proceeding in which the basis for action was the denial of benefits under a trade agreement is the investigation in response to a petition filed on October 23, 1981, by the California Cling Peach Advisory Board. The petitioner alleged that the EC violated GATT Article XVI by granting production subsidies on EC member states' canned peaches, canned pears, and raisins. The petition further maintained that such subsidies displace sales of non-EC producers within the EC and impair tariff bindings on those products.<sup>32</sup> The United States obtained a favorable GATT panel report which found nullification or impairment of United States GATT benefits with respect to the subsidies for canned peaches and canned pears, but not raisins.<sup>33</sup>

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discussions followed. They consulted under art. XXIII:1 on Apr. 20, 1982. Conciliation efforts in September 1982 failed. On Nov. 2, 1982, the GATT Council agreed to establish a panel, whose composition and terms of reference took some months to resolve. The panel met on Oct. 31 and Nov. 29, 1983, and Feb. 13 and Mar. 12, 1984. The factual portion of the panel report was submitted to the parties on Sept. 27, and the full report was submitted Dec. 14, 1985. Section 301 Table, *supra* note 19.

<sup>30</sup> The GATT Council considered the panel's findings and recommendations on Mar. 12 and Apr. 30, 1985, but the EC blocked any action. Section 301 Table, *supra* note 19.

<sup>31</sup> Memorandum of June 20, 1985, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 50 Fed. Reg. 26,143 (1985). See *infra* notes 153-63 and accompanying text for a discussion of the action taken to resolve this matter.

<sup>32</sup> The petition is set forth in the notice initiating an investigation, California Cling Peach Advisory Board, 46 Fed. Reg. 61,358, 61,359 (USTR 1981) (initiation).

<sup>33</sup> The Trade Representative initiated an investigation on Dec. 10, 1981. *Id.* The United States consulted with the EC under GATT, *supra* note 4, art. XXIII:1 on Feb. 25, 1982, and requested a dispute settlement panel under art. XXIII:2 on Mar. 31, 1982. On Aug. 17, 1982, the President directed the Trade Representative to expedite dispute settlement. Memorandum of Aug. 17, 1982, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 47 Fed. Reg. 36,403 (1982). In so doing, the President formally determined that the EC production subsidies "nullify and impair benefits accruing to the United States under the (GATT)." *Id.*

The panel met Sept. 29 and Oct. 29, 1982. The panel report was submitted to the United States and the EC on Nov. 21, 1983. The panel met again with the parties on Feb. 27, 1984. A revised panel report was submitted to both parties on Apr. 27, 1984. An additional panel meeting was held June 28. A final panel report was issued July 20. The GATT Council, however, did not act on the report despite the United States' request for the adoption of the report at council sessions on Apr. 30, May 29, June 5, and July 6, 1985. Section 301 Table, *supra* note 19.



Thus, the basis for action under § 301 in the *EC Canned Fruit*<sup>34</sup> case was not a violation of a trade agreement, rather the denial of benefits reasonably anticipated under a trade agreement.

B. Unjustifiability, Unreasonableness, or Discrimination,  
and Burden or Restriction

1. *Unjustifiability, Unreasonableness, or Discrimination*

In addition to trade agreement cases, a foreign government's or instrumentality's act, policy, or practice may be actionable under § 301 if it is unjustifiable, unreasonable, or discriminatory *and* a burden or restriction on United States commerce.<sup>35</sup>

a. Unjustifiability

"Unjustifiable" is defined under § 301 as an act, policy, or practice inconsistent with international legal rights of the United States. This definition includes the denial of: 1) national or most-favored-nation treatment (i.e., treating United States firms less favorably than domestic or third-country firms, respectively); 2) the right to establish an enterprise in a foreign country; and 3) protection of intellectual property rights (such as copyrights and trademarks).<sup>36</sup> The most frequent basis for a finding of unjustifiable practices is a breach of an agreement other than a trade agreement, such as a treaty of friendship, commerce, and navigation ("FCN").<sup>37</sup>

A pertinent example is the United States-Korea FCN Treaty<sup>38</sup> which was relevant in the § 301 *Korea Insurance* investigation regarding the Republic of Korea's domestic restrictions on the provision of insurance services by foreign firms. (The Trade Representative initiated the investigation on its own motion<sup>39</sup> in response to a Presidential directive.<sup>40</sup>) Article VII of the treaty provides national treatment for many

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<sup>34</sup> See *infra* notes 146-52 and accompanying text for a discussion of action ultimately taken in this case.

<sup>35</sup> Trade Act § 301(a)(1)(B)(ii), 19 U.S.C. § 2411(a)(1)(B)(ii).

<sup>36</sup> *Id.* § 301(e)(4), 19 U.S.C. § 2411(e)(4).

<sup>37</sup> See *supra* note 4.

<sup>38</sup> Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947 [hereinafter Korea Treaty]. Article VII of the treaty provides, in part, that:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.

<sup>39</sup> Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (USTR 1985) (initiation).

<sup>40</sup> Radio Address of the President to the Nation, 21 WEEKLY COMP. PRES. DOC. 1047 (Sept. 7, 1985) [hereinafter Radio Address].

types of commercial activity by nationals and companies of one country in the other country.<sup>41</sup> The White House called attention to Korea's apparent violation of this provision regarding its closed insurance market when the President directed the Trade Representative to initiate an investigation.<sup>42</sup> It was the President's determination under § 301 that the Korean Government's policy of prohibiting or restricting the activities of foreign insurance firms in Korea was, *inter alia*, unjustifiable.<sup>43</sup>

Another example of unjustifiability based upon the violation of an agreement other than a trade agreement is the recent *Japan Tobacco* case.<sup>44</sup> The Government of Japan maintains a monopoly (the Japan Tobacco Institute) to manufacture tobacco products, in contravention of the United States-Japan Treaty of Friendship, Commerce and Navigation.<sup>45</sup> As with Article VII of the United States-Korea FCN Treaty,<sup>46</sup> Article VII of the United States-Japan FCN Treaty provides for national treatment with respect to various commercial activities by nationals and companies of one party within the territory of the other party.<sup>47</sup> The Government of Japan's exclusion of United States firms from the commercial activity of manufacturing cigarettes in Japan while maintaining a monopoly for a Japanese entity was considered to be inconsistent with the FCN treaty and, thus, actionable under § 301.

#### b. Unreasonableness

Another basis for action under § 301 (if combined with a burden or restriction on United States commerce) is unreasonable acts, policies, or practices of a foreign government or its instrumentality. "Unreasonable" is defined in § 301 to mean any act, policy, or practice which, although not inconsistent with international legal rights of the United States, is otherwise unfair or inequitable. This definition includes the denial of fair and equitable market opportunities, opportunities to establish an enter-

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<sup>41</sup> Korea Treaty, *supra* note 38.

<sup>42</sup> Radio Address, *supra* note 40. The President said:

I'm directing the U.S. Trade Representative to start proceedings . . . against a Korean law that prohibits fair competition of U.S. life and fire insurance firms in the Korean market in direct contradiction of treaty obligations.

*Id.*

<sup>43</sup> Memorandum of Aug. 14, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 29,443 (1986) [hereinafter Aug. 14, 1986 Memorandum].

<sup>44</sup> Docket No. 301-50; *see* Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, 50 Fed. Reg. 37,609 (USTR 1985) (initiation).

<sup>45</sup> United States-Japan Treaty of Friendship, Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter United States-Japan Treaty].

<sup>46</sup> *See supra* note 40 and accompanying text.

<sup>47</sup> United States-Japan Treaty, *supra* note 45.

prise, and protection of intellectual property rights.<sup>48</sup> Since unreasonable acts are not necessarily inconsistent with any international agreement, they represent potentially the most unilateral (and interesting) determinations under § 301.<sup>49</sup>

One illustration of a finding of unreasonableness is the *Argentina Air Couriers* case.<sup>50</sup> The unfair foreign government practice at issue was the Government of Argentina's grant of exclusive control over the international air transport of time-sensitive commercial documents to the Argentine postal system.<sup>51</sup> On November 16, 1984, the President determined that such practices were unreasonable and a restriction on United States commerce.<sup>52</sup>

Unreasonableness was also the basis for a presidential unfairness determination in the "self-initiated"<sup>53</sup> *Korea Intellectual Property* investigation.<sup>54</sup> In asking the Trade Representative to initiate an investigation of the adequacy of Korea's protection of intellectual property rights, the White House noted that "Korea's laws appear to deny effective protection for United States intellectual property" (the lack of effective protection appeared to be similar to the failure of Korean patent law to cover foodstuffs or chemical compounds and compositions and the failure of Korean copyright law to protect works of United States authors).<sup>55</sup> This investigation culminated in an agreement between the two governments in August 1986 under which the protection of intellectual property

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<sup>48</sup> Trade Act § 301(e)(3), 19 U.S.C. § 2411(e)(3).

<sup>49</sup> By contrast, the EC's analogue to § 301, its commercial instruments policy, does not include unreasonableness as a basis for action against a foreign government's acts, policies, or practices. Council Regulation (EEC) No. 2641/84, 27 O.J. EUR. COMM. (No. L 252) 1 (1984). See generally Atwood, *The European Economic Community's New Measures Against Unfair Practices in International Trade: Implications for United States Exporters*, 19 INT'L LAW. 361 (1985).

<sup>50</sup> Docket No. 301-44, initiated on Nov. 7, 1983, in response to a petition filed on Sept. 21 by the Air Courier Conference of America. 48 Fed. Reg. 52,664 (USTR 1983) (initiation).

<sup>51</sup> *Id.*

<sup>52</sup> Memorandum of Nov. 16, 1984, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 49 Fed. Reg. 45,733 (1984) [hereinafter Nov. 16, 1984 Memorandum]. The President instructed the Trade Representative to engage in one final round of consultations with Argentina. *Id.* at 45,734. As a result of those consultations, Argentina lifted its prohibition for a 90-day period, and in March 1985 lifted it permanently. Section 301 Table, *supra* note 19.

<sup>53</sup> "Self-initiate" is a term of art meaning initiation by the Trade Representative on its own motion under § 302(c) of the Trade Act, 19 U.S.C. § 2412(c). In this case, the Trade Representative initiated in response to a presidential directive, rather than in response to a petition filed by an interested party. See Statement by the Principal Deputy Press Secretary, 21 WEEKLY COMP. PRES. DOC. 1258 (1985) [hereinafter Deputy Press Sec'y Statement].

<sup>54</sup> Adequacy of Korean Laws for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (USTR 1985) (initiation).

<sup>55</sup> Deputy Press Sec'y Statement, *supra* note 53.

rights in Korea would be improved substantially.<sup>56</sup> In approving the agreement, the President determined that Korea's prior policy of denying effective protection to intellectual property rights was unreasonable and a burden or restriction on United States commerce.<sup>57</sup>

A third example of a foreign government practice considered unreasonable is the Government of Canada's denial of an income tax deduction to Canadian advertisers which contract with United States television and radio broadcasting stations located near the United States-Canadian border for advertising aimed primarily at the Canadian market. In 1978, certain United States television licensees filed a petition complaining about this practice and the USTR initiated an investigation.<sup>58</sup> On July 31, 1980, the President determined in the *Canada Border Broadcasting* case that the Canadian tax practice with respect to advertising placed with United States border broadcasters is unreasonable and burdens or restricts United States commerce.<sup>59</sup>

### c. Discrimination

Another basis for action under § 301 is a discriminatory, foreign government or instrumentality act, policy, or practice (provided it causes a burden or restriction on United States commerce). An illustrative allegation of discriminatory foreign government action was made in a 1977 petition filed by George F. Fisher, Inc. The petition maintained that Japanese agreements with Brazil, Korea, and the People's Republic of China discriminatorily permitted imports of thrown silk from those countries, effectively preventing the entry of such imports from the United States.<sup>60</sup> The President never made a determination, however, as Japan adjusted its restrictions to the satisfaction of the United States during the course of the GATT dispute settlement.<sup>61</sup> The Trade Representative subsequently terminated the investigation.<sup>62</sup>

An additional illustration of this sort is the first § 301 case, which involved the Government of Guatemala's requirement that certain cargo

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<sup>56</sup> See *infra* notes 171-79 and accompanying text.

<sup>57</sup> Aug. 14, 1986 Memorandum, *supra* note 43. Denial of effective intellectual property protection could also have been deemed unjustifiable within the meaning of § 301, in view of the statutory definition of that term. See *infra* notes 170-79 and accompanying text.

<sup>58</sup> 43 Fed. Reg. 39,610 (STR 1978) (initiation).

<sup>59</sup> July 31, 1980 Memorandum, *supra* note 13.

<sup>60</sup> George F. Fisher, Inc., 42 Fed. Reg. 11,935 (STR 1977) (initiation).

<sup>61</sup> Following the failure of accelerated discussions with Japan, the United States filed a complaint under the GATT, *supra* note 4, art. XXIII:2. A dispute settlement panel heard the case in the fall of 1977, but had not yet issued its report when Japan adjusted the restrictions. Section 301 Table, *supra* note 19.

<sup>62</sup> 43 Fed. Reg. 8876 (STR 1978) (termination).

be carried on Guatemalan or associated line carriers.<sup>63</sup> The United States initiated an investigation,<sup>64</sup> but action under § 301 became unnecessary when the petitioner withdrew its complaint following bilateral negotiations between the petitioner and the National Shipping Line of Guatemala.<sup>65</sup>

## 2. *Burden or Restriction*

In order to be actionable under § 301, a foreign government's or instrumentality's act, policy, or practice must be unjustifiable, unreasonable, or discriminatory and also must burden or restrict United States commerce.

### a. Burden

A burden on United States commerce is frequently alleged in § 301 petitions. The burden may be demonstrated through increased imports into the United States. For example, the American Iron and Steel Institute argued that increased imports resulted from an agreement between the EC and Japan to divert significant quantities of Japanese steel to the United States.<sup>66</sup> A burden on United States commerce may also be demonstrated through reduced availability of raw material imports into the United States. The National Tanners' Council made this argument concerning the Government of Argentina's export controls on hides.<sup>67</sup> More frequently, the alleged burden is the displacement of United States export sales of goods or services, either in the market of the country engaged in an unfair trade practice — such as the early § 301 petition complaining of a Canadian quota on the import of United States eggs<sup>68</sup> — or in third-country markets — such as the subsequent petition complaining of EC export subsidies on wheat flour.<sup>69</sup> A burden may also be found

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<sup>63</sup> Delta Steamship Lines, Inc., 40 Fed. Reg. 29,134, 29,134 (STR 1975) (initiation).

<sup>64</sup> *Id.*

<sup>65</sup> Section 301 Table, *supra* note 19. The STR terminated the investigation on June 29, 1976. 41 Fed. Reg. 26,758 (1976).

<sup>66</sup> American Iron and Steel Institute, 41 Fed. Reg. 45,628 (STR 1976) (initiation). The USTR later terminated this investigation on the ground that there was not sufficient justification to the claim that the EC-Japan carbon steel agreement created an unfair burden on the United States. 43 Fed. Reg. 3962 (STR 1978) (termination). *See also* a similar claim in the Korea Steel Wire Rope case, Docket No. 301-38, 40 Fed. Reg. 20,529 (initiation), 55,790 (USTR 1983) (termination).

<sup>67</sup> Tanners' Council of America, Inc., 46 Fed. Reg. 59,353, 59,353 (USTR 1981) (initiation).

<sup>68</sup> Canada Egg, Docket No. 301-2, 40 Fed. Reg. 33,749 (STR 1975) (initiation), 41 Fed. Reg. 9430 (STR 1976) (termination). The USTR terminated the case after Canada approximately doubled its quotas for imports of United States eggs. Section 301 Table, *supra* note 19.

<sup>69</sup> EC Wheat Flour, Docket No. 301-6, 40 Fed. Reg. 57,249 (initiation); July 31, 1980 Memorandum, *supra* note 13. The GATT panel report in this case was inconclusive as to whether the EC's

resulting from inadequate protection of intellectual property rights.<sup>70</sup>

b. Restriction

A restriction has been alleged somewhat less often in § 301 cases because it implies a more sweeping effect on United States commerce than a burden. In most cases where the President made a determination of unfairness and a finding of a burden or restriction on United States commerce was required,<sup>71</sup> the President found both a burden and a restriction.<sup>72</sup> In at least one case, however, the President distinguished between the two and found only a restriction.<sup>73</sup>

III. PROCEDURES UNDER SECTION 301

Investigations under § 302 (often referred to as § 301 investigations) may be initiated in response to a petition filed by an interested party<sup>74</sup> or by the USTR on a self-initiated motion.<sup>75</sup> When a petition is filed, the Trade Representative must determine whether to initiate an investigation within forty-five days of its receipt.<sup>76</sup>

Before filing a petition, the potential petitioner often has consulted with the Office of the United States Trade Representative and submitted a draft petition for comment. The USTR officials concerned — usually an attorney in the General Counsel's Office and representatives of the

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use of export subsidies violate art. XVI:3 of the GATT, *supra* note 4, to gain more than an equitable share of world export trade in wheat flour.

<sup>70</sup> See *infra* notes 170-79 and accompanying text.

<sup>71</sup> See *supra* notes 4-5 and accompanying text.

<sup>72</sup> *E.g.*, Aug. 14, 1986 Memorandum, *supra* note 43; Memorandum of May 15, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 18,294 (1986) [hereinafter May 15, 1986 Memorandum].

<sup>73</sup> Nov. 16, 1984 Memorandum, *supra* note 52.

<sup>74</sup> Trade Act § 302(a)(1), 19 U.S.C. § 2412(a)(1). The regulations define an "interested party" as "a party who has a significant interest; . . . any person representing a significant economic interest affected either by the failure of a foreign government to grant United States rights under a trade agreement or by the act, policy or practice complained of in the petition." 15 C.F.R. § 2006.0(b).

<sup>75</sup> While the President previously could initiate investigations on his own motion, the USTR was not authorized to do so until 1984. Trade Act § 302(c), 19 U.S.C. § 2412(c), as amended by § 304 of the Trade and Tariff Act of 1984, 98 Stat. 3002, 3004 (1984). See H.R. REP. NO. 1156, 98th Cong., 2d Sess. 147, 1984 U.S. CODE CONG. & AD. NEWS 5220, 5264.

At the President's direction, the Trade Representative has initiated four investigations: Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (USTR 1985) (initiation); Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, 50 Fed. Reg. 37,609 (USTR 1985) (initiation); Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (USTR 1985) (initiation) [hereinafter Korea's Insur. Restrictions]; and Adequacy of Korean Laws for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (USTR 1985) (initiation) [hereinafter Adequacy of Korean Laws].

<sup>76</sup> Trade Act § 302(a)(2), 19 U.S.C. § 2412(a)(2); 15 C.F.R. § 2006.3.

regional and sectoral offices — point out any deficiencies, revisions, alternative arguments, the likelihood of prevailing in an international dispute settlement (if applicable), and possible policy issues. All such comments are informal, and do not bind the Trade Representative in any way.<sup>77</sup> Potential petitioners often seek additional comments from the inter-agency § 301 Committee. This is a standing committee chaired by the USTR and normally composed of representatives of the Departments of State, the Treasury, Commerce, Justice, Agriculture, and Labor, the Office of Management and Budget, and the Council of Economic Advisors. (Individual representatives may vary from case to case, but the agencies remain the same.) Potential petitioners may also have asked the USTR in advance what efforts are underway to resolve a particular problem. In some cases the United States government may have already begun to eliminate or reduce the problem.<sup>78</sup>

Occasionally, potential petitioners are in need of more information to develop an adequate petition and submit a written request for more information under § 305.<sup>79</sup> Section 305 requires the Trade Representative's office to make available to a requestor nonconfidential information concerning the nature and extent of a specific trade policy or practice of a foreign government, United States actions under any trade agreement and remedies available under such an agreement or United States law, and past or pending proceedings with respect to the policy or practice concerned. If the information requested is not available to the USTR, the office must either ask the foreign government for the information or advise the requestor of the reasons for not making the request to the foreign government.<sup>80</sup>

The petition filed must include at least the following information: 1) the identity of the petitioner, its relationship to a United States industry, and the basis for its being an "interested party" (defined in the USTR regulations as anyone with a "significant economic interest"); 2) the

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<sup>77</sup> Many draft § 301 petitions are never filed. They may nonetheless be used quite successfully to focus more attention on an industry's complaint within foreign governments. Section 301 petitions can also increase leverage for the United States Government in its ongoing efforts to resolve problems with foreign governments. At the same time, a draft petition may put more pressure on the foreign negotiators to offer a satisfactory resolution so as to avoid a more confrontational proceeding under § 301, in which one or both governments may lose some flexibility as a practical matter. It may also put more pressure on the United States negotiators to make a favorable, expeditious resolution a higher priority than might otherwise be the case.

<sup>78</sup> The National Trade Estimates Report, which the USTR files annually with the Congress under Trade Act § 181, 19 U.S.C. § 2241, identifies significant foreign trade barriers (not all of which are unfair), and describes the status of United States Government efforts to eliminate or at least reduce them.

<sup>79</sup> 19 U.S.C. § 2415.

<sup>80</sup> *Id.*

rights of the United States under a trade agreement, the denial of benefits to the United States under a trade agreement, or the act, policy, or practice of a foreign government or instrumentality that is unjustifiable, unreasonable, or discriminatory and a burden or restriction on United States commerce; 3) copies (if available) of relevant foreign laws and regulations covered by the petition; 4) the identity of the foreign government that is acting inconsistently with international rights of the United States under a trade agreement, nullifying or impairing benefits to the United States under such an agreement, or otherwise acting in a manner actionable under § 301; 5) arguments why the criteria of § 301 are satisfied (including information on the burden or restriction on United States commerce, where relevant); and 6) a statement whether the petitioner is filing for relief under any other provision of law.<sup>81</sup>

Following the receipt of a petition, the USTR notifies the foreign government or governments identified in the petition and provides them with a copy. The USTR may ask for information, in English, necessary for a determination of the case. If the foreign government does not respond within a reasonable amount of time, the USTR may elect to proceed on the basis of the best information available.<sup>82</sup>

Immediately upon the filing of a petition, the Chairman of the § 301 Committee circulates copies to the interagency § 301 Committee and asks for each agency's comments in writing, usually within two weeks. The Chairman of the § 301 Committee then reports the committee's advice to the Trade Representative. Within forty-five days of the petition's receipt, the USTR decides whether to initiate an investigation.<sup>83</sup> The USTR must publish the reasons for a decision in the *Federal Register*. When a determination is made not to initiate an investigation, the USTR must also notify the petitioner of the reasons for the negative determination.<sup>84</sup>

There is no statutory provision for judicial review of decisions by the Trade Representative under § 302. Consequently, a successful judicial challenge to a negative determination is unlikely. The USTR has broad discretion in deciding whether to initiate an investigation. The Trade Representative may decline to do so for policy reasons even if the act, policy, or practice complained of is actionable under § 301 as a matter of law. For example, the USTR may refuse to initiate an investigation if the petitioner files for relief under another, and arguably more appropriate,

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<sup>81</sup> 15 C.F.R. § 2006.1.

<sup>82</sup> *Id.* § 2006.4.

<sup>83</sup> Trade Act § 302, 19 U.S.C. § 2412; 15 C.F.R. § 2006.3.

<sup>84</sup> *Id.*



trade remedy provision.<sup>85</sup>

In addition to these policy reasons, the Trade Representative may, of course, decide not to initiate an investigation based on legal issues. This determination would be made, for example, when: 1) there is no significant likelihood that an act, policy, or practice is actionable under § 301; 2) the petition is technically deficient by failing to provide necessary information; or 3) the practice involves a trade agreement and the United States is unlikely to prevail in a dispute settlement case. Unlike the antidumping and countervailing duty laws,<sup>86</sup> § 301 permits wide political discretion in order to give trade negotiators flexibility in deciding how best to tackle a particular trade problem.

If the USTR decides not to initiate an investigation, the USTR typically will advise the petitioner in advance and give it the opportunity to withdraw the petition. This notification avoids a negative determination. If the Trade Representative initiates an investigation, the USTR must request consultations with the foreign government or instrumentality concerned, either on the date of initiation or within ninety days (if additional time is needed to prepare for consultations).<sup>87</sup> If the case does not involve exclusively a trade agreement,<sup>88</sup> the case is usually handled in the context of bilateral negotiations. On the other hand, if the case does involve exclusively issues arising under a trade agreement, the United States usually requests consultations under that agreement. If a mutually-acceptable resolution is not reached during these consultations, the USTR must promptly request further proceedings on the matter under the formal dispute settlement procedures provided under such agreement.<sup>89</sup>

Under the GATT,<sup>90</sup> for example, the United States initially would request consultations under Articles XXII or XXIII:1. If Article XXII consultations are held but are unsuccessful, the United States would proceed to consult under Article XXIII:1. If, in turn, those consultations did not result in a resolution, the United States next would ask for the

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<sup>85</sup> For example, in 1982, the Trade Representative terminated, under § 302, an investigation of Canadian export credit subsidies on railcars when petitioner filed a countervailing duty petition at the Department of Commerce, which initiated an investigation. Industrial Union Department, AFL-CIO, 47 Fed. Reg. 42,059 (USTR 1982) (termination).

<sup>86</sup> Section 303 and Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1303, 1671-1677g.

<sup>87</sup> Trade Act § 303(b)(1)(A), 19 U.S.C. § 2413(b)(1)(A), as amended by § 304 of the Trade and Tariff Act of 1984, 98 Stat. 2948, 3005. See H.R. REP. NO. 1156, *supra* note 75, 1984 U.S. CODE CONG. & AD. NEWS at 5264.

<sup>88</sup> See *supra* note 4 and accompanying text.

<sup>89</sup> Trade Act § 303, 19 U.S.C. § 2413; 15 C.F.R. § 2006.5(b).

<sup>90</sup> See *supra* note 4.

establishment of a panel under Article XXIII:2. The panel usually consists of three to five members, normally representatives in Geneva of governments not involved in the dispute. (Experts who are not representatives of foreign governments may now be used on occasion.) Once the panel and its terms of reference are established, the panel examines arguments from the two parties. This process normally includes at least two rounds of written briefs and two rounds of oral argument. The panel then writes a report which is circulated initially only to the two parties for comment. The panel then transmits the final report to the GATT Council which, in practice, decides by consensus (rather than majority vote) whether the report should be adopted. The vast majority of reports are adopted although the practice of decision by consensus has meant a delay in adopting several reports and, in a few cases, blocking reports by a small number of parties.

In response to a petition filed under § 302, the USTR must provide an opportunity for the presentation of views on issues presented in a self-initiated investigation.<sup>91</sup> This opportunity is typically provided through a request for public comments included in the USTR's notice of initiation of an investigation. If a petitioner requests a hearing, the USTR must hold one. If the request is made in the petition or is made in other ways prior to the initiation of the investigation, then the USTR will normally set a date for the hearing in its initiation notice. At the petitioner's timely request, that hearing must be held within thirty days of initiation; it may be held later if the petitioner agrees.<sup>92</sup> If the petitioner requests a hearing subsequently during the course of the investigation, the USTR issues a notice published in the *Federal Register* advising the public of this opportunity.

Throughout the course of an investigation under § 302, the USTR consults with other interested agencies. The § 301 Committee meets on a weekly basis to review developments in pending or likely cases. Prior to any negotiations, or whenever a significant decision is required in a case, either the § 301 Committee or a specially convened subcommittee analyzes issues in detail. For example, if it appears likely that the Trade Representative may wish to recommend retaliation, then a subcommittee may be established to value the amount of retaliation appropriate and to assemble an initial list of products and services on which retaliation may be recommended.

Interagency decisions are typically made at the lowest level possible. If the § 301 Committee unanimously agrees on a course of action and

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<sup>91</sup> 19 U.S.C. § 2412(b); 15 C.F.R. § 2006.7.

<sup>92</sup> *Id.*

each member speaks for a represented agency, then there is no need for review at a higher level. However, if the § 301 Committee does not agree, the issue may be taken to the Assistant Secretary-level Trade Policy Review Group.<sup>93</sup> Similarly, if the Trade Policy Review Group does not agree, the issue may be placed on the agenda of the Cabinet-level Economic Policy Council.<sup>94</sup> The interagency process is extremely important in the conduct of § 301 proceedings.

During a § 301 proceeding, the USTR also consults with the petitioner and other private sector representatives. As already noted, if the Trade Representative decides not to initiate an investigation, the USTR must inform the petitioner of the reasons for this decision.<sup>95</sup> If the Trade Representative initiates an investigation, the USTR is required to seek information and advice from the petitioner and from the private sector advisory representatives on the Advisory Committee for Trade Negotiations in preparing for consultations and any dispute settlement proceedings.<sup>96</sup> The Trade Representative must also seek the advice of the Advisory Committee on Trade Negotiations on recommendations to the President and may request the views of the International Trade Commission on the probable impact of such action on the United States economy.<sup>97</sup>

In an investigation initiated in response to a petition, the USTR must provide an opportunity for the presentation of views. This may include a hearing, if requested by any interested parties, before recommending that the President take action under § 301 with respect to the treatment of a foreign country's products or services. (If expeditious action is required, the Trade Representative may recommend action and provide such an opportunity later.) On the other hand, in an investigation initiated on the President's or the USTR's own motion, the President must provide an opportunity for the presentation of views

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<sup>93</sup> Section 242(a) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1872 (1982), calls for the establishment of an interagency trade organization. The Cabinet-level group established pursuant to this directive is the Trade Policy Committee ("TPC"), chaired by the Trade Representative and composed of the Secretaries of Commerce, State, the Treasury, Defense, Interior, Agriculture, Labor, Transportation, and Energy; the Attorney General; the Director of the Office of Management and Budget; the Chairman of the Council of Economic Advisers; the Assistant to the President for National Security Affairs; and the Director of the United States International Development Cooperation Agency. Exec. Order No. 12,188, § 1-102(b), 3 C.F.R. § 131 (1980).

Under the TPC is the Assistant Secretary-level Trade Policy Review Group ("TPRG"), and under it for § 301 matters is the § 301 Committee. *Id.* § 1-102(c)(2).

<sup>94</sup> Statement on the Creation of Two Cabinet-Level Bodies, 21 WEEKLY COMP. PRES. DOC. 437 (Apr. 11, 1985).

<sup>95</sup> See *supra* note 87 and accompanying text.

<sup>96</sup> Trade Act § 303(a), 19 U.S.C. § 2413(a).

<sup>97</sup> *Id.* § 304(b), 19 U.S.C. § 2414(b).

concerning action to be taken, unless the President determines that expeditious action is required. A hearing, however, is not required; similarly, there is no requirement to provide an opportunity for the presentation of views after expeditious action has been taken which precluded such an opportunity beforehand.

In practice, the USTR consults closely with the petitioner and other interested private sector representatives throughout the proceeding. *Ex parte* meetings may be held at a party's request, and the USTR often seeks private sector views on particular proposals. The object of all such consultations is to try to ensure that any settlement with a foreign government or retaliatory action taken under § 301 furthers United States interests and limits any adverse effects on sectors of the economy other than those of the petitioning industry or industries.

In cases piquing significant congressional interest, the USTR keeps the concerned Members of Congress and their staffs informed of major developments. Moreover, the USTR is required statutorily to advise Congress of the reasons for any delay in dispute settlement beyond the minimum period provided in any trade agreement.<sup>98</sup> This report must include the reasons why the dispute was not resolved within the minimum time period, the status of the case, and the prospects for resolution. The USTR must also submit a report to the House of Representatives and the Senate semiannually describing the petitions filed, determinations made, actions taken or reasons for no action, and general developments in and the status of each proceeding.<sup>99</sup>

In § 301 cases handled under trade agreement dispute settlement, it is uncertain how long the process should take. For disputes concerned solely with export subsidies under the GATT Subsidies Code,<sup>100</sup> the process technically is to be completed within seven months after the initiation of an investigation.<sup>101</sup> For disputes under the same code but involving subsidies other than export subsidies, dispute settlement is supposed to be completed within eight months of initiation of an investigation.<sup>102</sup> In fact, Subsidies Code dispute settlement cases have not been completed within these deadlines. The Trade Representative has made a recommendation to the President on a timely basis and the President's determination was to continue the pending dispute settlement process.<sup>103</sup>

In cases under other trade agreements, there is no deadline which

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<sup>98</sup> *Id.* § 303(b), 19 U.S.C. § 2413(b).

<sup>99</sup> *Id.* § 306(3), 19 U.S.C. § 2416(3).

<sup>100</sup> *See supra* note 4.

<sup>101</sup> Trade Act § 304(a)(1)(A), 19 U.S.C. § 2414(a)(1)(A).

<sup>102</sup> *Id.* § 304(a)(1)(B), 19 U.S.C. § 2414(a)(1)(B).

<sup>103</sup> *See, e.g.*, Memorandum of July 21, 1982, for the United States Trade Representative. Deter-

the Trade Representative must meet in making a recommendation to the President. The statute requires only that the USTR make a recommendation to the President within thirty days after the conclusion of dispute settlement.<sup>104</sup> In cases not pursued under a trade agreement, the deadline is twelve months following the initiation of an investigation.<sup>105</sup>

In all cases, the President is required to determine what action, if any, to take within twenty-one days after receipt of the Trade Representative's recommendations.<sup>106</sup> The President need not act within twenty-one days, but a decision must be made on what action to take, if any. The President may retaliate by increasing tariffs, imposing other import restrictions on goods or services,<sup>107</sup> or taking any other appropriate and feasible action within the President's power.<sup>108</sup> The President may decide to retaliate without immediately deciding how to retaliate, and direct the Trade Representative to propose appropriate and feasible action in response.<sup>109</sup> The President may simply determine that the foreign government act, policy, or practice is unfair within the meaning of § 301.<sup>110</sup> This determination may increase the pressure on the foreign government to reach a satisfactory settlement. In contrast, the President

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mination Under Section 301 of the Trade Act of 1974, 47 Fed. Reg. 31,841 (1982). In this case, concerning EC export subsidies on pasta, the President noted:

We are disappointed that the entire dispute settlement process was not concluded in the minimum time set forth in the Subsidies Code, and that consultations, which might have contributed to a more expeditious resolution, were not held. Nevertheless, the dispute settlement is now proceeding in a timely manner and we believe that U.S. interests would be best served by following that process to its conclusion. It is our hope that the panel will act expeditiously on this matter.

*Id.*

<sup>104</sup> Trade Act § 304(a)(1)(C), 19 U.S.C. § 2414(a)(1)(C).

<sup>105</sup> *Id.* § 304(a)(1)(D), 19 U.S.C. § 2414(a)(1)(D).

<sup>106</sup> *Id.* § 301(d)(2), 19 U.S.C. § 2411(d)(2).

<sup>107</sup> Section 301 makes unfair foreign government barriers on United States direct investment with implications for trade in goods and services actionable under § 301. It does not, however, authorize retaliatory action on foreign investment in the United States. Of course, the President may act under other authority within the context of a § 301 case. For the definition of "commerce," see Trade Act § 301(e)(1).

<sup>108</sup> For example, last spring, the President temporarily suspended tariff commitments and established quotas on imports from the EC in response to unfair EC quotas and tariff actions taken in conjunction with Portugal's and Spain's accessions to the EC. May 15, 1986 Memorandum, *supra* note 72; Proclamation No. 5478, 51 Fed. Reg. 18,296 (1986).

<sup>109</sup> For example, the President determined that Taiwan's disregard of "transaction value" (usually the invoice price of goods) in calculating customs duties was actionable under § 301 and directed the Trade Representative to propose retaliatory action. Memorandum of Aug. 1, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 28,219 (1986).

<sup>110</sup> For example, in 1984, the President determined that restrictions imposed by the Government of Argentina, through its postal authorities, on services provided by United States courier companies were unreasonable and a restriction on United States commerce. Nov. 16, 1984 Memorandum, *supra* note 52.

may direct the continuation of pending dispute settlement under a trade agreement<sup>111</sup> or negotiations. Finally, the President may determine that the foreign government or instrumentality act, policy, or practice is *not* unfair within the meaning of § 301.<sup>112</sup>

The President is required to publish the reasons for a decision. Once the President acts under § 301, there remains no other requirement for presidential or other action. Additional action may still be taken, but a presidential decision exhausts all requirements under § 301.

#### IV. RECENT DEVELOPMENTS UNDER SECTION 301

Section 301 has become an increasingly significant tool in implementing the Administration's free and fair trade policy.<sup>113</sup> The following section of this Article illustrates the significance and variety of its uses, particularly in those cases seeking improved access to foreign markets for United States exports of goods and services and for direct investment.

##### A. Products

Since most international trade rules concern goods, it is not surprising that many recent § 301 developments are in product cases.

##### 1. EC Enlargement

For the first time, the President acted under § 301 last spring without any preceding formal investigation under § 302. The decision was a response to actions of the EC concerning its enlargement to include Portugal and Spain. Effective March 1, 1986, the EC: 1) imposed restrictions on the importation into Portugal of oilseeds and oilseed products and on the consumption of certain vegetable oils in Portugal; 2) required that a specified portion of Portuguese grain imports be reserved for suppliers from other member countries of the EC; and 3) withdrew Spanish tariff concessions and imposed variable levies on imports of corn and sorghum. The average annual value of United States exports affected by the

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<sup>111</sup> See *supra* note 4.

<sup>112</sup> For example, in 1985, the President determined that certain practices by member states of the European Space Agency and their instrumentalities with regard to the commercial satellite launching services of Arianespace, S.A., were not unreasonable, in part because the United States Government engages in some of the same or similar practices. Memorandum of July 17, 1985, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 50 Fed. Reg. 29,631 (1985).

<sup>113</sup> Text of Remarks by the President to Business Leaders and Members of the President's Export Council and Advisory Committee for Trade Negotiations, 21 WEEKLY COMP. PRES. DOC. 1128 (Sept. 23, 1985).

EC actions exceeded one billion dollars in the 1981-1983 period.<sup>114</sup>

On March 31, 1986, the President announced that restrictions comparable in effect to the EC's restrictions in Portugal would be imposed on imports of EC products unless and until the United States and the EC resolved those matters.<sup>115</sup> The President also announced that, in response to the EC's tariff and levy actions in Spain, the United States would withdraw tariff commitments in the GATT on certain products, but maintain current tariff levels until July 1 to permit expedited negotiations of agreed compensation from the EC. The announcement stated that the President would proclaim increased duties as appropriate if such agreement were not possible and would restore concessions to the degree those negotiations were successful.<sup>116</sup> These actions were carried out through a proclamation published May 16, 1986.<sup>117</sup>

On July 2, the United States and the EC reached an interim solution to this dispute regarding corn and sorghum exports to Spain.<sup>118</sup> The EC provided assurances that any loss of United States corn and sorghum exports to Spain (compared to a monthly average of 234,000 metric tons) for the remaining six months of 1986 would be offset by increased access to the EC under a reduced import levy quota. The United States will not increase duties on EC products while United States exports are safeguarded in this way. The two parties also made a commitment to reach a definitive settlement of the issues by December 31, 1986.<sup>119</sup>

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<sup>114</sup> See *supra* note 23 and accompanying text.

<sup>115</sup> Statement by the Principal Deputy Press Secretary and Fact Sheet, 22 WEEKLY COMP. PRES. DOC. 435 (Mar. 31, 1986).

<sup>116</sup> *Id.*

<sup>117</sup> The USTR held a public hearing on proposed United States action on Apr. 21-22. 51 Fed. Reg. 11,532 (USTR 1986). On May 15, the President formally determined, under § 301, that the quantitative restrictions on oilseeds, oilseed products, and grains in Portugal and the uncompensated withdrawal of tariff concessions on corn and sorghum in Spain denied benefits to the United States arising under GATT, *supra* note 4. The President further determined that they were unreasonable and constituted a burden and restriction on United States commerce. May 15, 1986 Memorandum, *supra* note 72.

In response to the EC's quantitative restrictions in Portugal, the President proclaimed certain quantitative restrictions on products of the EC (chocolate candy, apple juice, certain beer, and white wine). Proclamation No. 5478, at 1, ¶ 3 and Annex I, 51 Fed. Reg. 18,296 (1986). These quotas were adjustable to mirror the effects of the EC measures on United States exports to Portugal. In response to the EC's withdrawal of tariff concessions on corn and sorghum in Spain, the President suspended United States tariff concessions on certain products. Still, United States tariffs were not increased pending efforts to resolve United States claims. Proclamation No. 5478, *supra*, at 1, ¶ 4; 2, ¶ 2.

<sup>118</sup> Report to Congress Required by Section 306 of the Trade Act of 1974, at 1 (Jan.-June 1986) [hereinafter Section 306 Report]. See also *Finan. Times*, July 3, 1986, at 1, col. 3; Testimony of Ambassador Clayton Yeutter on Section 301 of the Trade Act of 1974, before the Comm. on Finance, U.S. Senate, 99th Cong., 2d Sess. 4, 9 (July 22, 1986).

<sup>119</sup> Section 306 Report, *supra* note 118, at 1.

## 2. Taiwan Customs Valuation

The President made another determination under § 301 in 1986 without a preceding formal investigation by the USTR under § 302. On August 1, the President determined that Taiwan's use of a duty paying list system to determine the value of imports for purposes of calculating customs duties violated a trade agreement and was unjustifiable or unreasonable and a burden or restriction on United States commerce.<sup>120</sup> The President decided to take appropriate and feasible action against Taiwan and directed the Trade Representative to recommend specific retaliatory measures.<sup>121</sup>

In 1979 Taiwan agreed to observe obligations "substantially equivalent" to those applied to developing countries under the GATT Customs Valuation Code.<sup>122</sup> Under the code, imports must be valued for customs purposes based on their "transaction value"<sup>123</sup> (usually the invoice price). Industrially-developed countries that became parties to the code undertook this obligation immediately after the code's entry into force; in contrast, developing countries were not required to implement this and other obligations for five years after the code's entry into force.<sup>124</sup>

Taiwan should have used the "transaction value" for customs purposes by January 1, 1986.<sup>125</sup> In 1986, however, Taiwan enacted a law establishing a duty paying list system based on administratively-determined values rather than on the "transaction value" — a breach of its 1979 commitment. Following the President's August 1 determination,<sup>126</sup> Taiwan authorities agreed to issue regulations by September 1 that would abolish the duty paying list system by October 1. Based upon this undertaking and its implementation, no retaliatory action was taken against Taiwan.<sup>127</sup>

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<sup>120</sup> Aug. 1, 1986 Memorandum, *supra* note 24.

<sup>121</sup> *Id.*

<sup>122</sup> See *supra* notes 4, 24. Taiwan could not be a party to the Code itself since it is not a GATT party. The United States derecognized Taiwan in 1978, Memorandum of Dec. 30, 1978, Relations with the People on Taiwan, 3 C.F.R. § 318 (1979), but still conducts relations with Taiwan. See generally the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979). The 1979 agreement on customs valuation is one of several trade agreements with Taiwan.

<sup>123</sup> Customs Valuation Code, *supra* note 4, art. 1.

<sup>124</sup> *Id.* arts. 24, 21, respectively. The opportunity for developing countries only to delay implementation of obligations under the code was a "special and differential" measure for developing countries.

<sup>125</sup> This is five years from the code's entry into force on Jan. 1, 1981. *Id.* arts. 21, 24.

<sup>126</sup> See *supra* note 120.

<sup>127</sup> Taiwan Customs Valuation Unfair Trade Practice, 51 Fed. Reg. 37,528 (USTR 1986) (termination).



### 3. Japan Semiconductors

Responding to a petition filed by the Semiconductor Industry Association, the Trade Representative initiated an investigation in July 1985 of the Government of Japan's acts, policies, and practices which allegedly and unfairly restricted access to its semiconductor market.<sup>128</sup> On July 31, 1986, the President announced that the United States and Japan had reached a "landmark pact" on semiconductor trade that would enhance the ability of United States semiconductor manufacturers to compete fairly in the Japanese market and would help prevent Japanese manufacturers from dumping semiconductors in the United States and third countries.<sup>129</sup>

The principal aim of this agreement is to enhance free trade in semiconductors in the Japanese market. A steady increase in access is expected during the five-year duration of the agreement. The Japanese Government will encourage Japanese producers and users of semiconductors to take advantage of the increased availability of foreign-manufactured products in their market. Based on monitoring or consultation, the Japanese Government will take appropriate action available under Japanese law and regulation to prevent exports at less than company-specific "fair value."<sup>130</sup>

Another goal of the agreement is to help prevent the dumping of semiconductors by Japanese manufacturers at below-cost prices in the United States and other countries. In this regard, the Japanese Government agreed to monitor costs and prices of semiconductor products exported from Japan to the United States. Products subject to monitoring are either standard, general use semiconductors, or semiconductors for which there is evidence of a threat of sales at less than fair value. The list of products subject to monitoring will be reviewed as necessary and products may be added or deleted from the list.<sup>131</sup>

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<sup>128</sup> Semiconductor Industry Association, 50 Fed. Reg. 28,866 (USTR 1985) (initiation).

<sup>129</sup> Statement by the President, 22 WEEKLY COMP. PRES. DOC. 1021 (July 31, 1986).

<sup>130</sup> Fact Sheet: U.S.-Japan Semiconductor Trade Agreement 1-2 (July 31, 1986) [hereinafter Fact Sheet]. Under the agreement, the Government of Japan also will establish an organization to help foreign semiconductor producers increase sales in the Japanese market. This organization will make quality assessments of foreign semiconductor products, upon request, and will organize a research fellowship program, seminars, and exhibitions for foreign firms. The Japanese Government will also promote long-term relationships between Japanese semiconductor purchasers and foreign manufacturers through joint product development and Japanese customers. Finally, both governments will assure foreign companies full and equitable access to the patents which result from government-sponsored research and development in this area.

<sup>131</sup> *Id.* at 2-3. Japanese semiconductor exporters will submit company- and product-specific cost and export price data to the Japanese Ministry of International Trade and Industry ("MITI"). When the United States Government believes that a monitored Japanese product is being dumped in

The United States Government retains full rights to initiate antidumping investigations based on available information either by self-initiation or in response to a petition. In the event of self-initiation, the United States will seek prior consultations with Japan. If an antidumping action is initiated on any monitored product, the Japanese Government will see to it that the affected Japanese exporters provide the Department of Commerce with the data submitted to the Japanese Ministry of International Trade and Industry within fourteen days after the department presents a questionnaire. The Department of Commerce will then conduct an expedited antidumping investigation.

In order to prevent dumping, the Government of Japan also will monitor costs and export prices on semiconductor products exported by Japanese firms to third countries.<sup>132</sup> The two governments will meet periodically to evaluate progress under the agreement and to deal with any disputes that may arise. Emergency consultations may be requested by either government at any time.<sup>133</sup> As a result of this agreement, both the antidumping cases<sup>134</sup> and the investigation under § 302 have been suspended.<sup>135</sup> They will remain suspended as long as the principles and objectives of this agreement are fulfilled.<sup>136</sup>

#### 4. Japan Leather and Leather Footwear

On September 7, 1985, the President directed the Trade Representative to recommend retaliatory measures against imports of leather and leather footwear from Japan unless long-standing disputes over Japanese quotas were satisfactorily resolved by December 1, 1985.<sup>137</sup> As early as

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United States markets at prices less than company-specific fair value, they will provide the Japanese Government with information to support that belief. The United States Government may then request immediate consultations with the Japanese Government, to last no longer than 14 days unless both parties agree to an extension.

<sup>132</sup> *Id.* Ancillary to the Arrangement on Trade in Semiconductor Products are agreements between the Department of Commerce and certain Japanese semiconductor producers suspending the department's investigations of certain semiconductor products from Japan. See Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 51 Fed. Reg. 28,396 (Dep't Comm. 1986) (suspension); and Erasable Programmable Read Only Memory Semiconductors from Japan, 51 Fed. Reg. 28,253 (Dep't Comm. 1986) (suspension). Under these suspension agreements, the Department of Commerce will monitor the costs and prices of these particular products and advise Japanese firms exporting to the United States of appropriate fair market values for their sales of semiconductors so that they may avoid dumping at lower prices. Should a Japanese firm engage in future dumping or otherwise violate a suspension agreement, the Department of Commerce may terminate that agreement and immediately impose dumping duties. Fact Sheet, *supra* note 130, at 3.

<sup>133</sup> Fact Sheet, *supra* note 130, at 1.

<sup>134</sup> See *supra* note 132.

<sup>135</sup> July 31, 1986 Memorandum, *supra* note 9.

<sup>136</sup> Fact Sheet, *supra* note 130, at 1.

<sup>137</sup> See *supra* notes 10-22 and accompanying text.

1949, Japan imposed quotas on imports of leather and leather footwear despite the general prohibition of quotas under Article XI of the GATT.<sup>138</sup> In 1977, the Special Trade Representative initiated an investigation in response to a petition filed by the Tanners' Council of America complaining of the quotas and the alleged excessively high tariffs on leather imports.<sup>139</sup> The two governments finally reached an understanding that Japan would expand the leather quota so as not to affect adversely United States leather exports to Japan. On this basis, the President decided not to take retaliatory action, but directed the Special Trade Representative to monitor implementation of the understanding.<sup>140</sup>

The results of this understanding proved to be unsatisfactory and the United States pursued dispute settlement in the GATT.<sup>141</sup> On May 16, 1984, the GATT Council adopted a panel report finding that Japan's leather quotas violated Article XI and nullified and impaired United States benefits under the GATT.<sup>142</sup> Meanwhile, in 1982, the Trade Representative initiated an investigation in response to a petition filed by the Footwear Industries Association of America, Inc. and others alleging that Japan's import restrictions on non-rubber footwear denied United States footwear exporters access to Japanese markets, were inconsistent with the GATT, and were unreasonable and discriminatory and a burden on United States commerce.<sup>143</sup> Under GATT Article XXIII:2, the United States requested application to Japan's leather footwear quotas of the conclusions reached by a GATT panel in the leather case.<sup>144</sup>

In December 1985, the United States accepted compensation from Japan through reduced or bound Japanese tariffs on \$2.3 billion worth of United States exports to Japan in 1984. The total compensation to the United States is estimated to be \$236 million and involves numerous

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<sup>138</sup> Article XI:1 of the GATT, *supra* note 4, provides, in part, that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

<sup>139</sup> Notice, Tanners' Council, *supra* note 10.

<sup>140</sup> July 31, 1980 Memorandum, *supra* note 13.

<sup>141</sup> The United States and Japan consulted under GATT, *supra* note 4, art. XXIII:1 on Jan. 27-28, Mar. 30, and Apr. 12, 1983. On Apr. 20, a dispute settlement panel was authorized under art. XXIII:2. The panel heard the case in the fall and winter of 1983-84. Section 301 Table, *supra* note 19.

<sup>142</sup> Section 301 Table, *supra* note 19.

<sup>143</sup> 47 Fed. Reg. 56,428 (USTR 1982) (initiation). Petitioners also complained about other governments' acts, policies, or practices—namely, the acts, policies, or practices of Brazil, the EC, France, Italy, Korea, Spain, Taiwan, and the United Kingdom. *Id.*

<sup>144</sup> See *supra* note 142 and accompanying text.

items. The United States also increased duties on an estimated \$24 million in United States imports of leather and certain leather goods from Japan. Together, these measures satisfied the United States for the trade damage caused to United States commerce by the Japanese import restrictions. In a memorandum to the Trade Representative, the President noted: "The settlement will increase opportunities for American producers to sell products in Japan. This is far preferable to protectionist measures that would restrict imports without increasing United States exports."<sup>145</sup>

### 5. EC Canned Fruit

On September 7, 1985, the President also directed the USTR to recommend retaliatory measures with respect to the EC concerning its production subsidies for canned fruit unless the United States and the EC resolved this long-standing dispute by December 1, 1985.<sup>146</sup> On October 23, 1981, the California Cling Peach Advisory Board had filed a petition complaining of the EC's violation of GATT Article XVI in granting production subsidies on EC member states' canned peaches, canned pears, and raisins. The petitioner claimed that these subsidies displaced United States exports from the EC market and impaired tariff bindings on these products.<sup>147</sup>

The Trade Representative initiated an investigation<sup>148</sup> and pursued dispute settlement procedures in the GATT.<sup>149</sup> The United States obtained a largely favorable panel report and asked the GATT council several times in 1984 to adopt the report. Nonetheless, the council deferred action at the EC's request.<sup>150</sup> Following the President's September 7 direction to the USTR,<sup>151</sup> representatives of the United States and the EC held a series of consultations. In December 1985, the United States and the EC reached an agreement which was formalized on December 13.

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<sup>145</sup> Memorandum of Mar. 16, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 9437 (1986).

<sup>146</sup> See *supra* note 42,

<sup>147</sup> 46 Fed. Reg. 61,358 (USTR 1981).

<sup>148</sup> *Id.*

<sup>149</sup> The United States and EC consulted under GATT, *supra* note 4, art. XXIII:1 on Feb. 25, 1982. On Mar. 31, 1982, the United States requested establishment of a dispute settlement panel under art. XXIII:2. On Aug. 17, 1982, the President directed the Trade Representative to expedite dispute settlement. 47 Fed. Reg. 36,403 (1982). The GATT panel met on Sept. 29 and Oct. 29, 1982, and submitted its report to the parties on Nov. 21, 1983. The panel met again with the parties on Feb. 27, 1984, and submitted a revised report to both parties on Apr. 27, 1984. On June 28, the panel met again, and issued its final report on July 20. Section 301 Table, *supra* note 19.

<sup>150</sup> The United States requested adoption of the panel report at the GATT Council meetings of Apr. 30, May 29, June 5, and July 16, 1985. Section 301 Table, *supra* note 19.

<sup>151</sup> See *supra* note 42.

The two governments noted the EC's reduction in subsidies for canned pears, and the EC agreed to phase out the processing elements of its subsidies for canned peaches by July 1987.<sup>152</sup>

#### 6. EC Citrus

This § 301 proceeding began in 1976 when the Florida Citrus Commission and others complained of the EC's discriminatory citrus tariff preferences for certain Mediterranean countries which allegedly had an adverse effect on United States citrus exports to the EC.<sup>153</sup> Although the United States finally obtained a favorable GATT panel report in 1984, the EC blocked its adoption by the council.<sup>154</sup> The United States subsequently deemed dispute settlement as being concluded.<sup>155</sup> On June 20, 1985, the President found the discriminatory EC tariffs actionable under § 301 on the grounds that they deny the United States benefits under the GATT, are unreasonable and discriminatory, and constitute a burden and restriction on United States commerce.<sup>156</sup> On June 21 the President proclaimed that increased duties would become effective on July 6, 1985.<sup>157</sup> The EC counterretaliated on June 23 by announcing increased duties on United States exports of lemons and walnuts to the EC which were also to become effective on July 6.<sup>158</sup>

On July 19, both sides agreed to delay their duty increases until Oc-

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<sup>152</sup> Section 306 Report, *supra* note 118, at 2-3.

<sup>153</sup> The STR initiated an investigation on Nov. 30, 1976, 41 Fed. Reg. 52,567 (1976), and held public hearings on Jan. 25, 1977. During the Tokyo Round of Multilateral Trade Negotiations, the United States obtained duty reductions on fresh grapefruit only. In October 1980, the United States consulted with the EC under GATT, *supra* note 4, art. XXII:1, and later had informal discussions. The United States consulted under GATT art. XXIII:1 on Apr. 20, 1982. Conciliation efforts in September 1982 failed.

On Nov. 2, 1982, the GATT Council agreed to establish a panel. It took some months for the parties to agree on the panel's composition and terms of reference. The panel finally met on Oct. 31 and Nov. 29, 1983, and Feb. 13 and Mar. 12, 1984. The panel submitted the factual portion of its report to the parties on Sept. 27, and the full report on Dec. 14, 1984. Section 301 Table, *supra* note 19.

<sup>154</sup> The GATT Council considered the panel's findings and recommendations on Mar. 12 and Apr. 30, 1985, but the EC blocked any action at either session. Section 301 Table, *supra* note 19.

<sup>155</sup> On May 10, the USTR held a public hearing on the substance of the Trade Representative's recommendations to the President. 50 Fed. Reg. 15,266 (USTR 1985). On May 30, the Trade Representative transmitted his recommendation to the President. *Id.*

<sup>156</sup> Memorandum of June 20, 1985, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 50 Fed. Reg. 25,685 (1985). *See also* Office of the USTR, Ambassador Michael B. Smith Announces Decision on the Citrus 301 Petition (June 20, 1985).

<sup>157</sup> Proclamation No. 5354, 50 Fed. Reg. 26,143 (1985).

<sup>158</sup> Section 301 Table, *supra* note 19. *See also* Office of the USTR, Statement by Acting United States Trade Representative Ambassador Michael B. Smith (June 27, 1985), characterizing the EC's retaliation measures as "totally uncalled for."

tober 1 pending the outcome of bilateral efforts to resolve the underlying dispute.<sup>159</sup> The parties did not reach a satisfactory settlement. Consequently, on November 1, the United States put into effect its pasta duties and the EC took action with respect to United States lemons and walnuts on November 4.<sup>160</sup>

The United States and the EC finally reached an agreement on August 10, 1986. The EC agreed to lower its tariffs on various citrus products (including products not covered in the GATT panel case or products which did not receive an unfavorable GATT report). In addition to the resolution of this citrus case, the EC agreed to lower its tariff on almonds for which the United States agreed to lower its tariffs on anchovies, olives, olive oil, capers, paprika, and fermented cider,<sup>161</sup> and to increase the EC's cheese quotas.<sup>162</sup> Both sides agreed to eliminate the increased duties imposed in November 1985.<sup>163</sup>

## B. Services

Services such as banking, insurance, and transportation are increasingly important to the Administration's trade policy because of their greater role in the United States gross national product. One of the four investigations self-initiated at the President's request in the fall of 1985<sup>164</sup> concerned United States insurance firms' lack of fair and equitable access to the Korean insurance market.<sup>165</sup> This subject had already been the object of an earlier § 301 case.<sup>166</sup> The Korean Government prohibited or

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<sup>159</sup> Office of the USTR, Yeutter Announces Agreement on Citrus and Pasta (July 19, 1985). Under Proclamation No. 5363, 50 Fed. Reg. 33,711 (1985), the President suspended the application of increased duties until Nov. 1, 1985, and authorized the Trade Representative to suspend, modify, or terminate the increased duties upon publication in the Federal Register of his determination that such action is justified by EC actions toward a mutually-acceptable solution to the dispute.

<sup>160</sup> Proclamation No. 5363, *supra* note 159.

<sup>161</sup> These United States tariff reductions are subject to congressional enactment.

<sup>162</sup> See generally Wash. Post, Aug. 11, 1986, at 1, col. 5; N.Y. Times, Aug. 11, 1986, at D1, col. 4.

<sup>163</sup> Withdrawal of Increased Rates of Duty on Certain Pasta Articles from the European Economic Community, 51 Fed. Reg. 30,146 (1986).

<sup>164</sup> Radio Address, *supra* note 40.

<sup>165</sup> Korea's Insur. Restrictions, *supra* note 75. For the other three self-initiated investigations, see *supra* note 75.

<sup>166</sup> Docket No. 301-20, initiated on Dec. 19, 1979, in response to a petition filed Nov. 5, 1979, by the American Home Assurance Company. Petitioner alleged that the Government of the Republic of Korea ("Korea") discriminated against it by: 1) failing to issue a license permitting petitioner to write insurance policies covering marine risks; 2) not permitting petitioner to participate in joint venture fire insurance; and 3) failing to grant retrocessions from Korea Reinsurance Corp. to petitioner on the same basis as Korean insurance firms. See 44 Fed. Reg. 75,246 (USTR 1979) (initiation). On Nov. 26, 1980, the Office of the USTR invited public comments on proposals for retaliation. 45 Fed. Reg. 78,850 (1980). As a result of consultations, the Korean Government agreed to promote more open competition in its insurance market. On Dec. 19, 1980, petitioner withdrew

restricted operations of foreign insurance firms in the \$5 billion Korean compulsory fire insurance, life insurance, and reinsurance markets. The United States considered these restrictions inconsistent with the United States-Korea Treaty of Friendship, Commerce and Navigation.<sup>167</sup>

On July 21, the White House announced that the two governments had reached an agreement which would significantly increase United States firms' access to the Korean market by enabling them to underwrite both life and non-life insurance in Korea.<sup>168</sup> Korea agreed to license qualified United States insurance firms to participate fully in its market and to provide all necessary information on applicable technical requirements. On August 14, 1986, the President accepted this agreement as an appropriate and feasible action under § 301 to terminate the investigation under § 302. The President also directed the Trade Representative to "take any actions necessary to implement and monitor [the agreement]."<sup>169</sup>

### C. Intellectual Property

Another important component of the President's Trade Policy Action Plan, articulated in September 1985, was to further the protection of patents, copyrights, trademarks, and other intellectual property rights.<sup>170</sup> Not surprisingly, another investigation self-initiated at the President's direction concerned Korea's inadequate protection of intellectual property rights.<sup>171</sup>

On July 21, 1986, the White House announced the conclusion of an agreement with the Korean Government that will dramatically improve protection of intellectual property rights in Korea.<sup>172</sup> The Korean Government agreed to present to its National Assembly for enactment by mid-1987, comprehensive copyright bills which will cover traditional literary works, sound recordings, and computer software. A separate bill will be introduced regarding computer software copyright protection.

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its petition, and on Dec. 29, USTR terminated its investigation. 45 Fed. Reg. 85,539 (USTR 1980) (termination).

<sup>167</sup> Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947. Article VII of this treaty provides, in part, that:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.

<sup>168</sup> Statement by the Deputy Press Secretary 1 (July 21, 1986).

<sup>169</sup> Aug. 14, 1986 Memorandum, *supra* note 43.

<sup>170</sup> The President's Trade Policy Action Plan 4 (Sept. 23, 1985). *See also* Administration Statement on the Protection of U.S. Intellectual Property Rights Abroad (USTR Apr. 7, 1986).

<sup>171</sup> Adequacy of Korean Laws, *supra* note 75.

<sup>172</sup> Statement by the Deputy Press Secretary 1-2 (July 21, 1986).

The provisions of that bill will be consistent with those of the general copyright law. An interministerial committee will be established to ensure conformity.

The new copyright law will provide a term of life plus fifty years for works whose authors are individuals and a term of fifty years from first publication in the country of origin for works authored by juridical entities, such as corporations. The Korean Government will accede to the Universal Copyright Convention<sup>173</sup> and the Geneva Phonograms Convention<sup>174</sup> during 1987. Sound recordings will be afforded a twenty-year term as a neighboring right in the new copyright law and their protection against unauthorized reproduction, importation, and distribution will be strengthened through stricter enforcement of Korea's Phonograms Law. The Korean Government will study the feasibility of extending copyright protection of data bases to compilations, semiconductor chips, satellite telecasts, and cable television. The government will also strengthen penalties against copyright infringement under the new copyright law so that the rights of both domestic and foreign copyright owners are protected effectively.<sup>175</sup>

Concerning patent rights, the Korean Government will introduce by mid-1987, a comprehensive bill to amend the patent law to include patent coverage for chemical and pharmaceutical products and for new uses of these products. The enactment will establish a patent term of fifteen years from the date of publication of the patent application and provide for the granting of nonexclusive licenses only in those situations in which the dependent patent represents a substantial technical advancement over the dominant patent. Patent protection for new microorganisms will be effective in mid-1987 and Korea will accede to the Budapest Treaty in 1987.<sup>176</sup>

With regard to trademarks, Korea eliminated its previous requirement of technology inducement as a condition for accepting applications for trademark licenses. As a result, the trademark license will be permitted to continue beyond the life of any accompanying technology inducement agreement. In addition, joint venture or raw material supply agreements will no longer be necessary for trademark licensing. Korea has also repealed export requirements on goods covered by trademark licenses and lifted restrictions on royalty terms in licenses. Korea also agreed that, under its Office of Patent Administration guidelines, import

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<sup>173</sup> July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

<sup>174</sup> Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. No. 7808, 888 U.N.T.S. 67.

<sup>175</sup> Fact Sheet: Korea-Intellectual Property Rights 2 (Oct. 16, 1985).

<sup>176</sup> *Id.* at 2.



bans, or restrictions will constitute "just cause" for non-use, thereby precluding cancellation for non-use or rejection of trademark registration of goods subject to such restrictions. Finally, Korea agreed to adopt and implement guidelines prohibiting domestic entities from registering trademarks identical to or resembling those owned by foreign entities, regardless of whether the foreign mark is "well known" in Korea.<sup>177</sup>

The Korean Government also agreed to ensure adequate protection of intellectual property rights and give a high priority to enforcement and enactment of effective penalties for intellectual property rights violations.<sup>178</sup> On August 14, 1986, the President accepted this agreement as an appropriate and feasible action under § 301 to terminate the investigation under § 302. The President also directed the USTR to "take any actions necessary to implement and monitor [the agreement]."<sup>179</sup>

#### D. Investments

The USTR used the authority of § 307 of the Trade and Tariff Act of 1984<sup>180</sup> for the first time in response to export performance requirements imposed by Taiwan on foreign direct investment in the automotive sector. On March 31, 1986, the President directed the Trade Representative to investigate the imposition of export performance requirements on such investment.<sup>181</sup> On April 8, 1986, the USTR initiated an investigation under § 307.<sup>182</sup> The American Institute on Taiwan ("AIT") and the Coordinating Council for North American Affairs ("CCNAA") held two rounds of consultations on these issues.<sup>183</sup> Under an agreement reached between the AIT and the CCNAA, export performance requirements will not be imposed with respect to any future or pending applications for initial or expanded direct foreign investment in the automotive sector. Moreover, Taiwanese authorities will conduct a general review of their Automotive Industrial Development Plan by July 1987 and eliminate the export performance requirements in that plan.<sup>184</sup>

Based upon this agreement, the USTR terminated the investigation

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<sup>177</sup> *Id.* at 2-3.

<sup>178</sup> *Id.* at 3.

<sup>179</sup> Aug. 14, 1986 Memorandum, *supra* note 43, at 29,445.

<sup>180</sup> 19 U.S.C. § 2114d.

<sup>181</sup> Statement by the Principal Deputy Press Secretary, 22 WEEKLY COMP. PRES. DOC. 435 (Mar. 31, 1986).

<sup>182</sup> Export Performance Requirements in the Automotive Sector on Taiwan, 51 Fed. Reg. 12,008 (USTR 1986) (initiation).

<sup>183</sup> *See supra* note 122.

<sup>184</sup> Export Performance Requirements in the Automotive Sector on Taiwan, 51 Fed. Reg. 41,558 (USTR 1986) (termination).

under § 307 effective October 9, 1986.<sup>185</sup> Consequently, in its first use by the USTR, § 307 proved to be successful in persuading a foreign government<sup>186</sup> to eliminate export performance requirements on foreign direct investment.

## V. CONCLUSION

Section 301 is currently the lodestar of the Administration's free and fair trade policy. This policy stresses, in particular, the need for equitable access to foreign markets for United States exports of goods and services and foreign direct investment. The increasing importance of § 301 is evident from the range and significance of actions which have been taken recently. For these reasons, an understanding of the legal criteria for action under § 301 and the procedures employed in these proceedings is critical to the effective use of available United States trade remedies.

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<sup>185</sup> *Id.*

<sup>186</sup> *See supra* note 122. Under the Taiwan Relations Act, Taiwan is still treated as a government for many purposes.