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Can Competition Policy Control 301?

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Competition policy is not an antidote to 301. To preserve the economic benefits of the open international trading system, it may be necessary to regress to a more primitive legal and political system.

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Summary findings

Should fair trade rules be replaced by national or international competition rules? A familiar argument for doing so is that more rigorously enforced competition standards might eliminate the basis for the burgeoning number of antidumping cases of recent years.

A less familiar argument is that the implementation of internationally agreed competition standards might reduce the frequency with which the U.S. government uses section 301 of U.S. trade law. Section 301 lists foreign government toleration of systematic anticompetitive activities as one of the bases for taking retaliatory action against foreign exporters.

Finger and Fung found that of 82 "301" actions taken from 1975–92, in only three was the uncompetitive clause the basis for the complaint.

The authors found that a number of additional disputes involved allegations of foreign uncompetitive practices but were taken up through other mechanisms; extraterritorial application of U.S. antitrust law or direct negotiations sometimes capped by an understanding at the presidential level. These negotiations often included the threat of initiation of antidumping, "301," or other trade remedies cases. (The structural impediments initiative negotiations with Japan are the most familiar example.) In several of these cases, the foreign government agreed to and implemented more rigorous antitrust enforcement, but these actions seldom ended the dispute. The U.S. government pressed on for tangible evidence of increased U.S. export sales.

Finger and Fung conclude that removing the *basis* for these disputes — alleged lax enforcement of competition policy — did not remove the *motive* for them — increased U.S. exports. Competition policy then is not the antidote for "301."

The last section of the paper reviews the compatibility of "301" with the preservation of open international trading system. Of 70 "301" cases (through December 31, 1992) that have led to policy changes, 52 have led to liberalizations, and only 18 have led to increased trade restrictions. Viewed from the point of view of results, the major shortcoming of "301" is that the United States is the only country whose policies do not come under its scrutiny.

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Can Competition Policy Control "301?"

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Can Competition Policy Control "301"?

by

J. Michael Finger and K.C. Fung

The contributors to this session were asked to address the following question: *Should 'fair trade' rules be replaced by national or international competition rules?* Professor Messerlin has examined competition policy as a substitute for antidumping, our assignment is to look in the same way at other kinds of fair trade rules. We have concentrated on "301," for obvious reasons. "301" is controversial -- one of the big issues at the Uruguay Round. And in an important dimension it is different from antidumping and other 'trade remedies' -- it is about forcing other countries to relax their trade barriers rather than about creating new ones for oneself.

As we see it, the issue in this session is discipline over the burgeoning use of antidumping restrictions and against the escalating use by the United States of another unilateral instrument,[1] "301." In examining "301" we will attempt to answer the following questions:

1. Would more rigorous application in victim countries of competition policy eliminate the *basis* for "301" actions?
2. Would more rigorous application in victim countries dampen the *motive* for these actions?

[1] GATT Article VI allows antidumping actions and the 1989 antidumping code elaborates the procedures through which they are to be decided and applied. Since the code was implemented, GATT panels have completed reviews of five national antidumping actions and have determined that each of the five was taken in violation of the GATT or of the code. These five are more suitably described as *typical of* rather than as *exceptions to* the 2000 antidumping cases reported to the GATT since the code is in effect. See Finger and Fung, 1993.

Anyone who studies policy institutions knows that the issue that justifies a policy action is often far removed from the motives that propel its advocates, and that when push comes to shove, it is the motive, not the issue that dictate what the action will be. Hence the two questions are not the same.

Section I below reviews how "301" works, after which sections II and III ask if "301" is, in any significant sense, about the lack of competition in foreign markets. We concluded that it is not. It is about increased sales of U.S. exports in foreign markets. In section IV we review the results of "301" actions. This section has two purposes: (a) to put aside concerns that "301" is just another legal way to excuse trade restrictions, and (b) to point out that the overwhelmingly larger proportion of "301" outcomes have been multilateral liberalizations.

We conclude from the information reviewed in sections II, III and IV that competition policy is not an antidote for "301." The last two sections present our interpretation of why "301" has been a success for the United States and our preliminary thoughts on the possibility of an international dispute settlement mechanism made up of national "301s." As systemic concerns and abiding by agreed international norms seem to have little force today, to preserve the economic benefits of the present international system it may be necessary to regress to a more primitive political and legal system.

I. "301" -- How it Works

Section 301 (of the trade act of 1974) is part of the U.S. Congress's response to U.S. exporters' complaints about foreign practices and policies that reduce U.S. exporters' access to foreign markets. As a weapon against foreign practices, the section ultimately authorizes the U.S. Trade

Trade Representative[2] to retaliate by reducing foreign access to the U.S. market. The section, as amended in 1979, 1984 and 1988, explicitly covers not only merchandise trade, but services, investment and intellectual property as well. Cross-retaliation is allowed, e.g., the Trade Representative may retaliate by restricting imports of *merchandise* from a country in which U.S. *investment* or sales of *services* has been compromised.

"301" deals with three categories of practices that burden or restrict U.S. commerce -- unjustifiable, unreasonable and discriminatory. "Unjustifiable" is defined as any act, policy or practice that violates the international legal rights of the United States -- including (but not limited to) those under a trade agreement such as the GATT, a bilateral Voluntary Export Restraint Agreement, or an agreement that settled a previous "301" case. When the agreement in question has its own dispute settlement process (as the GATT does) the Trade Representative is required to submit the matter to that dispute settlement process simultaneous with his investigation under "301." In U.S. procedure, the schedule and the terms of the "301" investigation are dominant.

If the U.S. Trade Representative finds a foreign violation that is "unjustifiable," she must retaliate.[3] But, the section also allows the President to waive retaliation if the GATT dispute settlement process decides against the United States, the foreign government takes action to remove or offset the violation, or if retaliation would backfire and significantly harm U.S. commercial interests or U.S. national security.

Section 301 defines "unreasonable" as an act, policy or practice that is unfair and inequitable, though not necessarily a violation of explicit U.S. legal rights. Specific actions are listed as unreasonable: the list including denial of workers' rights, export targeting, denial of fair and equitable

[2] The section has been modified and extended in the trade acts of 1979, 1984 and 1988. Until the 1988 amendments, "301" authority rested with the President.

[3] Since 1988, retaliation may not be on the case's subject product or service, e.g., if the subject practice affects US exports of rice, retaliation cannot be a restriction on US imports of rice.

market opportunities, and government toleration of systematic anticompetitive activities.[4] "Discriminatory " means any act, policy or practice that denies national or most favored nation treatment to U.S. goods, services or investment. Retaliatory action in these cases is discretionary.

Besides tightening "regular" 301, the 1988 trade act added "Super 301" and "Special 301." Super 301 mandates that the Trade Representative, in May 1989 and April 1990, submit to Congress a list of "priority countries" and "priority practices" that pose significant barriers to U.S. exports. The act also requires the Trade Representative to initiate investigations concerning each priority practice of each priority country. Special 301 provides similar requirements to identify and investigate countries that maintain significant barriers to market access by U.S. persons who depend on intellectual property protection.

II. "301" and Competition Policy

As we noted above, governmental toleration of systematic anticompetitive activities is one of the practices that "301" defines as "unreasonable," and therefore a basis for retaliatory action by the United States. The wording in the law is as follows:[5]

> Acts, policies, and practices that are unreasonable include, but are not limited to any act, policy, or practice, or any combination of acts, policies, or practices, which denies fair and equitable market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by private firms or among private

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[4] The 1988 act introduced a provision to permit foreign governments to defend themselves against accusations of "unreasonableness" by pointing out that the United States does the same thing. (Hudec, 1990, p. 22)

[5] Section 301(d)(3)(B)(i)(III). Quoted from House Ways and Means, 1993, p. 423.

firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of goods to purchasing by such firms.

The inclusion of this definition is by and large due to the perception by Congress that at least some of the invisible barriers in the Japanese market stem from the anticompetitive behavior of private firms; for example, bidrigging, group boycotts and exclusionary procurement practices by private firms. (Bello and Homer, 19[illegible])

The U.S. Trade Representative determines, in junction with an interagency group, whether a specific practice is unreasonable or unjustifiable. Though the Justice Department is part of the "301" interagency committee that reviews cases, the standard of proof to label practices as anticompetitive and then unreasonable is not necessarily the standard required to pursue court cases under the U.S. or foreign antitrust statues. According to some officials in U.S. Trade Representative, the determination of an unreasonable act is not one that requires the same rigorous standard of proof as in antitrust court cases.[6] As only one "301" action has ever been based on the uncompetitive practices clause, the acceptability of a lower standard in "301" cases has not been thoroughly tested legally.

Despite the inclusion of this designation of unreasonable practice, the Executive Branch of the U.S. government has to this date cited only once the anticompetitive clause as the basis for a "301" determination. Instead, the Administration has attempted to use instruments other than "301" to deal with possible anticompetitive conduct abroad. These extra-301 instruments include the 1992 reinterpretation of the guidelines for the application of antitrust laws in overseas operation, the Structural Impediment Initiatives (SII), and ad hoc commitments made by heads of states.

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[6] In parallel, the standards of proof and evidence required to establish dumping in an antidumping investigation are weaker than those necessary to establish price discrimination in an antidumping case. Finger, 1993, ch. 2, provides documentation

Regular 301 Cases Involving Anticompetitive Practices

According to the U.S. Trade Representative's (mandatory) reports on "301" to Congress, the case of Japan construction and construction-related services (301-69) is the only case in which a positive "301" determination is based on the anticompetitive clause. Inadequate access to Japan's architectural, engineering, and construction markets has been a long-standing U.S. concern. Until 1987, U.S. companies had received only small contract awards totaling about $1.6 million for contracts given on the $8 billion Kansai International Airport (USTR, 1987). Section 1305 of the 1988 Trade Act required the USTR to initiate an investigation regarding acts, policies and practices of the Japanese government, and of entities owned, financed, or otherwise controlled by the government of Japan, that are barriers in Japan to the offering of performance by U.S. persons of architectural, engineering, construction and consulting services in Japan. On November 21, 1988, the U.S. Trade Representative initiated such an investigation.

The U.S. Trade Representative's investigation concluded the Japanese government's practices to be unreasonable, and a burden to U.S. commerce, that the Government of Japan implemented procurement policies in the construction sector in a way that limited competition and facilitated collusive bidding practices, including inadequate use of administrative measures restricting collusive activities, and operation of the designated bidder system. In other words, the U.S. Trade Representative concluded that the Government of Japan did tolerate anticompetitive practices by these construction companies and thereby did impede sales of foreign construction firms.

On April 26, 1991, U.S. Trade Representative proposed to impose restrictions on the provisions in the U.S. by Japan of such services. No Japanese contractor would be eligible to enter into contracts for such services with certain federal agencies.

On July 31, 1991, an agreement was reached through an exchange of letters and thus no retaliation action was taken under 301. This agreement extended the 1988 Major Projects

Arrangement (MPA). The 1991 agreement provided for special measures designed to facilitate foreign access to 23 additional projects, worth an estimated $26.7 billion. This brought to 40 the number of public works construction projects covered by such measures.

Since the original agreement in May 1988, 12 U.S. contractors have obtained construction licenses to work in Japan, and eight companies have registered as first-class architects' offices. As of December 1992, U.S. firms had been awarded a total of approximately $463 million in contracts for MPA projects. Prior to the MPA, U.S. firms had complained that they had virtually no access to the public work market in Japan.

As stated earlier, the Japanese public construction case is the only case in which the anticompetitive section of "301" was used by USTR as a basis for positive determination. There are, however, two other instances where the 301 petitioners invoked the 301 anticompetitive clause in their petitions. One instance is the issue of access to the Japanese market of amorphous metals, a high technology product used primarily to improve efficiency in electric power transmission. On March 5, 1990, Allied-Signal Inc., a U.S. firm with patent rights to amorphous metals, filed a "301" petition against Japan. Allied-Signal Inc. alleged that it had been denied market access to Japan through a combination of Japanese targeting and toleration of anticompetitive practices (USTR 301 Report to Congress, July-December 1990). One complaint was that the Japanese government allowed a boycott by Japanese electric utility companies of purchases of clearly superior amorphous metal transformers. Allied-Signal Inc. also accused the Japanese government of tolerating the refusal by certain individual Japanese companies to negotiate separate license agreements with Allied which would allow Allied to enjoy significant participation in the Japanese market.

On April 18, 1990, the Administration obtained a commitment from the Japanese government to engage in negotiations on market access in Japan for amorphous metals. Rather than starting a one-year section 302 investigation, the Administration used the leverage of the pending petition to obtain a

commitment from Japan to continue negotiations for finding a solution to this issue within 150 days. Allied-Signal thereafter withdrew its petition. Negotiations were completed with a joint announcement in September 1990. One result was that the government of Japan agreed to require Japanese utilities to evaluate bids using standards similar to those applied by U.S. utilities in their purchases. In addition, Japanese utilities would buy from Japanese manufacturers 22,000 units of amorphous metal transformers over two years in order to conduct tests to see whether the amorphous metal transformers can be effectively mass-produced in Japan. The transformer manufacturer would, in turn, buy amorphous metals produced in the U.S. or by a licensee of Allied-Signal. This test was set up to allow Japanese manufacturers to achieve economies of scale and to acquire know-how in production of amorphous metal transformers. It would also allow the performance of amorphous metal transformers to be compared with the performance of their substitute, silicon steel transformers.

The agreement did not provide for any market share allocation or for any purchases after the completion of the test period. As a result of this resolution, Allied-Signal announced that it would not re-file its petition (USTR 301 Report to Congress, July-December 1990).

A second instance in which the petitioners (P&M Cedar Products, Inc. and Hudson ICS) argued that foreign practices are unreasonable because of toleration of anticompetitive conduct is the case of Indonesian pencil slats, small wooden boards used in the production of pencils (301-90). The petitioners, competitors to the Indonesian government in both the U.S. and in third markets as suppliers of these slats, alleged that in addition to export targeting, the Indonesian government had been encouraging vertical integration of Indonesian logging and processing activities. They also accused the Indonesian government of not promoting competition in the logging industry and of not protecting the interests of the consumers.

On October 2, 1992, the USTR initiated an investigation to determine whether the allegations contained in the petition warranted actions. Based on the investigation, USTR determined that factors

other than the practices alleged in the petition appeared to have a much greater impact on prices of Indonesian logs and thus pencil slats. These factors included (1) exchange rate changes favoring Indonesian exports since 1985 and (2) labor and transportation cost advantages enjoyed by the Indonesian producers. Based on the results of this investigation, USTR determined that there was no evidence that the alleged practices were having the adverse trade effects asserted by the petitioners. Thus, even assuming that the alleged practices existed and would otherwise be actionable under section 301, there was no basis for concluding that they were burdening or restricting U.S. commerce. On December 31, 1992, the USTR determined that no action was appropriate in this investigation and that it should be terminated.

Though the anticompetitive clause of "301" did not come about until 1988, there have already been references to anticompetitive practices in the earlier 301 case of the U.S. - Japanese dispute over U.S. imports and exports of semiconductors. In fact, some former U.S. government officials have claimed that the anticompetitive section of "301" was written with the Japanese semiconductor industry in mind. The initial "301" petition, filed on June 14, 1985, by the U.S. Semiconductor Industry Association, alleged that through a series of policies which existed until 1974-75, the Government of Japan created a market structure in which the semiconductor industry is dominated by a small number of major semiconductor consuming companies that have strong, interlocking ties with respect to research and development, production and sales, and that this market structure constitutes a barrier to the sale of foreign semiconductors in Japan. The practices which allegedly created this market structure included: (1) restrictions of entry into the semiconductor industry except by the large, established electronic producers; (2) concentration of semiconductor subsidies and R&D aid to the largest electronic producers; (3) pressure on semiconductor to buy Japanese; and (4) formal restrictions on foreign imports and investment (Federal Register, p. 28866, 1985).

The U.S. industry also brought a series of antidumping cases against Japanese producers exporting to the U.S. market. The antidumping cases and the "301" case reached a joint negotiated agreement signed on September 2, 1986. The Japanese government agreed to provide fair and equitable access to its domestic market for foreign semiconductor products and to prevent dumping by Japanese exporters both in the U.S. and in third countries. More specifically, in the market access portion of the agreement, the government of Japan committed to impress upon Japanese semiconductor producers and users the need to aggressively increase market access opportunities in Japan for foreign-based semiconductor firms; and to provide further support for expanded sales of foreign-produced semiconductors in Japan through establishment of a sales assistance organization and promotion of stable long-term relationships between Japanese purchasers and foreign-based semiconductor producers. The U.S. and Japanese governments agreed that the expected improvement in access by foreign-based semiconductor producers would be gradual and steady over the period of the arrangement. In the area of dumping, the government of Japan committed itself to encourage Japanese semiconductor producers to stop dumping. The Japanese government further committed itself to monitor costs and export prices on semiconductor products exported by Japanese semiconductor firms from Japan in order to prevent dumping. The agreement would be in effect until March 31, 1991.

On April 17, 1987, President Reagan determined that the Government of Japan had not implemented or enforced major provisions of the agreement. Specifically, the U.S. government decided that the government of Japan had not met its commitments to increase market access opportunities in Japan for foreign-based semiconductor producers or to prevent dumping through monitoring of costs and export prices of exports from Japan of semiconductor products. In the language of "301", these omissions by Japan were unjustifiable and unreasonable and constituted a burden or restriction on United States commerce.

Acting under "301" authority, the President increased duties on selected imports from Japan, including certain color televisions, power hand tools, and automatic data processing machines. On June 15, 1987, USTR suspended the increased duties imposed on 20 inch color televisions because of improved compliance of the agreement. Based on the Department of Commerce's monitoring, the prices of Japanese DRAMs (dynamic random access memory semiconductor chips) had increased, which reduced dumping. However, Japanese EPROMs (erasable programmable read only memory semiconductor chips) were still sold at an "unfairly" low price. Furthermore the access of foreign-based companies to Japan's semiconductor market had not improved (Federal Register, p. 22693, 1987).

On November 9, 1987, USTR further suspended increased duties on certain power hand tools, 18 and 19 inch color televisions and low performance 16-bit desktop computers from Japan. This suspension was a result of price increases of EPROMs and DRAMs that eliminated the "unfairly" low pricing (Federal Register, p. 43146-43147, 1987). The remaining April 1987 duty increases were suspended when a new agreement was reached in 1991.

The 1991 semiconductor arrangement came into effect on August 1, 1991, replacing the 1986 arrangement. Like the 1986 agreement, the new arrangement contained provisions to address the market access problems U.S. semiconductor manufacturers face in Japan as well as dumping of semiconductors by Japanese suppliers. The new aspect of the 1991 agreement was the explicit reference in the agreement to the U.S. expectations that foreign semiconductor manufacturers could, through continuous efforts by both foreign suppliers and Japanese users, attain a 20 percent market share by 1992.[7] Though the agreement pointed to the 20 percent target, its meaning --whether it is

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[7] According to sources from the U.S. industry (Howell, Barlett and Davis p.81, 1992), a secret side letter was exchanged concurrently with the text of the 1986 semiconductor arrangement. The side letter also referred to the 20 percent market share. The existence of the side letter was revealed by the publication of Clyde Prestowitz's book *Trading Places*. MITI had denied the existence of the letter.

mandatory or just hortatory-- remained far from clear. According to the agreement, the 20 percent target was not a floor or a guarantee. But the government of Japan considered that the target could be realized and welcomed its realization. Both sides also agreed to assess the growth of design-ins (development of new semiconductors for use in future products) and long-term relationships between foreign manufacturers and Japanese user companies when determining whether progress in market access had been achieved.

From the U.S. standpoint, however, it soon became evident that for the U.S., the 20 percent foreign market share was the bottom line. Unless foreign (mostly U.S.) market share is close to 20 percent, all other factors, long-term relationships, Japanese government's effort, design-ins, market conditions, etc, no matter how favorable, would not be sufficient to make the Japanese semiconductor market "open".

The U.S. government all along pushed for assured purchases from U.S. suppliers, the matter of the uncompetitive arrangements among Japanese companies was marginal to the agreement. To quote what President Reagan once said about the 1986 semiconductor agreement, the agreement "achieves a key objective of Section 301, which is to open foreign markets to U.S. exports. The satisfactory resolution of this problem demonstrates our ability to help U.S. industries and to resolve contentious trade disputes through the negotiating process." (Federal Register, p. 27811, 1986). In other words, 301 in general and the semiconductor agreements in particular are about helping U.S. industries to increase sales abroad, not about uncompetitive conditions in the foreign market. This emphasis on "achieving results" has become an important feature of negotiations between the U.S. and Japan. Indeed, the Clinton administration has headlined its attention to pursue a "results oriented" trade policy.

Super 301 designation

The Administration had an opportunity to tackle cases involving perceived anticompetitive practices in Japan when it had to designate countries and practices under Super 301. Within Washington, "everyone knew" that Japan would be one of the designated countries: the Congress would insist. There remained however the question of what Japanese practices would be cited. U.S. officials reviewed Japanese practices toward three industries for possible designation: auto parts, soda ash and private construction projects (Mastanduno 1992).

In the case of soda ash, U.S. firms had since the 1970s alleged that the Japanese producers had organized a group boycott of imported products, thereby effectively holding down the U.S. share of the Japanese market to about 2 percent. The U.S. firms also complained that their market share was blocked because the Japanese competitors controlled the distribution network and enjoyed close ties with users of soda ash. Spurred by industry pressure to self-initiate a "301" investigation, the U.S. government pressed the Japanese government to take action. In 1983, the Japan Fair Trade Commission (JFTC) investigated and later confirmed that indeed there was a group boycott. The JFTC then issued a cease and desist order. As a result of this action, the U.S. share of the Japanese soda ash market increased to 17 percent. In 1986, the JFTC again investigated the industry and issued a warning to the producers not to violate the Japanese Antimonopoly law. Subsequently, the U.S. market share rose again to 22 percent. Perhaps because of the improvement of their market share in Japan, the U.S. industry did not press for a Super 301 designation.

For the case of auto parts, the main issue was the network of suppliers and users that are in long-term relationships--the so called keiretsu. The U.S. firms had complained for a long time that even though they had been successful in the U.S. and third markets, they were unable to penetrate the Japanese market. A Super 301 designation would likely have had support in Congress. A section of the 1988 Trade Act was devoted to Fair Trade in Auto Parts, calling upon the Secretary of Commerce

to establish an initiative to increase the sale of U.S. parts to Japan. The industry and the United Auto Worker (UAW) petitioned the U.S. Trade Representative to select Japanese auto parts as a priority practice under Super 301.

In the area of private sector construction, the U.S. suppliers complained of "dango", the practice of rigging bids and rotating winning bids among Japanese subcontractors. They also complained that the Japanese subcontractors refused to deal with U.S. firms seeking to bid on big projects.

In each of the above cases, anticompetitive behavior is in some way invoked as a market access barrier. No Super 301 case under the rubric of government toleration of private anticompetitive practices was designated (Federal Register, p. 24438-24442, 1989). But ultimately, the Administration chose not to designate any of these cases under Super 301. There are two reasons as to why this is the result. One is that the Bush Administration decided that anticompetitive practices can best be pursued by other instruments. For example, anticompetitive practices were explicitly discussed under SII. Under SII, the Japanese would make commitments in six areas: saving and investment patterns, land policy, distribution system, exclusionary business practices, keiretsu relationships and pricing mechanisms. All except the first two have implications for policies toward anticompetitive practices. To satisfy Congress' wish to attack anticompetitive practices in Japan, the Administration created SII and claimed that issues of anticompetitive acts would be solved via an alternative mechanism. However, though commitments are made in SII, there is much more flexibility under that forum than Super 301. U.S. officials are not bound by any precise legal language.

Another reason why the Administration was reluctant to designate these practices was perhaps due to the difficulty of actually justifying the assertion that the Japanese government *tolerated* these practices, even if the U.S. officials were convinced of their existence. At least in the case of soda ash, the JFTC did intervene twice in an effort to reduce activities of group boycott and consequently

improve market access for the American firms. For the case of Japanese private sector construction there was also an ongoing investigation involving public construction projects based on uncompetitive practices under the regular 301. Much of the complaints are similar to those in the private construction case. The fact that there was an ongoing "301" investigation may have swayed the U.S. officials in their deliberations for Super 301 designations. Finally, it should also be noted that another frequently mentioned candidate for Super 301 designation was the case of semiconductors (Bello and Holmer 1990). Some of the market barriers mentioned by the industry also involve the keiretsu. But semiconductors were already governed by a bilateral agreement since 1986, and the usefulness of an additional Super 301 designation may be seen as somewhat questionable. Ultimately the case of semiconductors was not designated under Super 301.

III. Other Instruments to Deal with Perceived Anticompetitive Practices

We pointed out earlier that where the U.S. government has seen lack of competition or failure to enforce competition rules as a significant deterrent to U.S. exports the U.S. government has generally used instruments other than "301." The following describes these extra-301 instruments.

Presidential Commitments

One mechanism to deal with cases that have antitrust implications is through "ad hoc" Presidential commitments. The general sequence of events is as follows: a particular U.S. industry has relatively little success in Japan and wants to improve its sales. It goes to Congress as well as the Administration to complain, often threatening to file for a "301" investigation. This pressure causes the Administration to initiate consultations with Japan. Consultation goes on without breakthrough.

The dispute festers and the pressure rises as the industry increasingly lobbies the government. To forestall increasing trade tension, the Administration uses special events such as Presidential visits and announces that the two heads of states have agreed that a settlement has to be reached by a certain date. This creates pressures on the trade negotiators, who then scramble to reach a compromise to meet the deadline, diffusing or delaying confrontations.

Several agreements were reached as a result of the presidential trip to Tokyo in January 1992. Two of them, the computer and the paper agreements, specifically contain implications for competition policy.

For the computer case, the U.S. computer industry asserted that in the 1960s and 1970s, the Japanese government practiced explicit "Buy Japanese" policy in procuring computers. This enabled the Japanese computer firms to estabiisn a long-term relationship with the procuring agencies and lock out foreign firms. Even though the explicit "Buy Japanese" policy no longer existed, the computer procurement practices prior to the agreement, which included reliance on vendors for technical advice and inadequate bid protest procedures, were still causing difficulty to the U.S. industry. To back up their claims, the U.S. computer industry pointed out that foreign computer manufacturers had 41 percent of the private sector mainframe computer market in 1990, while the share of the central government market remained at less than one percent (USTR Foreign Trade Barriers, 1993). The computer industry had asked the U.S. government to pursue the government procurement issue formally with the Japanese government. This prompted USTR to raise the issue with the Japanese in a Trade Committee meeting in 1989 (Trade Committee meetings are regular meetings between U.S. and Japan to discuss current and potential bilateral trade problems).

The computer agreement was concluded on January 22, 1992. The U.S. Trade Representative and the Japanese ambassador exchanged letters on "Measures related to Japanese public sector procurements of computer products and services." Major provisions include the establishment of

mechanisms by the Japanese government to facilitate procedures for the enforcement of the Antimonopoly Act in the public sector, equal access to pre-bid information, a commitment to formulate technical specifications in a neutral, non-discriminatory manner, the establishment by the Japanese government of an impartial bid protest system to provide equitable and effective bid challenge procedures and to make transparent criteria (such as the performance of specific computer functions) used in evaluating competing bids.

According to the computer agreement, the United States government will meet with the Government of Japan periodically to assess the implementation of the agreement based upon the following information: annual purchasing data for all Japanese public sector procurements of computer products and services from both foreign and domestic manufacturers; similar data that is publicly available for private sector procurements; efforts by foreign computer manufacturers to increase their Japanese public sector participation, and the growth in the Japanese public and private computer sectors. Though the agreement does not specify the share that U.S. firms should get, the periodic review of these data would undoubtedly put pressure on the Japanese government to procure more foreign computers and allow more sales by U.S. companies.

Another agreement reached as a result of the Presidential commitment made in Bush's trip to Tokyo is the paper market access agreement. U.S. suppliers of paper and paperboard products complained to the U.S. government that they cannot make full use of the Japanese industry's distribution system. According to the U.S. industry, the Japanese distribution system is characterized by stable, long-term relationships and capital linkages between Japanese manufacturers and their distributors. Alliances between producers and distributors in Japan prevent the substitution of foreign made paper products for domestically produced paper products. The U.S. industry's assertion is at least partly confirmed by the JFTC , which in 1986 noted its concern about the ability of foreign paper manufacturers to obtain access to domestic users and the distributional channels (U.S. Trade

Representative Foreign Trade barriers 1992). The U.S. firms further complained that Japanese end users of paper told them that they did not want to displace Japanese paper producers who have been supplying the users with paper over a period of time. At stake here was the $27 billion Japanese market for paper and paperboard products.

The U.S. industry had indicated that they would file a "301" petition if there was not a settlement soon. Using the Presidential visit, President Bush and Prime Minister Miyazawa agreed and publicly stated that by the end of March 1992, the two governments would agree on measures to substantially increase market access for foreign firms exporting paper products to Japan.

On April 5, 1992, the U.S. and Japanese governments reached an agreement. The agreement requires the government of Japan to encourage Japanese paper distributors and major users to increase imports of competitive foreign paper products; develop long-term buyer-supplier relationship with foreign producers; establish and implement open and non-discriminatory purchasing practices and to prepare and adopt company-specific, written purchasing guidelines, applicable to both domestic and foreign suppliers. In addition, the Japanese government will encourage major Japanese producers, distributors and users to establish and implement Anti-Monopoly Act compliance programs. The Japanese government reaffirmed its commitment to effectively enforce the Anti-monopoly Act with respect to the paper market. As part of the agreement, the Japanese government will conduct a number of surveys on conditions in the Japanese paper market and on the specific efforts of various paper consumers to use foreign paper products. Both governments will review jointly on a semiannual basis progress in implementing the measures in the agreement, taking into consideration changes in the level of import penetration, trade data, and efforts of both governments to implement the measures (USTR Foreign Trade Barriers, 1993, USTR Press Release 92-20, 1992). The U.S. industry and the U.S. officials will focus their attention on changes on the level of import penetration as the

critical factor. As in the computer agreement, the review process will generate pressure for the Japanese government to act to increase sales by U.S. paper suppliers.

To make sure that the meeting between President Bush and Prime Minister Miyazawa was seen by the media as a political and diplomatic success, the Japanese government also gave out some "gifts" unilaterally. As discussed earlier in the paper, the U.S. auto parts industry has for some time complained that the close and durable intercorporate relations among auto and auto parts manufacturers make it difficult for foreign auto parts suppliers to compete with the Japanese suppliers (U.S. Trade Representative Foreign Trade Barriers 1993). At the end of Bush's visit, the Japanese government pledged to increase the total purchase of American auto parts (including local procurement in the United States and export to Japan) from $9 billion in FY 1990 to about $19 billion in FY 1994.

All these issues involve alleged anticompetitive practices as market access barriers to various degrees. Both governments had paid some attention to these trade issues before the presidential visit. For example, since 1986, the U.S. and Japanese governments had been working together under the Market-Oriented Sector Selective (MOSS) framework to improve market access to Japan for foreign auto parts suppliers. In 1990, the two governments agreed on a Market-Oriented Cooperation Plan (MOCP) intended to facilitate the development of long-term business relations between Japanese auto manufacturers and U.S. auto parts suppliers. However, these cases, if unresolved, could have led to "301" investigations eventually. But President Bush decided to use his visit to forge agreements and to obtain pledges to deal with these trade tensions. This mechanism helped the U.S. industry to increase sales and at least delayed any potential "301" petitions.

Structural impediment initiative (SII)

SII was created by the Administration as an alternative to 301 and Super 301 to satisfy industry and Congressional desires to tackle competition-related trade barriers in Japan and to deal with the current account imbalance with Japan. Under SII, there are six areas of commitments for the Japanese: saving and investment patterns, land policy, distribution system, exclusionary business practices, keiretsu relationship and pricing mechanisms (U.S.-Japan working group, 1990). Under SII, the Japanese government has committed to improve competition policy and its implementations.

First, under the Japanese commitment "Enhancement of the Antimonopoly Act and its enforcement"' the U.S. is able to get Japan to agree to increase resources at the JFTC (U.S.-Japan Working Group, 1992). As a result, the government of Japan has acted to strengthen the enforcement arm of the JFTC by increasing the investigative staff of the JFTC by about 38 percent since FY1989. With these new resources, the JFTC has stepped up their investigations. In FY 1991, the JFTC took 30 formal actions against Antimonopoly violation, more than 4 times the average number of actions taken in the six years prior to SII. The JFTC also imposed a record level $97 million in administrative fines in FY 1990.

Under SII, the government of Japan also committed to bring more criminal enforcement actions against hard core antimonopoly violations including price fixing, bidrigging, market allocations and group boycotts. The Ministry of Justice, Public Prosecutor's Office and the JFTC jointly established a permanent liaison mechanism to facilitate the development of cases for criminal prosecution. This new mechanism has led to the first *criminal* antimonopoly action in 17 years. In November 1991, a case was brought against 8 firms and 15 individuals that had engaged in a price-fixing cartel in the plastic food wrap industry.

The Japanese Government also agreed to increase certain fines. As part of the Japanese commitment, the Antimonopoly act was amended to raise the surcharges JFTC automatically imposed

on companies committing the most serious antimonopoly violations. JFTC will now assess large manufacturers and service providers a surcharge of 6 percent of the value of their commerce affected by the anticompetitive activities, four times higher than before. While this is a significant increase, it still falls short of the 10 percent that the U.S. government wanted. The Japanese government has also submitted legislation that would increase the maximum penalty for criminal violations of the Antimonopoly act more than 20 fold -- from about $35,000 to about $750,000.

Under the SII commitments, the JFTC also issued new antimonopoly guidelines that clarified and strengthened the JFTC's enforcement policy with respect to unlawful distribution practices and activities by keiretsu or corporate groups in Japan. The JFTC is following up by investigating and conducting detailed analysis of keiretsu practices in four sectors: automobiles, auto parts, paper and glass.

In addition, the Japanese government agreed to increase its efforts to eliminate bidrigging on government funded projects in Japan. To this end, the JFTC has taken eight enforcement actions against bidrigging activities in the last 2 years.

To meet the commitment to promote effective resource to private damage remedies for antimonopoly violations, the JFTC has adopted a number of administrative measures. The JFTC will preserve evidence it obtains in its investigations, and upon request of the court, will submit these materials to the court for use in private damage litigation. The JFTC also will provide the court with its detailed analysis of the amount of damages suffered by the plaintiff and the causal link between the violation and those damages.

There are also other changes that would facilitate competition. For example, under SII an improvement was made in the revision of the large-scale retail store law. Under the amendments, new opening or expansion up to 1000 square meters of floor space for import sales in a large scale retail store is exempted from coordination procedures after notification. This change will facilitate the entry

of new products, including imports. Toys R Us is one store that was opened successfully in Japan under the revised retail store law.

The JFTC has also committed to a reduction of Antimonopoly exemptions, including certain cartels in the textile industry, and certain exempted items in cosmetics and pharmaceuticals. To deter infringement of the Antimonopoly act, including bid-rigging, the procurement entities will be assigned a contact person with the JFTC to provide information concerning practices that may violate the antitrust laws.

Extraterritorial application of antitrust law

Another instrument which was initiated under the Bush Administration to deal with foreign anticompetitive practices is the 1992 reinterpretation of the overseas operation of antitrust enforcement. On April [illegible], 1992, the U.S. Department of Justice announced a change in antitrust enforcement policy that would permit the Justice Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it took place in the United States.

According to then Attorney General William Barr, this change is meant to be a way to use the American antitrust laws to remove illegal barriers to export competition. He said, "Our antitrust laws are designed to preserve and foster competition, and in today's global economy, competition is international." (Department of Justice Press Release, 1992).

The change in enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations that had been interpreted as foreclosing Department of Justice enforcement actions against anticompetitive conduct in foreign markets unless the conduct resulted in direct harm to U.S. consumers. The new policy represents a return to the Department's pre-1988 position on such matters.

Under the new policy, the Department of Justice can take antitrust enforcement action against conduct occurring overseas that restrain U.S. exports, whether or not there is direct harm to American consumers, when (1) the conduct has a direct, substantial, and reasonable, and foreseeable effects on exports of goods or services from the U.S.; (2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws--in most cases, group boycotts, collusive pricing, and other exclusionary activities; and (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct (Statement of Antitrust Enforcement Policy, Department of Justice, 1992).

In the Department's 1977 Antitrust Guide for International Operations, two purposes are identified by the Antitrust laws' application to trade: to protect consumers and "to protect American export and investment opportunities against privately imposed restrictions" (put aside by the 1988 Guidelines). The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not to shut out by some restrictions imposed by a bigger or less principled competitor." (1977 Antitrust Guide cited in Background, Antitrust Enforcement Policy, Department of Justice, 1992).

The Department's 1977 Antitrust Guide for International Operations thus allowed for actions against export-restraining conduct, even in the absence of direct harm to U.S. consumers. In 1982, for example, the Antitrust Division challenged a foreign buying cartel for fixing the prices its members paid Alaskan seafood processors for crab exported to Japan (U.S. v. C. Itoh & Co. et. al 1982-83). The Japanese cartel had branch offices in the United States that are not independently incorporated. Thus the Justice Department could established jurisdiction. The case was finally settled by a consent decree. In fact, going back to 1912, the Department had brought over 40 antitrust cases based in whole or in part on allegations that the foreign conduct harmed U.S. exports.

According to the views of the Justice department, the Supreme Court has also confirmed that the antitrust laws can apply to anticompetitive conduct that impeded U.S. export opportunities. In *Zenith Radios Corporation v. Hazeltine Research Inc., 395* U.S. 100 (1969), the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada, and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

The Justice Department also stated that they will continue the practice of notifying and be prepared to consult with foreign governments. Export-restricting conduct may also violate antitrust laws of the country where the conduct took place. Where foreign antitrust authorities are in a better position to remedy unlawful conduct, the Justice Department will be prepared to work with those authorities.

Current negotiations with Japan

As described above, past Administrations have utilized "301" only minimally as a way to deal with perceived anticompetitive practices abroad. Instead, they relied on other instruments to pressure foreign governments to reduce these activities. Some, such as the commitments at the Presidential levels, are ways to bypass the bureaucratic channels to reach a quick agreement, in order to defuse potential trade tensions that may jeopardize the overall international relationship. Others, such as the SII and the extraterritorial application of the U.S. antitrust laws, are ways to strengthen the process of competition policies, either via increased enforcement in Japan, or through the threat of applying the more rigorous U.S. antitrust policies abroad. Stronger competition laws and enforcement are then believed to lead to a more open market.

The Clinton Administration, it seems, has decided that strengthening the antitrust process in Japan is no longer a sufficient or quick enough way to deal with competition-related trade barriers.

The new Administration has been outspoken in advocating a results-oriented policy toward Japan: this objective pursued through continued pressure at the level of heads of states, witness the framework agreement reached at the July summit in Tokyo. The two heads of states further agreed to meet twice a year to review progress toward meeting the objectives of the framework agreement.

The framework agreement sets up the rules by which a future set of agreement will be negotiated. For the subsequent sets of agreements, there will be more detailed macro and micro components. The Clinton administration's initial bargaining position was to seek quantitative targets in both areas. In the framework agreement that emerged in Tokyo the Japanese pledged to reduce substantially their current account surplus. On the micro side, the two sides agreed that objective criteria will be used, both quantitative and qualitative, to evaluate the progress in each of the component areas.

There are five components to the micro side of the framework. They include Japanese government procurement, particularly in relation to foreign computers, supercomputers, satellites, medical technology, and telecommunications; regulatory reform, covering financial services, insurance, the distribution network and competition policy; other major sectors particularly auto and auto parts, economic harmonization addressing issues affecting two-way foreign direct investment, intellectual property and access to technology; and the implementation of existing and future agreements.

So far there are already different interpretations to this framework agreement. The Japanese stated that there will be no hard and fast numerical targets, especially targets that will be used in sanctions. But President Clinton has said," At least we have agreed what the outcome of these negotiations needs to be: tangible, measurable progress,". (Wall Street Journal, July 12).

From the U.S. side, this emphasis on targets represents a continuation of the approach adopted under the semiconductor agreement. But it is a clear change from the approach of the SII.

Under SII, after the macro topic of saving and investing, competition policy has been the most important area of discussion. But the new administration's framework agreement suggests that while competition policy will be one of the component for negotiations, it will not be a primary one. Topics more directly related to U.S. sales in Japan have higher priority.

In opting for results, not processes, the current Administration in some cases will have to rely on agencies such as the Ministry of International Trade and Industry (MITI), which traditionally have been tolerant of domestic anticompetitive behavior, to issue more guidance to the private sectors and pressure the industries to purchase more foreign products. Rigged markets and managed trade will be tolerated, so long as they are rigged or managed in favor of U.S. sales. "301" is in the background, for use when the Administration needs legal authority to retaliate against unilaterally determined violations of agreements (including possibly failure to flesh out the framework agreement) when U.S. sales in Japan are below the aspirations of powerful constituents.

Alternatively, the current emphasis on the target approach can be interpreted to mean that in fact the preferred substitute to "301" is old-fashioned managed trade. On the import side, there have always been import maxima. Now on the export side, the U.S. government is striving for export minima. Neither "301" nor the successor to SII is about competition policy.

To summarize, there are three main points to the above discussion: (1) Foreign anticompetitive practices are only a very small percentage of the scope of "301", (2) the U.S. has other tools to attack conditions of competition in foreign countries, including SII, commitments by heads of states and extraterritorial application of antitrust laws, and (3) changing the "background conditions" such as the degree of competition is less the U.S. objective than increasing U.S. sales.

IV. "301" and Import Liberalization[8]

Since "301" was created in the 1974 trade bill, the U.S. Trade Representative has opened a total of 90 investigations, 82 of which have been completed[9] -- this count based on the most recent U.S. Trade Representative table of cases, dated October 2, 1992 and Report to Congress on Section 301 Developments, July-December 1992. Of the eight "pending" cases, six were suspended when the target country agreed to take up the matter in a multilateral negotiation.[10] The other two are recently initiated investigations that have not come to the mandatory completion date.

Foreign liberalization has been the most frequent outcome

As the Congress was making "301" into an important instrument of U.S. trade policy, knowledgeable observers expressed concern that it would be used as a protectionist instrument -- that its attacks on foreign barriers would be attractive excuses for retaliatory actions to restrict access to the U.S. market.[11] "301" can be criticized over many dimensions, but our tabulation of investigations and outcomes indicates that its primary function has not been to provide the U.S. government with an excuse to restrict imports. Table 1 reports that the most frequent outcome of a case is for the target country to liberalize the policy that the "301" case attacked.

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[8] The outcomes of "301" cases have been tabulated independently by Finger (1991) and Bayard and Elliot (1992). The following discussion closely follows Finger (1991).

[9] USTR (1992) reports 28 petitions that did not lead to investigations.

[10] All six are on topics being negotiated at the Uruguay Round. Three concern disputes over European Community agricultural subsidies, that date back as "301" cases to 1981. A fourth, concerning Argentine marine insurance, began in 1979. The last two are over the Super 301 designation of Indian investment practices and Indian insurance.

[11] Helen Milner (1990) reviews these concerns

To understand what the numbers in the table signify, the reader should be aware that from time to time, before a net liberalization is reached, a trade dispute goes through intermediate stages of retaliation by the United States, and counter-retaliation by the target country. For example, the National Pasta Association filed a petition on October 16, 1981, alleging EC violation of GATT Article XVI and the GATT Subsidies Code in using pasta export subsidies that resulted in increased imports into the United States. The U.S. Trade Representative initiated an investigation and consulted several times with the EC. U.S. Trade Representative also refereed the matter to the GATT Subsidies Code for conciliation. In 1982, a dispute settlement panel was established: consideration of its findings extended into 1985. In 1985, the United States increased its customs duties on pasta imports -- technically, in retaliation for the EC's discriminatory citrus tariffs. The EC counter-retaliated on lemons and walnuts.

In August 1986 the U.S. and the EC agreed to end their retaliatory and counter-retaliatory duties and to negotiate in good faith toward a settlement to the pasta dispute. In August 1987 the U.S. and the EC reached tentative agreement by which the EC would eliminate export subsidies on half the pasta exported to the United States. The U.S. Customs Service is now monitoring that agreement.

Most of the induced liberalizations have been multilateral rather than preferential to the United States

Table 1 sorts foreign liberalizations into two categories, multilateral or bilateral. The pasta case ended with an action by the EC that would benefit only U.S. producers. Another case that ended with a bilateral liberalization began with a petition in 1976 the United Egg Producers complaining of a Canadian import quota on U.S. eggs. Eventually, Canada agreed to double the U.S. quota. In a more recent case that ended with a bilateral concession, the Amtech Corporation (a U.S. company) complained that Norway denied U.S. rights under the GATT government procurement code, and in so doing adversely affected U.S. (i.e., Amtech's sales) of highway toll electronic identification

equipment. In the end the Norwegian government agreed to several actions to offset the impact of their procurement practices on the petitioner. One of these was to clarify that the Amtech system met the requirements of the Oslo Toll Ring project, another was to provide a statement that the Amtech system has been found to be proven, reliable, competitive, and type-approved by the Norwegian PTT.

While a number of countries found responses that benefitted only the United States, Table 1 shows that almost three times as often the liberalization was a multilateral action -- something that would benefit all exporters, not just the United States.[12] In 1979, in response to an investigation stemming from a petition by the National Canners Association, the EC agreed to discontinue a minimum import price system that had been applied to imports of canned fruits, canned juices and canned vegetables. In another multilateral action pressed for by a '301" case, Taiwan in 1986 abolished a schedule for assigning customs duties that departed from the principle of basing such duties on invoice values. And a "301" case filed by the Florida Citrus Mutual was part of the build-up to agreement by Japan to eliminate quotas on imports of fresh oranges and orange juice. An intermediate stage, involving enlargement of import quotas, was skewed perhaps toward the United States.[13]

Many of the disputes were with the EC over agriculture

Tables 2 provides information on the distributions of "301" cases across subject matter. By far the biggest lump of cases were about EC agricultural policies. Subsidies were the subject of many

[12] According to Bhagwati (1990, p. 35) US Trade Representative Carla Hills pledged that market openings resulting from "301" actions would be multilateral.

[13] Multilateral reductions of trade barriers will, of course, favor countries that are the "principle suppliers" of the products on which barriers have been reduced. The point applies to the non-tariff barriers that "301" has attacked as well as to the tariff concessions that have been agreed at the GATT rounds of tariff negotiations.

of them, though there were other issues, such as the displacement of U.S. exports when Spain and Portugal joined the EC.

"Traditional issues" were disputed with developed countries, "new issues" with developing countries

Half of the cases that targeted a developing country were on subjects that the Uruguay Round labels "new issues" -- services, intellectual property, and investment regulations that affect trade. In contrast, disputes with developed countries were almost all over "traditional issues" -- restrictions that limited access of U.S. merchandise exports to foreign markets. (Table 2)

End result: multilateral liberalization, not new trade restrictions

The pressure of "301" may not have been the only impetus for many of the policy actions that terminated the cases -- and may even in some cases have slowed the target country's implementation of a reform it had already decided -- but qualifications aside, the pattern of these policy actions should be noted. Counting the one case that ended with a liberalizing action by the United States (see the footnote to Table 1), two-thirds of completed cases ended with a liberalizing action. Twelve petitions were dismissed as not justifying any action, leaving three times as many liberalizing outcomes as restrictive outcomes.

V. "301," An Institutional Analysis

"301" needs fixing -- the abundance of criticism it has attracted both inside and outside the United States attests to that. But is it worth fixing: might abolition be the better alternative?

"301" itself is not a GATT violation, and beyond that, there are two arguments for fixing rather than abolishing. For one, the results of "301" have been mostly multilateral liberalizations, not

trade restricting retaliations by the United States. (Section IV, above) For another, in the United States, something like "301" will be a necessary *domestic* part of a stronger *international* mechanism for enforcing GATT rules.

"301" is not a GATT violation

"301" may generate some outrageous results, but as GATT law has been applied, the GATT enforcement process would probably not uphold a suit against it. Take for example the case against the EEC's anti-circumvention regulations (EEC Council Regulations Nos. 2176/84 and 2423/88). The GATT panel that evaluated this case did not find the regulations themselves to be a violation of the EEC's obligations under the GATT -- only that duties imposed on imports from Japan (who had made the complaint to GATT) under the regulations, or undertakings agreed by the EEC in lieu of such duties were in violation. (GATT 1990, p. 77) Though the EEC anti-circumvention regulations authorize duties or undertakings, they do not mandate them: the EC Commission has discretionary authority not to act. Thus the panel noted that "the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties." (ibid, p. 76)

Robert Hudec (1990, p. 124) explains that regulations such as "301" that provide for but do not mandate retaliation are difficult to distinguish from other political bluster, threats and posturing that are the usual idiom for such trade disputes.

The domestic dimensions of "301"

The international dimension of "301" is familiar: it is the policy instrument through which the U.S. government presses a foreign government -- by threatening retaliation -- to change its policies

in a way that the U.S. wants. But "301" also has important domestic dimensions which are perhaps less well understood.

Without "301", It would be difficult for the U.S. government to effectively enforce U.S. rights under the GATT. Suppose the U.S. government took the issue of a foreign import restriction to the GATT, the GATT determined that the U.S. complaint was valid and in turn asked the foreign government to bring itself into accord with its obligations under GATT -- implicitly, to remove the trade restriction. Suppose further that the foreign government persistently refused to do so and the GATT eventually authorized the U.S. government to retaliate, by imposing an equivalent import restriction.

Under the U.S. Constitution, the Executive branch of government conducts international affairs, hence the GATT case would be pursued by the Executive. The Constitution however gives to Congress the authority to lay and collect taxes and to regulate commerce with other nations. Thus, when the GATT authorized the U.S. to retaliate, the President would be unable to do: he would not have the authority under U.S. law. Congressional enactment of the authorized retaliation would be tedious, and difficult to constrain to the dimensions of retaliation that the GATT had authorized.

Thus under its constitution, for the United States to be a functioning part of an effective international system for realizing GATT rights, something like "301" is necessary.

The strength of "301," internationally

The domestic *politics* of "301" is not of course to provide the president the legal means to retaliate when the GATT authorizes the U.S. to do so. In domestic politics, "301" is a mechanism

through which a private U.S. party with a commercial interest at stake in U.S. rights under the GATT may compel the U.S. government to act to seize those rights.[14]

In the language of bargaining theory, '301" influences the bargaining situation between the United States and the target country -- the country the United States is pressing to relax an import restriction or other impediment to a U.S. enterprise doing profitable business in that country. In simple terms, the U.S. bargaining position will be stronger the more highly the target country values access to the U.S. market and the more credible is the U.S. threat to retaliate -- to reduce this access -- if the target country does not give in. The existence of "301" does not affect the value to the foreign country of access to the U.S. market, but it does affect the credibility of the U.S. government's threat to retaliate if the target country government does not give in.

Allow us to explain. Suppose the decision to retaliate against the foreign country rested with the U.S. government. The U.S. government is equally accountable to those U.S. interests that would benefit from the target country's liberalization, those U.S. interests that would suffer from the target country's possible counter-retaliation, and those U.S. interests that would suffer from the general "foreign policy" costs of U.S. retaliation. Through "301," the Congress has shifted authority over this decision to the interest that would benefit from foreign liberalization, and who has a smaller stake in possible foreign counter-retaliation and the foreign policy costs of U.S. retaliation.[15]

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[14] "301" is, of course, more than that. We will take up its additional dimensions below.

[15] Discussions sometimes represent the last fifteen or so years as a period in which the Congress has reclaimed from the Executive its authority over the regulation of commerce with foreign nations. While it is true that the Congress has acted to weaken the Executive's authority in this area, the Congress has not taken upon itself the responsibility of exercising that authority. By expanding the trade remedies laws -- that are the principal US instrument for regulating imports -- and likewise expanding 301, the Congress has reassigned authority over the regulation of US trade with foreign countries to the private parties with a direct commercial interest in the *benefits* of each action, but not in the *costs*. This is the intersection of Congress' motivating concerns, blame avoidance and constituent service. On the former, see Nivola (1993) and on the former, see Milner (1990)

Private motives and public issues

Anyone who studies public policy soon learns that the issue that justifies a policy action is often far removed from the motives that propel its advocates, and that when push comes to shove, it is the motive, not the issue that dictates what the action will be. Some discussions criticize "301" because it is based on private rather than public priorities.[16] While *public* action should be taken only when the *public* interest will be served, policy-making cannot suppress or even ignore private motives. All dogs have fleas, therefore all dogs have legs with which to scratch. Likewise, all governments must have mechanisms to deal with citizens' requests for protection from import competition. "301" suggests that they should have mechanisms to deal with constituent concerns for better access to foreign markets.

The challenge is not to suppress private pressures for trade policy action, but to screen them more effectively to approve only those petitions that serve the overall national economic interest. Whe· the issue is an antidumping or other restriction on imports into the United States, there is an obvious conflict between the U.S. private interests that compete with imports and U.S. private interests that buy imports or import competing products. The national economic interest -- the sum of the economic interests of all U.S. citizens -- will often be reduced by such actions. The antidumping and other import remedy rules are not a sensible basis to decide when it is or is not in the national economic interest to restrict imports.[17]

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[16] For example, Palmeter (1990).

[17] One way to limit actions under import remedies to those that will add to the national economic interest is to screen petitions according to the criteria of antitrust law. Another would be to provide the same standing in law and in administrative processes for the US interests that will bear the costs of an import restriction as the administrative import remedies already provide for those who enjoy the benefits of such actions. The problem with the import remedies is not that they empower too many private interests, but that they empower too few.

But removing a foreign barrier to U.S. exports initiates no such conflict. An import restriction has a primary impact on both U.S. buyers of imports and of U.S. producers of competing products. Creating a new opportunity will have a primary impact on U.S. exporters, but only secondary effects on other U.S. interests -- through bidding up prices of the U.S. products for which new export opportunities were created.

Rallying then the appropriate domestic interests might be an effective way to bring U.S. import relief mechanisms under control. But "301" has no direct enemies among domestic U.S. commercial interests. Bringing "301" under control will depend on arousing the U.S. leadership community's sense of international responsibility.

VI. Strengthened GATT Enforcement Based on "301"

The GATT dispute settlement mechanism has authorized retaliation only once in GATT's 46 years -- that one time in 1954. This outcome displays less the success of GATT in maintaining discipline than the concern of GATT's drafters to prevent countries from retaliating in beggar-thy-neighbor fashion against another a country's new trade restriction. Before the GATT process comes to retaliation there would be (1) consultation, (2) conciliation, (3) a panel review (all of these designed to facilitate a "mutually agreed solution" between the contesting countries), then (4) a membership vote to make official the panel's finding and recommendations, then (5) a membership vote to authorize the complaining country to retaliate.

"301" is effective, but it is an international rogue. In the "301" process, the two decisions (1) that U.S. rights have been violated, and (2) to retaliate, are national, not international decisions. And of course, the criteria against which a foreign country is judged goes beyond explicit international

agreements -- to behavior that is "unreasonable or discriminatory" in the unilateral view of the United States.

There is however a need for a more forceful approach to enforcing international rules than the GATT dispute settlement process provides. I. M. Destler (1992, p. 242) in arguing that "301" should be maintained as an instrument of national policy, lists the following reasons:

1. There remain many arbitrary foreign practices that close potentially lucrative export markets.
2. The GATT process has not proven an effective process for addressing these arbitrary practices.
3. An idle mind is the devil's workshop; i.e., to many members of the U.S. Congress, the alternative is likely to be tougher restrictions on imports.

This reasoning can be made international by pointing out that there remain many arbitrary *United States* practices that the GATT process has not effectively addressed. The absence of foreign instruments to attack similarly arbitrary U.S. practices is not the fault of "301."

Maintaining international peace among nations all armed with policy instruments like "301" requires significant progress in at least five problem areas.

One problem is how to make the foreign "301's" as effective as the U.S. instrument. The threat of reduced access to a small country's market is not as powerful as the threat of reduced access to the U.S., the EEC or the Japanese market. But the present GATT process suffers the same weakness -- it does not offer the possibility of community-wide retaliation against a country that has violated its international obligations vis-á-vis a smaller country.

There is another reason why foreign countries' "301s" might be less effective than the U.S. instrument. As discussed above,the effectiveness of "301" is not based solely on the size of the U.S. market. It is based also on the credibility of the U.S. threat to retaliate, and that credibility derives

from the willingness of the U.S. Congress to transfer authority over U.S. trade restrictions to private commercial interests. A government that transfers such authority to private parties in an attempt to increase the credibility of its retaliation threat would not be successful in doing so. The credibility of the U.S. threat derives from the entire politics of this transfer of authority, from a folklore that is deeply held and would not be put aside simply because doing so might at some point improve the U.S. bargaining position on a commercial issue.

Secondly, for an international dispute settlement process made up of national "301's" to be effective, it might be necessary to leave the decision to retaliate a national decision. GATT, (or any other international agreement) as now would decide when the GATT (or the other agreement) had been violated, but would sacrifice to national processes the decision to retaliate. GATT article XIX.3, in allowing automatic compensation or retaliation rights to a country against whose exports another has taken a safeguards action, might be a model.

It is also evident that an international system composed of national "301's" cannot work without more responsible behavior by the United States. Robert Hudec (1990, Appendix 2) documents the following record of compliance with GATT legal rulings returned between January 1, 1980 and December 31, 1988.

Japan: out of 4 adverse rulings substantial compliance in all 4.

Canada: out of 6 adverse rulings, compliance in 4, noncompliance in 1, the other was too recent at the time of Hudec's analysis to allow a conclusion.

EEC: out of 9 adverse rulings, compliance in 3. In another 3 adoption of the ruling was blocked but the case was eventually settled with a compromise. The other 3 were too recent at the time of his analysis to allow a decision.

United States: Of 9 adverse rulings, the U.S. complied in 3 and did not in five, though in three of the five the U.S. has announced that it intends to comply.

Of the three instances in which the U.S. complied with a GATT legal finding against the U.S., the complying action came in one case 30 months after the GATT ruling and in another, 26 months. According to the timetable of "301," a foreign government taken to GATT by the United States would have at most 7 months after the GATT ruling to comply. Otherwise "301" requires retaliation. Hudec further points out that "the United States has recently reaffirmed its disregard of the new 301 time limits in no less than four other pending cases." (1990, p. 141)[18]

A final (for this paper) problem is that some of the problems with the present international trading system are not GATT-illegal. The new issues, such as services, are an obvious example. Reluctance of developing countries who have become significant powers in international trade to give up special and differential status, the expansion of the scope of antidumping restrictions are others.

The dispute settlement process includes no commitment from the community as a whole to act against a member who violates the agreement and it is constrained by an institutionalized reluctance to authorize retaliation by a member forward enough to call out another one for having violated the agreed norms. The present GATT dispute settlement process depends simply on normative pressure -- reminding an out-of-line country of a previously agreed international standard.

The driving force behind GATT's trade liberalization successes has often been more mercenary than that -- an urge for access to foreign markets, and a willingness to allow foreigners to sell in the home market only when it was the necessary price of access to theirs. Appeal to normative standards seems to have little force today, hence to preserve the economic benefits of the open international trading system, it may be necessary to regress to a more primitive political and legal system.

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[18] Hudec (1990) and Palmeter (1990) place the blame for the roguery of "301" on the determinedly blind and awesome self-righteousness of the US Congress on trade issues. One might also point to the US Congress' tendency, when pressed by circumstances to clarify US interests, to do so by delegating another piece of its authority over the regulation of trade to the particular special interest that will pay the largest bundle of constituent service points for that authority. Which is servant and which master, the blind self-righteousness or the venal politics?

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Annex

Cases Involving the Anticompetitive Practice Clause of Regular 301

1. Japan construction and construction-related services (301-69)

Petitioner: USTR

Complaint: The Government of Japan implemented procurement policies in the construction sector that limited competition and facilitated collusive bidding. Section 1305 of 1988 Trade Act required the USTR to initiate an investigation regarding acts, policies, and practices of the Japanese government that are barriers in Japan to the offering of performance by U.S. persons of architectural, engineering, construction and consulting services in Japan.

Determination: Positive determination based on the anticompetitive clause of Section 301

Result: No retaliations taken. An agreement reached that extended a previous agreement in the construction sector. The new agreement provided for special measures to facilitate foreign access to 23 additional projects, worth an estimated $26.7 billion.

2. Japan amorphous metals

Petitioner: Allied-Signal, Inc.

Complaint: Allied-Signal alleged that it had been denied market access to the Japanese amorphous metals market through a combination of Japanese targeting and toleration of anticompetitive practices. Allied-Signal also accused the Japanese government of allowing Japanese utilities to evaluate transformers by a method that favored Japanese suppliers.

Determination: With the conclusion of the agreement, Allied-Signal withdrew the petition.

Result: No retaliations taken. An agreement was reached that committed Japanese utilities to buy transformers based on a method called "lowest lifetime cost", which was the method used in the United States. The agreement also committed the Japanese utilities to buy from Japanese transformer manufacturers 32,000 units of amorphous metal transformers over two years. The transformer manufacturers would, in turn, buy amorphous metals produced in the United States or by a licensee of Allied-Signal.

3. Indonesian Pencil slats (301-90)

Petitioner: P&M Cedar Products, Inc. and Hudson ICS

Complaint: The Indonesian government engaged in activities that target exports of wood products, including pencil slat. They also accused the Indonesian government of encouraging vertical integration of logging and processing activities, not promoting competition in the logging industry and not protecting the interests of the consumers.

Determination: Negative determination based on USTR's conclusion that other factors other than those alleged by the petitioners appeared to have a much greater impact on Indonesian pencil slats. There was no basis that these practices were burdening or restricting U.S. commerce.

Result: USTR determined that no action was appropriate and the case was terminated.

Table 1

United States "301" Cases Completed through December 31, 1992

by Outcome and Country Group

Target country, by group	*Total*	*Negative Determination*	*Target Country Liberalization*			*US Retaliation*	*Other Restrictive Outcomes*[a]
			Multilateral	*Bilateral*	*Total*		
All Countries[b]							
Number of cases	82	12	38	13	51	13	5
(% of total number)	(100)	(15)	(46)	(17)	(62)	(16)	(6)
Developed Countries[b]							
Number of cases	50	7	17	10	27	10	5
(% of total number)	(100)	(14)	(34)	(20)	(54)	(20)	(10)
Developing Countries							
Number of cases	31	4	21	3	24	3	0
(% of total number)	(100)	(13)	(70)	(10)	(80)	(9)	(0)

Source: Tabulated from Office of the US Trade Representative, "Section 301 Table of Cases," Washington, DC, USTR, October 2, 1992, photocopied and Report to Congress on Section 301 Developments, July - December 1992.

a/ In three of these, on the US government's recommendation the petitioner withdrew his "301" petition and petitioned instead for an import-restricting action – an antidumping or a safeguards action. One of the others was the earlier Canadian softwood lumber case (301-58), in which Canada imposed an export tax. The fifth was the Japanese semiconductor case in which Japan agreed to import more US semiconductors and to observe a minimum price on Japanese sales in third markets.

b/ In 1979 a US firm complained about the Swiss customs service's testing of the gold content of eyeglass frames. USTR's investigation revealed that US standards of testing and making gold content were different from those used by many other countries. The US industry agreed to shift to the more common standards and markings which the Swiss customs service would accept without further testing. This action is classified as "liberalization by the US," and does not fit into any of the categories listed in this table.

Table 2
Subjects of US "301" Cases, July 1975 - December 1992

(number of cases)

	Merchandise Trade		*Services Trade*	*Intellectual Property*	*Government Procedures*[a]	*Investment Regulations*	*Several Subjects*	*Total*
	Agriculture	*Manufactures*						
All Countries								
Number of cases	42	24	11	8	2	1	2	90
(% of total number)	(47)	(27)	(12)	(9)	(2)	(1)	(2)	(100)
Developed Countries								
Number of cases	31	19	3	0	0	0	0	53
(% of total number)	(58)	(36)	(6)	(0)	(0)	(0)	(0)	(100)
Developing Countries								
Number of cases	11	5	7	8	2	1	2	36
(% of total number)	(31)	(14)	(19)	(22)	(6)	(3)	(6)	(100)

Source: Tabulated from Office of the US Trade Representative, "Section 301 Table of Cases," Washington, DC, USTR, October 2, 1992, photocopied and Report to Congress on Section 301 Developments, July-December 1992.

a/ Customs valuation and import licensing procedures.

Appendix Table 1

United States "301" Cases, July 1975 - December 1992

By Country and Outcome

(number of cases)

Target Country	*Total*	*Negative*	*Target Country Liberalized*			*US Retaliation*	*Other Restrictive Outcome*	*Pending*
			Multilateral	*Bilateral*	*Total*			
Developed Countries								
Austria	1	0	0	0	0	1	0	0
Canada	8	1	0	2	2	3	2	0
European Community	29	6	9	4	13	6	1	3
Japan	12	0	8	3	11	0	1	0
Norway	1	0	0	1	1	0	0	0
Sweden	1	0	0	0	0	0	1	0
Switzerland[a]	1	0	0	0	0	0	0	0
Developing Countries								
Argentina	5	0	3	0	3	1	0	1
Brazil	5	1	4	0	4	0	0	0
China, Peoples Republic	3	0	3	0	3	0	0	0
Guatemala	1	0	0	1	1	0	0	0
India	4	0	1	0	1	1	0	2
Indonesia	1	1	0	0	0	0	0	0
Korea	8	0	5	2	7	1	0	0
Taiwan	6	2	4	0	4	0	0	0
Thailand	3	0	1	0	1	0	0	2
Eastern Europe								
USSR	1	1	0	0	0	0	0	0
All Countries[a]								
Number of cases	90	12	38	13	51	13	5	8
(% of total)	(100)	(13)	(42)	(14)	(57)	(14)	(6)	(9)
Developed Countries[a]								
Number of cases	53	7	17	10	27	10	5	3
(% of total)	(100)	(13)	(32)	(19)	(51)	(19)	(9)	(6)
Developing Countries								
Number of cases	36	4	21	3	24	3	0	5
(% of total)	(100)	(11)	(58)	(8)	(75)	(8)	(0)	(14)

Source: Tabulated from Office of the United States Trade Representative, "Section 301 Tables of Cases," Washington, D.C., USTR, October 2, 1992, photocopied and Report to Congress on Section 301 Developments, July - December 1992.

a/ In 1979 a US firm complained about the Swiss customs service's testing of the gold content of eyeglass frames. USTR's investigation revealed that US standards for testing and making gold content were different from those used by many other countries. The US industry agreed to shift to the more common standards and markings which the Swiss customs service would accept without further testing. This action is classified as "liberalization by the US," and does not fit into any of the categories listed in this table.

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