Michigan Journal of International Law

Volume 11 | Issue 2

1990

The GATT Uruguay Round: Its Significance for U.S. Bilateral Trade with Korea and Taiwan

Judith H. Bello
Sidley & Austin

Alan F. Holmer
Sidley & Austin

THE GATT URUGUAY ROUND: ITS SIGNIFICANCE FOR U.S. BILATERAL TRADE WITH KOREA AND TAIWAN

Judith H. Bello and Alan F. Holmer***

I. OVERVIEW

The trade policy of most nations involves an intricate choreography of multilateral, plurilateral,[1] bilateral, and unilateral measures. Since World War II and the establishment in 1947 of the General Agreement on Tariffs and Trade (GATT),[2] the United States has concentrated its efforts in the multilateral GATT forum, which has completed seven "rounds" of multilateral trade negotiations aimed at liberalizing world trade.

However, the United States has never limited its trade policy to GATT activity. When necessary and appropriate, the United States has sought to complement the effective functioning of the GATT with plurilateral, bilateral, and — occasionally — unilateral undertakings. For example, the U.S. has addressed such trade-related issues as export credits and steel and shipping subsidies with other NATO member countries, Japan, and Australia in the plurilateral Organization for Economic Cooperation and Development. It has entered into bilateral free trade agreements with Israel[3] and Canada,[4] as well as a host of other commercial agreements with countries around the globe, from broadly aimed treaties of friendship, commerce, and navigation to narrowly tailored issue- or sector-specific agreements, such as the U.S.-Japan Semiconductor Arrangement.[5] Occasionally, the United States also has felt compelled to resort to unilateral action (as in response to

* Mrs. Bello is a partner in Sidley & Austin's Washington, D.C. office. She previously served as the General Counsel for the U.S. Trade Representative, among several other government positions.

** Mr. Holmer is also a partner in the Washington, D.C. office of Sidley & Austin. He previously served as the Deputy U.S. Trade Representative and General Counsel for the U.S. Trade Representative, among several other government positions. The authors wish to express their appreciation for the assistance of Celia G. Jones in writing this article.

1. "Multilateral" refers to agreements and activities open to broad participation; "plurilateral" refers to agreements and activities of more limited participation (such as the Organization for Economic Cooperation and Development).

2. *Opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

3. Apr. 22, 1985, 24 I.L.M. 653.

4. Jan. 2, 1988, 27 I.L.M. 281.

5. Sept. 2, 1986, 25 I.L.M. 1408.

Japan's breach of the Semiconductor Arrangement),[6] in the hope that the proportional countermeasures would induce an otherwise reluctant trading partner to effect desired trade reforms.

While a panoply of multilateral, plurilateral, bilateral, and unilateral trade actions is always available, the mix of measures used in the choreography of U.S. trade policy has shifted over time. After the GATT was founded, the United States initially relied extremely heavily on that body for most of its major trade initiatives and activity. As time passed, however, the U.S. began to resume more activity outside the GATT context. The U.S. became more receptive to non-multilateral initiatives following the disappointing 1982 GATT Ministerial Meeting. Thus, when the U.S. trade deficit skyrocketed in 1985, the domestic political environment was ripe for more creative, expeditious approaches to resolving trade problems, complementing the multilateral but slower avenues available in the GATT.

In 1985, then, the U.S. — while still supportive of, and committed to, the GATT — began to use its trade remedy laws more aggressively, seeking at least interim improvements (if not solutions) in less-than-multilateral contexts. For the first time, the President and U.S. Trade Representative initiated investigations[7] under the export-oriented section 301[8] remedy on their own motion, and resorted — albeit reluctantly — to unilateral action when faced with the intransigence of a trading partner.[9] The U.S. also concluded a free trade agreement

6. Proclamation 5631 of Apr. 17, 1987, 52 Fed. Reg. 13,412 (1987) [hereinafter Japan Semiconductor Proclamation]; *see also* Semiconductor Industry Association, 50 Fed. Reg. 28,866 (1985) (initiation of investigation); Memorandum of July 31, 1986, 51 Fed. Reg. 27,811 (1986) (Presidential response under section 301); U.S.-Japan Semiconductor Arrangement, 52 Fed. Reg. 10,275 (1987) (request for comments on possible U.S. response) [hereinafter Japan Semiconductor Arrangement]; Japan Semiconductor Case, 52 Fed. Reg. 22,693 (1987) (suspension of some sanctions); Japan Semiconductor Case, 52 Fed. Reg. 43,146 (1987) (suspension of some sanctions).

7. Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (1985) (initiation of investigation under section 301); Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (1985) (initiation of investigation under section 301); Japan's Practice with Respect to Tobacco Products, 50 Fed. Reg. 37,609 (1985) (initiation of investigation under section 301); and Korean Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (1985) (initiation of investigation under section 301).

8. Trade Act of 1974, § 301, (codified as amended at 19 U.S.C. § 2411 (Supp. 1988)).

9. *See, e.g.*, Proclamation 5354 of June 21, 1985, 50 Fed. Reg. 26,143 (1985) (increase in duty for pasta articles from the EEC); Proclamation 5363 of Aug. 15, 1985, 50 Fed. Reg. 33,711 (1985) (modification of effective date for increased duty on pasta from the EEC); Proclamation 5448 of Mar. 16, 1986, 51 Fed. Reg. 9435 (1986) (increase in the rate of duty on Japanese leather); Proclamation 5478 of May 15, 1986, 51 Fed. Reg. 18,296 (1986) (imposition of quantitative restrictions on imports from the EEC); Japan Semiconductor Proclamation, *supra* note 6; Japan Semiconductor Arrangement, *supra* note 6; and Proclamation 5759 of Dec. 24, 1987, 52 Fed. Reg. 49,131 (1987) (increasing the rate of duty on certain products from the European Community). *See generally* Bello & Holmer, *U.S. Trade Law and Policy Series #13: Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197, 1199-1201 (1988).

with Israel, and embarked on free trade negotiations with its largest trading partner, Canada.

Despite its increasing resort to these other types of trade initiatives, the U.S. remains committed to the GATT and believes that in many (if not most) cases, effective multilateral solutions are generally preferable to less-than-multilateral approaches. Reflecting this view, the U.S. was instrumental in helping to launch the eighth Uruguay Round of multilateral trade negotiations in September 1986. Today, as the U.S. Trade Representative, Ambassador Carla A. Hills, reiterates everywhere she speaks, the Uruguay Round is her office's first, second, and third priority.[10]

This article reviews the choreography of U.S. trade policy, as reflected in the U.S. government's efforts to reconcile its objectives in the Uruguay Round with its actions in its bilateral relationships with Korea and Taiwan. It illustrates how developments in four key areas of the Round — protection of intellectual property, services, investment, and agriculture — and in bilateral trade negotiations are intended to be, and can be, complementary rather than contradictory.

In conclusion, it stresses the importance of the recent market-opening agreements with Korea and trade-liberalizing reforms by Taiwan. To the extent that the Uruguay Round succeeds, there should be less need for such bilateral initiatives in the future,[11] and the agreements or reforms recently achieved may serve as a prelude to multilateral reforms. To the extent that the Uruguay Round does not succeed, on the other hand, recent developments with Korea and Taiwan suggest that U.S. problems with those countries may continue to be resolved amicably, avoiding resort to unilateral action, reducing bilateral tensions, and increasing opportunities to facilitate trade.

II. MAJOR U.S. OBJECTIVES IN THE URUGUAY ROUND

The first six rounds of multilateral trade negotiations under the GATT, concluding with the Kennedy Round in 1967, significantly reduced tariffs around the globe. The seventh, or Tokyo Round, which

10. *See, e.g., Statement Before Subcomm. on Trade of the House Comm. on Ways and Means* 3 (Feb. 28, 1989) (statement of Carla A. Hills, U.S. Trade Rep.) (on file at U.S. Trade Rep.); *Statement Before Subcomm. on Oversight of the House Comm. on Energy and Commerce* 3 (Mar. 2, 1989) (statement of Carla A. Hills, U.S. Trade Rep.) (on file at U.S. Trade Rep.); *Testimony Before Subcomm. on Commerce, Justice, State, the Judiciary and Related Agencies of the Senate Comm. on Appropriations* 4 (Mar. 7, 1989) (testimony of Ambassador Carla A. Hills) (on file at U.S. Trade Rep.).

11. Taiwan is not a GATT Contracting Party and thus is not a participant in the Uruguay Round. However, U.S.-Taiwan trade is expected to reflect the multilateral rules agreed to in the Round, eliminating or at least reducing the need to develop special rules for U.S.-Taiwan trade.

concluded in 1979, took the first brave but faltering steps toward liberalization of some major nontariff barriers, including government procurement, antidumping and countervailing duty actions, and technical barriers to trade (standards). The eighth, "Uruguay" Round, launched in September 1986, seeks to transform the Tokyo Round's first steps regarding nontariff barriers into more sweeping, lasting, and effective achievements.

A primary aim of United States efforts in the Uruguay Round is to expand the GATT to include several new areas of growing importance to world trade: trade-related investment, services, and intellectual property. The United States seeks as well to improve the GATT's application in traditional areas, including trade-distorting agricultural subsidies.[12]

Both traditional trade problems such as agricultural subsidies, and the "frontier" trade issues — trade-related investment measures (TRIMs) and barriers to trade in services and intellectual property — have assumed increasing economic significance since the Tokyo Round concluded in 1979. Pending multilateral reforms in these areas, the United States has had to rely on bilateral negotiations with various trading partners and occasionally, unilateral action to overcome barriers and to open markets.

Under the Reagan Administration's free and fair trade policy aimed at opening world markets and liberalizing trade, the United States in 1985 began to use its trade laws more aggressively to achieve numerous bilateral agreements that have significantly expanded export opportunities for American and third country firms.[13] This more aggressive approach to trade policy was effectively codified in the so-called "Super" and "Special" 301 provisions of the Omnibus Trade and Competitiveness Act of 1988,[14] which require the United States Trade Representative to identify "priority countries" for negotiations aimed at eliminating key trade-distorting practices of major trading partners. Recent initiatives under "Super" and "Special" 301 have led to significant reforms affecting intellectual property, investment, industry, and agriculture by both South Korea and Taiwan.[15]

---

12. *See supra* note 10.

13. *Annual Report of the President of the United States on the Trade Agreements Program* 1 (1988).

14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176 (to be codified at 19 U.S.C. § 2420).

15. *See, e.g.*, Office of the U.S. Trade Rep., *Hills: Korea to Liberalize Trade and Investment* (May 18, 1989) (on file at U.S. Trade Rep.); Office of the U.S. Trade Rep., *Hills Announces Agreement with Korea on Agriculture* (May 19, 1989) (on file at U.S. Trade Rep.); U.S. Trade Rep. Fact Sheet, *"Special 301" on Intellectual Property* 4 (May 25, 1989) (on file at U.S. Trade

The United States recognizes, however, that many trade issues may be better resolved through multilateral agreements under GATT auspices than through bilateral initiatives alone. Bilateral negotiations by definition include only two countries, whereas increasingly the most complex and difficult trade problems require a multilateral solution. Moreover, bilateral talks consume significant time and resources because they require separate negotiations with individual trading partners. Aspects of the problems that prompted the bilateral negotiations with, for example, Korea and Taiwan are likely to arise in trade relations between the United States and other countries as well, requiring the United States to negotiate its priorities repeatedly. Moreover, concessions may be harder to obtain in a bilateral context, which can be more confrontational and which lacks general rules governing the issues to which many countries have agreed. In addition, bilateral attempts to resolve a problem can enable other countries to be "free riders," reaping the advantage of more liberal trade without making reciprocal concessions.[16]

Because GATT negotiations involve a broad range of issues and sectors, they facilitate a comprehensive approach to resolving a number of interrelated issues. The Uruguay Round affords the United States an opportunity to negotiate the elimination of many of the types of barriers enumerated as priority practices under "Super 301."[17] To the extent that the Uruguay Round succeeds in developing a multilateral consensus, the tensions inevitably created by successive bilateral negotiations between the United States and various trading partners can be reduced. Moreover, the perception that all United States trading partners are being treated fairly and equitably can be enhanced.

We turn now to a more detailed analysis of major initiatives in the Uruguay Round negotiations and how they affect U.S. bilateral trade relations with Korea and Taiwan in particular.

A. *Intellectual Property*

1. *Its Significance and Its Currently Inadequate Protection*

The share of United States exports that rely heavily on protection of patents, copyrights, trademarks, and trade secrets — "intellectual property rights" — has more than doubled in the postwar period, and

Rep.) [hereinafter *Special 301 Fact Sheet*]; *Statement of Ambassador Carla A. Hills* 5-6 (May 25, 1989) (on file at U.S. Trade Rep.) [hereinafter *May 25 Statement*].

16. U.S. Trade Rep. Fact Sheet, *"Super 301" Trade Liberalization Priorities* 8 (May 25, 1989) (on file at U.S. Trade Rep.) [hereinafter *Super 301 Fact Sheet*].

17. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176-79.

now amounts to over one quarter of total United States exports.[18] These products include chemicals, pharmaceuticals, computers, software, movies, sound recordings, books, and scientific equipment.

Lack of adequate and effective protection of intellectual property rights in many foreign markets is a significant and growing non-tariff barrier to trade in goods and services. A report released in February 1988 by the United States International Trade Commission estimates that worldwide annual losses to United States industry because of inadequate protection of intellectual property rights are between $43 and $61 billion.[19] United States videocassette interests report that they lose $350 million annually to pirates in just one developed country market; and that foreign markets, both developed and developing, are from twenty to one hundred percent comprised of pirated material.[20]

The United States is losing the competitive edge gained from the research, development, innovation, and creativity that flourish when investment in creative development is rewarded with exclusive rights that enable the establishment of a foothold in foreign markets. Moreover, deficiencies in intellectual property rights protection reduce the value of previously negotiated trade concessions, because copied goods displace legitimate exports of products from countries that adequately and effectively protect intellectual property rights.

There are several international intellectual property conventions, but standards contained in some of these conventions provide neither adequate protection for intellectual property rights nor effective enforcement mechanisms.[21] Many countries do not belong to any of the conventions. Some countries do not even have patent, copyright, or trademark laws.

Even in those countries that do have patent, copyright, and trademark laws, protection is often less than adequate. For example, the terms for patents may be as short as seven years, and for copyrights, twenty. These terms often prove too short to permit the innovator

18. *Intellectual Property, Domestic Productivity, and Trade: Oversight Hearings Before the Subcomm. on Courts, Intellectual Property and Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 2 (July 25, 1989) (statement of Ambassador Carla A. Hills) [hereinafter Statement of Ambassador Carla A. Hills].

19. Foreign Protection of Intellectual Property Rights and the Effect on U.S. Trade and Industry, Inv. No. 332-TA-245, USITC Pub. 2065, at H-3 (Feb. 1988).

20. Uruguay Round Negotiating Group on Trade-Related Intellectual Property Rights, *Submission by the United States* 2 (undated) (on file at U.S. Trade Rep.) [hereinafter United States TRIPs Submission].

21. *See, e.g.*, Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, T.I.A.S. No. 8733; International Convention for the Protection of New Varieties of Plants, as revised, Oct. 23, 1978, 33 U.S.T. 2703, T.I.A.S. No. 10199.

time to test the product, market it, and achieve an adequate return on investment.[22] Moreover, patent protection is often limited to the process by which the item is manufactured and does not extend to the product itself. This means that if an infringer can figure out how to make the product by another method, the infringer's product will have equally legitimate status with the original product. Some countries provide only limited protection for audio and video recordings and cable transmissions. In addition, the scope of protection for new technologies and forms of authorship — such as software, semiconductor chips, and biotechnologies — varies from country to country.[23]

Under most national laws, the government can issue compulsory licenses if the product is not being "worked." With this device, the government can legally revoke the patent holder's exclusive rights to produce the licensed product and allow someone else to share in those rights. Some countries allow compulsory licensing as little as two years after the patent is granted, when the product may still be in the government-required testing process and not sufficiently developed to be fully worked.[24]

Compounding the problems concerning the limited scope of intellectual property protection is the poor enforcement of whatever rights are protected. For example, some countries do not enforce sanctions against the copying of sound recordings, motion pictures, and computer software. Injunctive relief, which is invaluable in helping to confine monetary losses, is often not available. Fines for infringement are too small and usually there are no criminal penalties. Effective means to obtain evidence of infringement — that is, U.S.-style discovery — are not available. Moreover, the burden of proof is on the owner of the intellectual property. Access to a country's courts or administrative procedures is often difficult to gain.[25]

2. *U.S. Objectives in the Uruguay Round*

Broadly stated, the U.S. objective in the Uruguay Round intellectual property negotiations is to achieve clearer, more enforceable rules governing trade-related intellectual property practices. Specifically, the United States seeks to establish adequate substantive standards, effective enforcement of those standards both internally and at the border, and effective dispute settlement procedures. In addition, the United States wants basic GATT principles, such as national treat-

22. United States TRIPs Submission, *supra* note 20, at 4.

23. *Id.* at 3-4.

24. *Id.* at 5-6.

25. *Id.* at 6-7.

ment and transparency (the provision of clear and reliable information), to be applied to trade-related intellectual property.[26]

The United States has made a specific proposal in this regard on copyright, patent, trademark, and trade secret protection. The United States proposal asserts in part that computer programs, satellite transmissions, compilations, and sound recordings must be protected under copyright laws, as well as newly emerging forms of authorship, and that the rights of the copyright owner include the right of public display.[27] The proposal further asserts that patents must be granted for all products and processes that meet the criteria for patentability, and the exclusive patent right must cover the product, not just the process by which it is made. Under the U.S. proposal, the term of patent protection would be at least twenty years, and the patent would not be revokable simply because it was not being "worked."[28] Compulsory licensing for both patents and copyrights would be severely restricted; exclusive patent and trademark compulsory licenses, which deprive the intellectual property owner of all rights, would be prohibited.[29]

As to the critical area of enforcement of intellectual property rights, the United States proposal requires that governments assume the responsibility to take action on their own initiative when necessary for effective enforcement. Governments also must provide adequate means for obtaining the evidence necessary to prove infringement and an opportunity to present such evidence to the decisionmaker.[30] Injunctive relief and fully compensatory monetary awards are to be made available. Remedies would include seizure and forfeiture, destruction, removal of goods from commercial channels, and criminal penalties, at least for trademark counterfeiting and copyright infringement.[31]

3. *Intellectual Property Protection in Korea and Taiwan*

For some time now, the United States has been identifying deficiencies in intellectual property protection and rights enforcement that distort its bilateral trade. This has been necessary because only three GATT articles explicitly refer to intellectual property rights,[32] and

26. *Id.*

27. *Id.* at 8-9.

28. Uruguay Round Negotiating Group on Trade-Related Intellectual Property Rights, *Suggestion by the United States for Achieving the Negotiating Objective* 3-4 (Oct. 17, 1988).

29. *Super 301 Fact Sheet, supra* note 16, at 10-11.

30. *Id.* at 15.

31. *Id.* at 16.

32. GATT, *supra* note 2, arts. XX:(d), XII:3(c)(iii), XVIII:B(10).

they do not address the distortions that arise from inadequate and ineffective protection of intellectual property rights.

Two countries (of many)[33] whose treatment of intellectual property has been of great concern are Korea and Taiwan. In both countries, intellectual property piracy has been considered widespread.

In response to American initiatives in 1985-1987,[34] both Korea and Taiwan adopted new, or revised existing, laws on protection of patents, copyrights, and trademarks. In 1987, Korea upgraded its patent law, revised its copyright laws, and passed a computer program protection act.[35] Patent coverage was extended to new microorganisms, and the government agreed to study the feasibility of extending copyright protection to databases, semiconductor chips, satellite telecasts, and cable television. The terms of coverage for both patents and copyrights were extended and the penalties for copyright infringement were strengthened.[36]

Taiwan revised its copyright and trademark laws in 1985, and adopted a new patent law the following year.[37] In May 1989, Taiwan agreed to expeditiously resolve copyright problems concerning "MTV" (movie-television) parlors, an area of particular United States concern.[38]

Although significant improvements clearly were made in intellectual property protection in Korea and Taiwan prior to 1989, many problems adversely affecting United States trade remained. Korea's enforcement of its intellectual property legislation was considered lax; American industry claimed that the trade impact of inadequate copyright enforcement alone exceeded $100 million annually.[39]

Enforcement was likewise considered inadequate in Taiwan.

---

33. In implementing the "Special 301" provisions of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1179-81 (to be codified at 19 U.S.C. § 2242), the U.S. Trade Representative named seventeen countries to a "Watch List" and eight to a "Priority Watch List." *Special 301 Fact Sheet, supra* note 15, at 1-3. Thus, problems with respect to the adequate and effective protection of intellectual property rights were certainly not isolated to Korea and Taiwan (which were both included on the Priority Watch List).

34. *See supra* note 15; *see also Determination Under Section 301 of the Trade Act of 1974*, 51 Fed. Reg. 29,445 (1986) (describing intellectual property reforms undertaken by Korea in response to section 301 investigation).

35. *Special 301 Fact Sheet, supra* note 15, at 4-5.

36. Bello & Holmer, *U.S. Trade Law and Policy Series #10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211, 222-23 (1987).

37. *Special 301 Fact Sheet, supra* note 15, at 5.

38. *Id.* at 4. Despite the existence of the 1985 copyright law, American videotapes are shown publicly in these parlors without payment of royalties. This popular practice was responsible for a thirty to fifty percent drop in 1988 theatrical earnings in Taiwan by the United States motion picture industry. U.S. Trade Rep., *National Trade Estimate Report on Foreign Trade Barriers* 166 (1989) [hereinafter *National Trade Estimate Report*].

39. *Id.* at 120.

There were no provisions for confiscating infringing goods under the patent law. The copyright law allowed authorities to seize infringing goods, but not to confiscate them.[40] The laws were often ambiguous and gave much discretion to judges and prosecutors.[41]

In addition, coverage under Taiwan's laws remained incomplete. The patent law did not provide for patenting micro-organisms, foodstuffs, new animal and plant varieties, or semiconductors.[42] Trade secrets were not protected at all.[43] Compulsory licensing provisions also remained sweeping.[44] The Taiwan National Bureau of Standards maintained very strict standards for trademark registration, which effectively prevented many United States firms from obtaining protection under the law and successfully prosecuting infringers.[45]

Based on such inadequacies in both Korea's and Taiwan's protection of intellectual property rights as of the Spring of 1989, Korea and Taiwan, along with six other countries, were named to the "Priority Watch List" established by the U.S. Trade Representative.[46] While neither was named a "priority country" under "Special 301" (which would have required self-initiation of investigation under section 301), inclusion on the Priority Watch List signaled that the U.S. Trade Representative would accord priority attention to making intellectual property progress with those countries,[47] including through multilateral negotiations in the case of Korea.

4. *Cross-Fertilization Between Multilateral and Bilateral Initiatives*

On November 1, 1989, the U.S. Trade Representative announced that both Korea and Taiwan were being transferred from the Priority Watch List to the Watch List, based on the "[s]ignificant, . . . genuine progress" toward adequate and effective protection of intellectual property rights in each country.[48] It appeared that, at least in part, this determination was the result of progress in the Uruguay Round intellectual property negotiations (in the case of Korea) as well as bi-

40. *Id.* at 165.

41. *Id.*

42. *Id.* at 167.

43. *Id.* at 165.

44. *Id.* at 167.

45. *Id.* at 165.

46. *Special 301 Fact Sheet, supra* note 15; *see also supra* note 33.

47. U.S. Trade Rep. Fact Sheet, *"Special 301" on Intellectual Property* (May 15, 1989) (on file at U.S. Trade Rep.).

48. Office of the U.S. Trade Rep., *Hills Announces Results of Special 301 Review* 1 (Nov. 1, 1989) (on file at U.S. Trade Rep.).

lateral action.[49] At least to date, then, the U.S. is implementing its domestic law ("Special 301") in a bilateral context (in separate discussions with Korea and Taiwan)[50] in a manner intended and effected to promote multilateral protection of intellectual property.

Just as the Uruguay Round initiatives in intellectual property protection have facilitated bilateral progress, achievements with Korea and Taiwan cross-fertilize and energize momentum in Geneva multilateral negotiations. Favorable developments with respect to Korea and Taiwan[51] thus make it more likely that the U.S. can achieve its Uruguay Round goals.

B. *Services*

Services are not currently covered under the GATT, yet they constitute a significant segment of global economic production. As of 1985, the service sector accounted for the largest share of the GNP in most countries, from around forty percent in lesser-developed countries to almost sixty-seven percent in developed market-economy countries. Consequently, tensions have arisen as American providers of services have sought access to foreign markets that seek to protect their domestic services from foreign competition.

The United States goal in the Uruguay Round is to develop principles and procedures for reducing barriers to trade in services. Such barriers include restrictions on the transfer of information, movement of personnel, forms of establishment, issuance of licenses, and size of commercial presence in the marketplace. Governments also distort international trade in services by providing subsidies to domestic service providers and by discriminating in favor of domestic services in such critical matters as access to local distribution networks, local firms and personnel, and domestic customers.[52] The United States wants the GATT principles of national treatment, transparency, and nondiscrimination applied to services and seeks a governmental commitment to ensure that foreign service providers are considered in the promulgation of new regulatory measures.[53]

An example of governmental restrictions placed on services is Korea's "negative list" of certain service sectors. In these sectors, foreign

---

49. *Id.* at 5.

50. *Id.* at 3-4.

51. *Id.*

52. Services Group, U.S. Trade Rep., *Concepts for a Framework Agreement in Services* 4-5 (undated) (on file at U.S. Trade Rep.).

53. U.S. Dep't of Commerce, *Uruguay Round Update* 4 (May 1989) (on file at the Commerce Dep't).

investment is prohibited or severely circumscribed through equity participation or other restrictions. Even in those sectors where foreign investment is allowed, cumbersome and arbitrary regulations often limit the scope of activities to those already provided by well-established domestic competitors.[54] Taiwan's quota system, which limits the number of United States entrants into its insurance markets, provides another example.

Opening Korea's services market to foreign competition is an important American priority. U.S. investors and service providers are especially interested in opening the professional services (accounting, legal, and financial services), advertising, insurance, transportation, motion picture distribution, and telecommunications markets.[55]

Progress has been made in recent bilateral negotiations with Korea in many of these areas and it has been opening its services market by removing sectors from the negative list.[56] In 1985 the Korean government announced a schedule for liberalizing the importation and exhibition of foreign motion pictures.[57] Recently, Korea established timetables for permitting foreign investment in advertising agencies, with full liberalization to be achieved by 1991. By 1991, Korea will also permit full foreign participation in travel agency services.[58] In addition, Korea has recently liberalized the process for obtaining a trading license to enable foreign firms to distribute products more freely and has indicated that foreign direct investment in data base and data processing will be allowed in 1990.[59]

In 1986, Korea opened its $5-billion-a-year life and fire insurance market to foreign investors.[60] Korea agreed to license, and has been licensing, qualified United States firms to participate fully in the market. The Korean government also committed to provide all necessary information on applicable technical requirements.[61] The American firms are free to establish Korean operations in whatever form suits them — joint ventures, branches, or wholly-owned subsidiaries.[62]

54. *National Trade Estimate Report, supra* note 38, at 120-21.

55. *Id.* at 121.

56. *Id.*

57. *Subcomm. on Asian and Pacific Affairs of the Comm. on Foreign Affairs* 8 (1989) (testimony of Assistant U.S. Trade Rep. Peter F. Allgeier) (on file at U.S. Trade Rep.) [hereinafter Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier].

58. Letter from Tong-Jin Park, Ambassador of Republic of Korea, to Ambassador Carla A. Hills, U.S. Trade Rep., at 6-7 (May 19, 1989) (discussing actions to be taken by Korean Government regarding U.S. investment in Korea) (on file at U.S. Trade Rep.).

59. *National Trade Estimate Report, supra* note 38, at 121.

60. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 7.

61. Bello & Holmer, *supra* note 36, at 221.

62. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 8.

Bilateral negotiations have also resulted in significant progress toward opening Taiwan's insurance market. In 1987, United States insurance companies were allowed to open branch offices of a majority-owned joint venture with an existing domestic insurance company. These openings are limited to a maximum of two life and two non-life insurance branches each year, however.[63] In a recent agreement, to be implemented by spring 1990, the Taiwan government will propose a revision to the current insurance law permitting the establishment of mutual insurance firms and the liberalization of constraints on market entry such as the quota.[64] Further bilateral agreements still will be necessary to remove the remaining discriminatory barriers American insurance companies face in Taiwan, however. Branches of United States mutual insurance companies are still not allowed to open in Taiwan, and United States insurance firms are prohibited from establishing subsidiaries and joint ventures with Taiwan non-insurance enterprises.[65]

Bilateral negotiations with Korea continue, particularly in the area of Korea's telecommunications service market. The liberalization of this market is one of the United States' most important remaining services objectives.[66] In February 1989, Korea was designated as a priority country under the telecommunications provisions of the Omnibus Trade and Competitiveness Act of 1988.[67] Negotiations focused on both the services and equipment aspects of U.S.-Korea trade in telecommunications, while at the same time the United States pursued GATT agreements concerning multilateral telecommunications trade.

The United States expects that this continued two-pronged approach, both multilateral and bilateral, will succeed in further opening telecommunications markets around the globe, including the Korean and Taiwanese markets, to United States investors and service providers.

C. *Investment*

Trade-related investment measures (TRIMs) are government-imposed restrictions on foreign investment. TRIMs are widely used, often in an *ad hoc*, non-transparent, and discriminatory manner. Some are inherently trade-distorting, while others distort trade in

63. *National Trade Estimate Report, supra* note 38, at 167.

64. Statement of Ambassador Carla A. Hills, *supra* note 18, at 4-5.

65. *National Trade Estimate Report, supra* note 38, at 167.

66. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 9.

67. Office of the U.S. Trade Rep., *USTR to Seek Negotiations with EC and Korea Over Telecommunications Market Access* (Feb. 21, 1989) (on file at U.S. Trade Rep.).

some but not all circumstances. Their relationship to the GATT is complex; inherently trade-distorting TRIMs are inconsistent with GATT provisions, while other TRIMs are not.[68]

The imposition of performance requirements as a condition of permitting a foreign investment is a primary means by which governments restrict such investment. Performance requirements include requirements to export a certain portion of production or services, use local content, accept or achieve a given level or percentage of local equity, or manufacture locally, among others.[69]

Such TRIMs produce three categories of adverse trade effects. An increase of exports results from TRIMs which require or induce the investor to export. TRIMs which favor domestic products over like imported products or act as a quantitative restriction on imports cause a reduction of imports. Likewise, exports are reduced by TRIMs which discourage exports or function as quantitative restrictions on exports. Export performance requirements imposed on foreign direct investors may induce dumping and may be equivalent to subsidies.[70] Moreover, such effects generally impair the ability of an investing enterprise to respond accurately to developments in the marketplace, thus distorting manufacturing patterns.[71]

Traditionally, Korea used a variety of TRIMs, in combination with import restrictions, to promote its indigenous manufacturing capabilities in important industries or products.[72] The Korean government used a discretionary case-by-case investment approval process which allowed it to delay or place trade-distorting conditions on individual investment projects in order to accomplish certain industrial policy objectives.[73] The approval process formerly set arbitrary ceilings on the value of investment capital for some foreign distribution businesses.[74] In addition, Korean regulations restricted investment in several sectors and set explicit conditions for investment in certain industries.[75] These restrictive regulations are of particular concern to

68. Uruguay Round Negotiating Group on Trade-Related Investment Measures, *Submission by the United States* 2 (July 1989).

69. Letter from Ambassador Carla A. Hills, U.S. Trade Rep., to Tong-Jin Park, Ambassador from Republic of Korea 4 (May 19, 1989) (discussing consultations between Korea and U.S. regarding investment in Korea) (on file at U.S. Trade Rep.) [hereinafter Letter from Carla A. Hills to Ambassador Park].

70. Uruguay Round Negotiating Group on Trade-Related Investment Measures, *Statement by the U.S. Delegation* 3 (undated) [hereinafter United States Statement].

71. *Id.* at 1.

72. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 10.

73. *National Trade Estimate Report*, *supra* note 38, at 121.

74. *Id.* at 122.

75. *Id.*

the U.S. business community, which recommended that they be items of first priority in GATT negotiations on investment.[76]

The United States recently achieved a comprehensive investment agreement with Korea, effective July 1, 1989, which will significantly liberalize conditions for United States investments. Under this agreement, the formal or informal imposition of performance requirements as a condition of permitting foreign investment, or as a condition for a tax incentive is prohibited, with certain limited exceptions. Beginning in 1991, the approval system will be replaced by an investment notification system under which an investor will be required merely to notify the Korean government of his intention to invest.[77] If not disapproved within sixty days, the investment can proceed automatically; only certain specific reasons, such as protection of national security or violation of Korea's antitrust laws, will justify disapproval.[78] This system will prevent the imposition of informal performance requirements.[79] Once established, all foreign investment will be accorded national treatment, with limited exceptions for designated purposes.[80]

The investment objectives the United States is achieving with Korea as a result of bilateral negotiations parallel the goals the United States seeks to achieve in the Uruguay Round with regard to TRIMs. It is established GATT practice to prohibit measures that are inherently trade-distorting and to provide other disciplines for measures that distort trade in certain circumstances. The United States has proposed that this established practice be extended to TRIMs that are not already covered by the GATT and that prohibitions should apply with respect to both domestic and foreign investors. The United States has proposed that other disciplines should apply to non-prohibited TRIMs, including a commitment to use such TRIMs only on a non-discriminatory basis and to use only non-prohibited TRIMs that do not produce adverse trade effects.[81] The adoption of further GATT measures governing TRIMs will reinforce American efforts to urge Korea to adopt non-discriminatory and transparent practices for United States investments.

Taiwan seems to use its approval process and incentives to en-

76. *New Round of Multilateral Trade Negotiations: Hearings on S.1865 and S.1837 Before the Senate Comm. on Finance*, 99th Cong., 2d Sess. 131 (July 23, 1986) (statement of William R. Pearce, representing U.S. Chamber of Commerce) [hereinafter Statement by William R. Pearce].

77. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 11.

78. Letter from Carla A. Hills to Ambassador Park, *supra* note 69, at 6.

79. Testimony of Assistant U.S. Trade Rep. Peter F. Allgeier, *supra* note 57, at 11.

80. Letter from Carla A. Hills to Ambassador Park, *supra* note 69, at 1.

81. United States Statement, *supra* note 70, at 3.

courage direct foreign investment in high technology and large-scale, capital-intensive industrial sectors.[82] However, Taiwan maintains a negative list prohibiting or restricting foreign investment in certain industries.[83] Any future bilateral negotiations in the investment area with Taiwan should be facilitated if the U.S.-proposed standards for TRIMs are adopted at the Uruguay Round.

D. *Agriculture*

Unlike intellectual property, services, and many TRIMs, agricultural subsidies are encompassed by the current GATT. Because member nations strongly assert divergent views on the issue of farm subsidies, however, a multilateral consensus on whether and how agriculture should be subsidized has never been reached. As a result, existing GATT rules are highly ambiguous and essentially incapable of governing subsidy use in the agricultural sector. Over the years, agriculture has become the exception to the relatively strong GATT subsidy disciplines that apply to most other products.

The United States is still the world's leading farm product exporter, but the prospects for growth of the agricultural sector are substantially dependent on the growth of foreign sales.[84] Both Korea and Taiwan have been targets of American initiatives aimed at opening their restricted markets. Korea has many agricultural import restrictions which the United States believes are inconsistent with GATT.[85] Both countries have high tariffs on agricultural produce. For example, Taiwan imposes a forty percent tariff on sugar confectionery and Korea imposes a fifty percent duty for most fresh fruits and fruit juices.[86] Import licenses are required for most or all agricultural products and some products are subject to quotas or banned from importation.[87] Both countries also employ highly restrictive sanitary standards and testing requirements for some agricultural goods which work to protect domestic producers of comparable products, rather than to provide quality or safety assurances as would be consistent with international practice.[88]

The United States has been seeking, and continues to seek, the

82. *National Trade Estimate Report*, *supra* note 38, at 167.

83. *Id.*

84. Statement by William R. Pearce, *supra* note 76.

85. Office of the U.S. Trade Rep., *Hills: Korea to Liberalize Trade and Investment* (May 18, 1989) (on file at U.S. Trade Rep.).

86. *National Trade Estimate Report*, *supra* note 38, at 115, 163.

87. *Id.* at 116, 163-64.

88. *Id.* at 119, 164.

elimination of all quantitative restrictions in Korea and Taiwan. Negotiations with Taiwan have led to that country's proposal in May 1989 of simplified import licensing procedures.[89] On April 8, 1989, Korea announced the liberalization by 1991 of 243 agricultural and fisheries products.[90] By the terms of this agreement, Korea has committed to open its market to seventy out of some 140 products identified by the United States as priorities for its exporters. The import restrictions on these products will be lifted in three stages, with complete removal to be effected by January 1, 1991.[91] Korea will also reduce tariffs on seven products important to United States exporters.[92] Earlier in 1989, Korea agreed to abolish its "surveillance list," which was used to monitor imports of recently liberalized products in order to restrict them if they increased substantially.[93]

Negotiations will lead to further liberalization of agricultural trade in both of these markets. At present the United States and Taiwan are developing an action plan for accomplishing this purpose, and bilateral discussions are ongoing with Korea.[94] Agricultural subsidy problems, however, are difficult to solve in the absence of a broad multilateral agreement, because any government that agrees to eliminate subsidies in a bilateral agreement places its producers at a competitive disadvantage with respect to countries that have not assumed a similar obligation.[95] The long-term solution preferred by the United States is to achieve improvements in multilateral disciplines and enforcement procedures in the Uruguay Round. The United States is thus pursuing the elimination of a number of agricultural subsidies through multilateral negotiations in the Uruguay Round.

The original United States proposal to GATT called for the complete elimination, over 10 years, of nearly all forms of government support to agriculture, with the intent of shifting agricultural support from an essentially production-based system to a producer-based system worldwide.[96] The supports to be eliminated include market price supports, income supports, and other indirect supports, as well as ex-

89. Statement of Ambassador Carla A. Hills, *supra* note 18, at 4.

90. Office of the U. S. Trade Rep., *Hills Announces Agreement with Korea on Agriculture* 1 (May 19, 1989) (on file at U.S. Trade Rep.) [hereinafter *Hills Announcement*].

91. *Id.*

92. *Id.* at 2.

93. *National Trade Estimate Report*, *supra* note 38, at 117.

94. *Super 301 Fact Sheet*, *supra* note 16, at 4.

95. *Id.* at 8.

96. U.S. Trade Rep., Agricultural Policy Advisory Committee Report 1.

port subsidies and import restrictions.[97] All agricultural commodities would be covered — food, beverages, forest products, fish, and fish products.[98] If the United States proposal were implemented, it would establish subsidy disciplines for agriculture that are even stricter than those currently applied to industrial trade.

To implement these objectives, member nations would phase out all policies that directly or indirectly subsidize agriculture, except for bona fide foreign and domestic aid programs and direct income payments that are decoupled from production and marketing.[99] Each country would have the flexibility to determine which programs to cut and would develop its own process for monitoring progress. Each country also would develop special rules for safeguards, enforcement, and dispute settlement. Countries would also be required to harmonize health and sanitary regulations and to base domestic regulations on internationally agreed standards.[100]

More recently the U.S. has proposed the "tariffication" of all trade-distorting agricultural business. Bilateral negotiations will help to perform the task of helping to structure particular means by which this process is carried out, thus complementing the multilateral negotiations on generic rules to discipline agricultural trade practices. Improved access for agricultural products remains a matter of major concern for the United States, which intends to pursue the issue in both bilateral and multilateral fora.[101]

III. CONCLUSION

In choreographing its trade policy, the United States — like most of its trading partners — uses multilateral, plurilateral, bilateral, and (more rarely) unilateral action. Its emphasis among these types of approaches has shifted over time. Initially, the U.S. concentrated heavily on the GATT, then relied more on other types of measures, and currently aims to restore the preeminence of the GATT and the multilateral forum through the Uruguay Round.

Even in the unlikely event that the Uruguay Round succeeds beyond U.S. negotiators' most optimistic hopes, the U.S. will continue to complement its multilateral activities with plurilateral, bilateral, and unilateral action on occasion. To the extent that the Uruguay Round

97. Statement by the President of the United States, *Agricultural Trade Reform* (July 6, 1987).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Hills Announcement*, *supra* note 90, at 5-6.

succeeds, such complementary action will be less necessary and, perhaps, less frequently invoked. To the extent that the Uruguay Round fails, conversely, such creative complementary action will be needed and therefore more frequently invoked.

In either event, the recent, substantial reforms agreed to or undertaken by Korea and Taiwan are significant. Hopefully they serve as a prelude to even more comprehensive, more effective multilateral trade disciplines that will shape the U.S. bilateral relationship with Korea and Taiwan. To the extent that the Uruguay Round fails, recent developments with respect to Korea and Taiwan at least augur well for the prospects that trade problems with each of these countries can continue to be resolved amicably, without resort to confrontational unilateral action.