Global Business & Development Law Journal

Volume 3 | Issue 1 Article 7

1-1-1990

Section 301: The Privatization of Retaliation

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". . . to each according to his threat advantage is not a principle of justice."—John Rawls[1]

A multitude of bilateral and multilateral economic and trade agreements tie most of the world's governments to each other in a wide variety of ways, creating both rights and obligations. Governments may assert additional economic rights even in the absence of formal agreements. That governments claim authority to take steps to protect these interests is not a startling proposition. They sometimes pursue their claimed rights unilaterally; at other times they may do so through the often imperfect procedures of such international agreements as the General Agreement on Tariffs and Trade (GATT).[2]

In the United States the exercise of this authority is complicated by the constitutional separation of powers. The Constitution of the United States gives the legislature complete power over foreign commerce, yet, as a practical matter, that power must be exercised by the executive.[3] The problem is solved by laws that delegate specified

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1. J. RAWLS, A THEORY OF JUSTICE 134 (1971).

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 3687, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

3. U.S. CONST. art I, § 8, cl. 2, provides that Congress shall have the power "[t]o regulate Commerce with foreign nations . . . ." *Id.*

foreign commerce powers from Congress to the executive. For example, when the Trade Expansion Act of 1962 was enacted, Section 252 authorized the President to enforce the international economic rights of the United States by retaliating against foreign import restrictions with higher tariffs or quotas.[4] This was a limited, specified delegation by Congress to the President of the otherwise exclusive congressional power over tariffs and quotas.

There was nothing particularly unusual about this action. All governments would claim to have the same power, whether or not their constitutional structure requires that it be set out so explicitly. Unfortunately, however, the story in the United States does not stop there.

With enactment of the Trade Act of 1974, Section 252 was amended and renumbered "Section 301," a statutory designation that seems well on its way to becoming world-famous.[5] Section 301 was amended further in 1979,[6] again in 1984,[7] and most recently in the Omnibus Trade and Competitiveness Act of 1988.[8] Each amendment ratcheted the law further toward protectionism.[9] Today, Section 301 is neither as obscure nor as non-controversial as its predecessor, Section 252.

Nor should it be, for Section 301 dangerously automatizes and privatizes the exercise of what should be purely discretionary government power. Section 301 implicitly attempts to impose U.S. standards on the rest of the world and, somewhat hypocritically, establishes a standard for the rest of the world which the United States itself cannot meet.

Presently, there are three distinct Section 301 procedures: "Regular" 301 and two outgrowths: "Super" 301 and "Special" 301. They present to the lawyer a bewildering display of some of the worst statutory drafting in the common law world. Provisions refer forward and backward with confusing, tautological abandon, sometimes cancelling each other, sometimes not.[10] In fact, "301" is shorthand for

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4. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872, 879 (1962).
5. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (1974).
6. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 301, 93 Stat. 144, 295 (1979).
7. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 301, 98 Stat. 2948, 3000 (1984).
8. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 301, 102 Stat. 1107, 1164 (1988) [hereinafter 1988 Act].
9. This is detailed by Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 LAW & POL'Y INT'L BUS. 501 (1989) [hereinafter Bliss].
10. "Section 301 is an intricate maze of mandatory commands in one place and extremely wide loopholes in the other. One needs a wiring diagram to trace whether mandatory commands given in one part will actually reach their final target without passing through at least one

nine separate sections (Sections 301-309) of the Trade Act of 1974, as amended. "Super" 301 is yet another section, and "Special" 301 is still another.[11] In the end, they all represent unilateral decisions by one government as to the propriety of the policies of other governments; these unilateral decisions are combined with threats, and could lead to actions sufficient to ignite a trade war. Only the narrowest of escape routes is provided.

REGULAR 301

From its 1962 beginnings, Section 301 has grown from an unobjectionable grant of necessary authority to the President, to something closely resembling a right of action for aggrieved private parties. The rationale for these evolving changes is grounded in the fact that foreign import restrictions hamper private U.S. interests—the interests of exporters, either actual or potential. The earlier changes in Section 301 essentially were procedural: they provided a mechanism through which the private sector could bring its complaints to government. With successive amendments, the procedures have become more elaborate, the room for governmental discretion more limited.[12] Today's "Regular" 301 contains procedures that are almost formal, with petitions from private interests, public hearings, strict time limits for obligatory findings, and an all but mandatory requirement that the United States take unilateral, retaliatory action against other governments if appropriate findings are made.[13]

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loophole exit." R. Hudec, Thinking About the New Section 301: Beyond Good and Evil, Dec. 1, 1989 [hereinafter Hudec] (paper presented to Conference on Super 301 and World Trading System, Program in International Economics & Journalism, Columbia University, to be published in the Proceedings of the Conference) (copy on file at offices of *The Transnational Lawyer*).

11. 1988 Act, *supra* note 8, at § 1301 (amending Sections 301-309 of the Trade Act of 1974, 19 U.S.C.A. §§ 2411-2419 (West 1978 & Supp. 1989)); *id.* at § 1302 (adding Section 310, tit. III, ch.1 of the Trade Act of 1974, 19 U.S.C.A. § 2420 (West 1978 & Supp. 1989)) [hereinafter Super 301]; *id.* at § 1303(b) (adding Section 182 to tit. I, ch. 8 of the Trade Act of 1974, 19 U.S.C.A. § 2242 (West 1978 & Supp. 1989)) [hereinafter Special 301]. Future citations to Sections 301-310 and to Section 182 of the Trade Act of 1974 are to these sections as amended. Additionally, Title I, Subtitle C, Part 4 of the 1988 Act, 19 U.S.C.A. §§ 3101 - 3111 (West 1978 & Supp. 1989), constitutes the Telecommunications Trade Act of 1988, 19 U.S.C.A. § 3101 (West 1988). The Telecommunications Trade Act of 1988 provides for a Section 301-type procedure for telecommunications equipment. Section 1382 of that Act (19 U.S.C.A. § 3111 (West 1978 & Supp. 1989)) limits action to that permitted by international agreements, including GATT. *Id.*

12. *See* Bliss, *supra* note 9.

13. 1988 Act, *supra* note 8, at § 302(a) (19 U.S.C.A. § 2412(a) (West 1978 & Supp. 1989)), provides that any interested person may file a petition with the Trade Representative requesting action under Section 301, and setting forth allegations in support of the request.

The likelihood of mandatory action has been furthered by the 1988 formal transfer of Section 301 authority from the President to the U.S. Trade Representative.[14] While it is true, as some argue, that the Trade Representative is a presidential appointee and therefore subject to presidential control, it remains true that the transfer increases the likelihood of unilateral U.S. action.[15]

First, as a government official subject to Senate confirmation, the Trade Representative, unlike the President, is subject to congressional questioning and to direct congressional pressure. Further, when Section 301 authority was lodged in the President, government agencies other than the Trade Representative also had an important, formal role in the policy-making process. The State Department, for example, might approach the issue of unilateral retaliatory action from a foreign policy viewpoint, while the Defense Department considered the security implications, and the Treasury Department focused on the economic consequences. The transfer of Section 301 authority to the Trade Representative has greatly reduced the role of other agencies in the policy-making process. The matter now rests effectively on the Trade Representative's "turf," and the Trade Representative

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The Trade Representative is required to decide within 45 days whether to initiate an investigation. If the decision of the Trade representative is negative, the petitioner must be informed of the reasons, and a summary of the reasons for denial must be published in the Federal Register. If the decision of the Trade Representative is affirmative, the Trade Representative shall, *inter alia*, provide an opportunity for presentation of views, including, if requested, a public hearing. Section 303 of the 1988 Act (19 U.S.C.A. § 2413 (West 1978 & Supp. 1989)), requires consultations with the concerned foreign government if the dispute involves a trade agreement, and formal use of the agreement's dispute settlement procedures if the matter is not resolved in 150 days. Section 304 of the 1988 Act (19 U.S.C.A. § 2414 (West 1978 & Supp. 1989)), requires the Trade Representative to make a determination within 30 days of the conclusion of a dispute settlement procedure, or generally within 6, 12, or 18 months in other cases. The determination of the Trade Representative must be published in the Federal Register together with a description of the facts upon which it is based. *Id.*

14. As amended by the 1988 Act, Section 301 is entitled "Actions by United States Trade Representative" and states, at subsection (a)(1): "*If the United States Trade Representative determines. . . .*" 1988 Act, *supra* note 8; 19 U.S.C.A. § 2411 (West 1978 & Supp. 1989) (emphasis added). Previously, there was no reference to the Trade Representative in the title, and it stated, at subsection (a)(1): "If the *President* determines . . . ." Trade and Tariff Act of 1984, 19 U.S.C.A. § 2411 (West 1988) (emphasis added).

15. As the House Committee on Ways and Means noted:

> The Committee recognizes that the U.S.T.R. [United States Trade Representative] serves as the representative of the President and in certain limited circumstances broader U.S. national interests may be involved in Section 301 decisions affecting foreign governments that may override strictly trade policy concerns. The Committee expects such instances would be rare.

H.R. REP. No. 40, 100th Cong., 1st Sess., at 59 (1987). H.R. 3 was the House bill that eventually became the 1988 Act. *See* H.R. REP. No. 576, 100th Cong., 2d Sess.

will have to justify its decisions to Congress on that basis.[16]

While the law permits the Trade Representative to refrain from taking retaliatory action, it makes this decision extremely difficult in practice by ordering action with one hand, and providing only a very narrow, politically difficult escape with the other. Retaliatory action is required if the Trade Representative determines that: (1) U.S. rights under a trade agreement have been denied;[17] (2) an act, policy or practice of another government denies the United States the benefits of a trade agreement;[18] or (3) a foreign governmental act, policy, or practice is "unjustifiable."[19] When any of these criteria are satisfied, Section 301 provides that the Trade Representative "shall take action."[20]

But this apparent imperative for action is relaxed subsequently by clauses in the law authorizing the Trade Representative to decline to take action if: (1) GATT determines that the foreign practice in question does not violate U.S. rights;[21] (2) the Trade Representative finds that the foreign government is taking measures to reach a satisfactory solution;[22] (3) the foreign government agrees to compen-

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16. Traditionally, trade policy formulation has been an inter-agency responsibility. At the Cabinet level is the Trade Policy Committee; at the sub-Cabinet level is the Trade Policy Committee Review Group; and at the staff level, the Trade Policy Staff Committee. Rules concerning the operations and membership of these committees are set forth in 15 C.F.R. §§ 2002.0 - .2 (1989). A Section 301 Committee is a subordinate body of the Trade Policy Staff Committee. 15 C.F.R. § 2002.3 (1989). The 1988 Act contained a series of amendments that upgraded the role of the Trade Representative in the inter-agency process. *See* 1988 Act, *supra* note 8, at § 1601 (amending 19 U.S.C. § 2171). "The basic purpose of the amendments," according to the House Report,

> is to reemphasize the intent of Congress . . . that the [United States Trade Representative] has the primary responsibility in the Executive branch as chief adviser to the President and to the Congress for the development, coordination, and administration of U.S. international trade policy. The Committee emphasizes that the delegation by Congress of its constituted power to regulate foreign commerce in many areas is meant to be exercised by the U.S. Trade Representative on behalf of the President, not by other Cabinet officers.

H.R. REP. No. 40, 100th Cong., 1st Sess., at 166 (1987).

17. 1988 Act, *supra* note 8, at § 301(a)(1); 19 U.S.C.A. § 2411(a)(1) (West 1978 & Supp. 1989).

18. 1988 Act, *supra* note 8, at § 301(a)(1); 19 U.S.C.A. § 2411(a)(1) (West 1978 & Supp. 1989).

19. 1988 Act, *supra* note 8, at § 301(a)(1); 19 U.S.C.A. § 2411(a)(1) (West 1978 & Supp. 1989).

20. 1988 Act, *supra* note 8, at § 301(a)(1); 19 U.S.C.A. § 2411(a)(1) (West 1978 & Supp. 1989).

21. 1988 Act, *supra* note 8, at § 301(a)(2); 19 U.S.C.A. § 2411(a)(2) (West 1978 & Supp. 1989).

22. 1988 Act, *supra* note 8, at § 301(a)(2); 19 U.S.C.A. § 2411(a)(2) (West 1978 & Supp. 1989).

sate the United States;[23] (4) retaliatory action would result in an adverse impact on the U.S. economy greater than the benefits it would confer;[24] and (5) retaliatory action would cause serious harm to U.S. national security.[25]

The law also recognizes and accepts political realities to some degree by providing that the Trade Representative shall make its decision "subject to the specific direction, if any, of the President."[26] Thus, as a purely legal matter, the President remains in control. As a realistic political matter, however, Congress has sent a very clear signal to the Executive Branch that, apart form extraordinary situations, Congress wants these decisions to be made by the Trade Representative in the context of trade disputes alone, and not in light of other policy considerations.[27]

Since its days as Section 252 of the 1962 law, Section 301 has been steadily and uninterruptedly amended to reduce the influence of wider policy considerations in its use, and instead to compel action.[28] This trend is even more apparent from the two 1988 outgrowths of "Regular" Section 301: "Super" 301 and "Special" 301.

"SUPER" 301[29]

The belief that many foreign governments maintain an extensive web of protectionist devices that need to be attacked led not only to the increasingly mandatory procedures of "Regular" 301, it led also to "Super" 301 which is aimed at countries with a consistent pattern of trade barriers and market-distorting practices.[30] "Super" 301

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23. 1988 Act, *supra* note 8, at § 301(a)(2); 19 U.S.C.A. § 2411(a)(2) (West 1978 & Supp. 1989).

24. 1988 Act, *supra* note 8, at § 301(a)(2); 19 U.S.C.A. § 2411(a)(2) (West 1978 & Supp. 1989).

25. 1988 Act, *supra* note 8, at § 301(a)(2); 19 U.S.C.A. § 2411(a)(2) (West 1978 & Supp. 1989).

26. 1988 Act, *supra* note 8, at § 301(a)(1), 19 U.S.C.A. § 2411(a)(1) (West 1978 & Supp. 1989).

27. "Clearly on transferring final decision-making authority from the President to the [United States Trade Representative], Congress was sending a signal to the [United States Trade Representative] that it expects the amendment to produce a greater willingness to take action under Section 301." Bliss, *supra* note 9.

28. *See* Bliss, *supra* note 9.

29. The term "Super 301" has adhered to Section 1302 of the 1988 Act, *supra* note 8, which adds Section 301 to the Trade Act of 1974, 19 U.S.C.A. § 2420 (West 1978 & Supp. 1989). *See* Bliss, *supra* note 9.

30. Jagdish Bhagwati terms the belief that foreign markets are closed to United States goods, and the belief that the playing field is not level, to a "self-serving 'I am more open than thou' presumption against the new economically successful rivals." J. BHAGWATI, PRO-

requires the Trade Representative to investigate the world, to name the countries, the barriers and the practices that most offend, and then to self-initiate a 301 investigation against those deemed "priority." No petition from a private party is needed. After the investigation is underway, the Trade Representative is required to enter into negotiations with the offending government with a view toward eliminating the barrier or practice. If negotiations are unsuccessful, Section 301's mandatory retaliation provisions apply—subject, of course, to the five narrow escape hatches provided by the law.[31]

In June 1989, the Trade Representative identified Brazil, India, and Japan as three "priority" countries that, among them, maintained six barriers to be prosecuted under Section 301: Import licensing in Brazil; investment and insurance practices in India; and forest product, satellite, and super computer restrictions in Japan. Section 301 cases duly were initiated. If solutions satisfactory to the United States are not reached in these disputes, serious trade consequences could follow beginning as early as mid-1990.[32]

The saga does not end with the six disputes. The Trade Representative is required every year to file annually with Congress a "National Trade Estimate" which details remaining foreign barriers and distortions to trade.[33] If these priority barriers are identified and are not eliminated in accordance with the criteria of Section 301, the Trade Representative must retaliate or tell Congress why it has not done so.[34] In the context of the U.S. political system, it is possible

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TECTIONISM 68 (1988). Some would consider the comment of Senator John Heinz (R-Pa.) to be an example of this "I am more open than thou" presumption: "the mercantilist practices of other nations that deny their trading partners equal access to their markets while they exploit access to our market to the fullest." S. REP. No. 71, 100th Cong., 1st Sess. 274 (1987). For more on the political background of the Omnibus Trade Act of 1987, *see* Bliss, *supra* note 9.

31. This is an example of the less than clear drafting of Section 301 of the 1988 Act, *supra* note 8, and its assorted offshoots. Section 301(b) (19 U.S.C.A. § 2420 (West 1978 & Supp. 1989)), requires initiation of an investigation under Section 302(b)(1) (19 U.S.C.A. § 2412 (b)(1) (West 1978 & Supp. 1989)), which, in turn requires that the investigation be under the provisions of Section 301. Subsection (a)(2) of Section 301 of the 1988 Act provides that action need not be taken in certain specified circumstances. *See supra* notes 21-25 and accompanying text. Thus, the route seems to be Section 310, to Section 302, to Section 301. As Robert Hudec says, "One needs a wiring diagram. . . ." Hudec, *supra* note 10.

32. *See USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property, Released May 25, 1989*, 6 Int'l Trade Rep. (BNA), at 715 (May 31, 1989) [hereinafter *USTR Fact Sheets*].

33. *See* 1988 Act, *supra* note 8, at § 310(a); 19 U.S.C.A. § 2420(a) (West 1978 & Supp. 1989) (referring to the report required by Section 181(b) of the Trade Act of 1974, *reprinted as amended in* 19 U.S.C.A. § 2241 (West 1978 & Supp. 1989)).

34. 1988 Act, *supra* note 8, at § 310(b); 19 U.S.C.A. § 2420(b) (West 1978 & Supp. 1989).

that more pressure to retaliate could be imposed on the Trade Representative, but certainly not much more.

"SPECIAL" 301[35]

Congressional concern with international protection of intellectual property rights is reflected in a provision of the 1988 Trade Act that has been dubbed "Special" 301.[36] This requires the Trade Representative, "Super" 301-style, to investigate the world and to identify countries that deny adequate and effective protection to intellectual property rights, as well as those that deny fair and equitable market access to U.S. firms that rely on intellectual property protection. From this overall list, the Trade Representative is instructed to identify "priority" countries. The identification of priority countries has the effect of compelling the Trade Representative to self-initiate Section 301 cases against them unless the Trade Representative determines that an investigation would be "detrimental to United States economic interests."[37]

However, the Trade Representative did not identify any countries as priority under the "Special" 301 provision.[38] Instead, it finessed the issue by stating that due to continuing negotiations on intellectual property issues, the best course is to pursue those issues through the Uruguay Round. In the view of the Trade Representative, a Special

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35. 1988 Act, *supra* note 8, at § 1303 (adding Section 182 to the Trade Act of 1974, 19 U.S.C.A. § 2242 (West 1978 & Supp. 1989)).

36. The provision is intended, in the words of the House Report, "to address the growing problem of piracy and counterfeiting faced in foreign markets by United States firms and industries." H.R. REP. No. 40, 100th Cong., 1st Sess., at 163 (1987). Similarly, the Senate Finance Committee said that the provision "establishes a comprehensive program, within the overall framework of Section 301, to address the growing problem of inadequate and ineffective intellectual property protection, and to address the unique foreign market access problems of U.S. companies that rely upon intellectual property protection." S. REP. No. 71, 100th Cong., 1st Sess. 75 (1987).

37. This is another example of the less than clear drafting of Section 301 and its assorted offshoots. Special 301, *supra* note 11, may be read from beginning to end without an inkling that an investigation is required. Special 301 provides for the identification of countries that deny adequate protection, or market access, for intellectual property rights; it provides special rules for identification of countries; it provides further for revocations and additional identifications; and it sets forth definitions. Period. Not a word is mentioned on compulsory investigations or required action. *Id.* It is only in "regular" Section 301 that it becomes apparent that something is afoot. Section 302 of the 1988 Act, *supra* note 8, (19 U.S.C.A. § 2412 (West 1978 & Supp. 1989)) provides in subsection (b)(2)(A) that no later than 30 days after a country is identified under Special 301, the Trade Representative shall initiate a Section 301 investigation. *Id.* Thus, the route here seems to be Section 302, to Section 182, to Section 301. Again, one indeed does need a "wiring diagram. . . ." Hudec, *supra* note 10. *See also supra* note 31 and accompanying text for further discussion.

38. *See USTR Fact Sheets, supra* note 32, at 718-19.

301 action would be counterproductive to that policy.[39] Accordingly, in May, 1989, the Trade Representative created—with some ominous mutterings from industry[40]—two additional categories: a priority *watch* list consisting of Brazil, China, India, Korea, Mexico, Saudi Arabia, Taiwan, and Thailand; and a simple "watch" list of 17 additional countries.[41] We have decided that we are right, the United States in effect said, and that most of the rest of the world is wrong.

Yet, the proponents of Section 301 maintain that the law really does not offend the world trading system; rather, they say, the law seeks only to open markets, to further world trade for the benefit of all. And, they argue, Section 301 requires nothing more than the exercise of a power any government claims; it is simply the mechanism the U.S. government employs domestically to exercise this power. What, they ask, is wrong with that?[42]

There is quite a bit wrong with that, beginning with the means by which governmental power is exercised. It is one thing for governments to claim the unilateral power to protect their economic rights internationally; it is quite another thing to hand that power over, as Section 301 effectively does, to the initiative of private parties. It is one thing for governments to exercise that power narrowly, discretely, after due deliberation, and with proper appreciation of the possible consequences;[43] it is quite another thing to provide, as "Super" 301 does, for nearly automatic action without regard to the consequences.

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39. *See USTR Official Says Bringing Cases under "Special 301" Would Harm Uruguay Round*, INSIDE U.S. TRADE, Nov. 10, 1989, at 13.

40. Industrial groups publicly supported the action with, for example, the warning of the National Music Publishers' Association that prompt designation of the countries is expected if "results are not forthcoming." 6 Int'l Trade Rep. (BNA) at 686 (May 31, 1989). The United States Trade Representative's enforcement of Section 301 is likely to continue to be characterized by finessing moves and by delays that ignore some of its deadlines so long as the concerned industry, and its congressional backers, are appeased. As Robert Hudec observed, "If past conduct is any guide, Congress will be prepared to overlook delays as long as, in the end, a sufficient number of heads roll into the basket." Hudec, *supra* note 10, at 9.

41. These countries were: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, the Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. In November 1989, Korea, Saudi Arabia, and Taiwan were downgraded from the "priority watch list" to the "watch list." *See USTR Fact Sheets*, *supra* note 32.

42. *See, e.g.*, G. Feketekuty, U.S. Policy on 301 and Super 301, Dec. 1, 1989 (paper presented to the Conference on Super 301 and the World Trading System, Program in International Economics and Journalism, Columbia University, to be published in the proceedings of the Conference) (copy on file at offices of *The Transnational Lawyer*). Mr. Feketekuty, Counselor to the United States Trade Representative, remarked, *inter alia*, "Section 301 of U.S. trade legislation is designed, in part, to provide a procedure under which U.S. private actors can initiate actions with respect to U.S. rights under international trade agreements, including the GATT." *Id.* at 2.

43. *See* R. Hudec, *supra* note 10, at 15-16, who argues persuasively that a good case can, and perhaps must, be made for selective disobedience of GATT. *Id.*

To argue, as its supporters do, that Section 301 merely is an internal legal mechanism, and that others have no right to complain until action actually is taken—until 301 "crosses a border"—is akin to arguing that when a country makes bellicose threats to its neighbors, issues ultimatums, mobilizes its troops and fires up its tanks, the neighbors have no cause to complain since their borders have not yet been crossed.

Another thing wrong with Section 301 is its implicit notion that the U.S. way is the "fair" way, and that it is up to the rest of the world to follow suit. This is an arrogant assumption, particularly when U.S. performance may be viewed as falling short of what it should be—even in areas of greatest concern to 301's supporters. For example, the European Community complains that the United States does not provide adequate protection for geographic designations of origin, particularly for wines such as Burgundy, Champagne, Chablis, and for cheeses such as Cheddar and Gouda.[44] Would proponents of 301 support retaliation against U.S. exports by governments who contend that U.S. permits pirating of their appellations of origin? Or what of the U.S. use of jury trials in patent cases? Many foreign patent owners fear that their intellectual property rights may be destroyed by uninformed, or worse, prejudiced, lay jurors.[45] Would the right to trial by jury, as guaranteed by the United States Constitution and as implemented in the U.S., violate a Section 301 enacted verbatim by another government?[46]

Still another thing wrong with Section 301 is the fact that the United States itself does not live up to its own standard. For example, Section 301 calls for retaliation against countries which do not implement, within months, GATT panel reports favorable to the United States.[47] Yet the United States, on at least four separate occasions, has failed to implement adverse GATT panel reports within

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44. EUR. COMM., REP. ON U.S. TRADE BARRIERS 29 (May 3, 1989).

45. As related by international patent attorney, James D. Halsey, Jr., partner, Staas and Halsey, Washington, D.C. No formal complaints appear to have been made on this question, presumably because it involves a provision of the United States Constitution and as such, foreign governments consider change unlikely if not impossible.

46. U.S. CONST. amend VII.

47. 1988 Act, *supra* note 8, at § 304(a)(2)(A); 19 U.S.C.A. § 2414(a)(2)(A) (West 1978 & Supp. 1989), requires a determination 30 days after the dispute settlement procedure is concluded, or 18 months after the United States investigation was started—whichever is *earlier*. *Id.* Section 305(a) of the 1988 Act, *supra* note 8 (19 U.S.C.A. § 2415(a) (West 1978 & Supp. 1989)), in turn calls for retaliatory action within 30 days of the determination, subject to a maximum delay of an additional 180 days if substantial progress is being made in negotiating a solution to the dispute. *Id.*

the deadlines Section 301 would impose on other countries. These failures include: a June 1987 "Superfund" report which was not implemented until late 1989;[48] a customs-users fee report of early 1988 that as yet has not been implemented;[49] a November 1988 report on Section 337 of the Tariff Act that is languishing;[50] and a sugar quota report of June 1989 that is unlikely to be implemented anytime soon.[51]

The Section 337 report is notable for two reasons. First, the United States blocked GATT acceptance of the report from November 1988 to November 1989, causing a delay that itself violated Section 301's deadlines.[52] More importantly, the report found that Section 337 denied GATT rights to foreign owners of intellectual property in the United States. Now, given the great concern expressed by supporters of Section 301 for intellectual property rights, it seems odd—if not hypocritical—that they take so long to amend a U.S. statute determined to deny those rights.[53]

In addition to unjustifiable or discriminatory foreign practices, Section 301 also applies to practices that are found to be "unreasonable," no matter how justifiable they otherwise may be.[54] By this

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48. *United States—Taxes on Petroleum and Certain Imported Substances, Report of the Panel adopted on 17 June 1987, General Agreement on Tariffs and Trade*, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 136 (34th Supp. 1988). More than two years later, the United States took action to correct the violation. Steel Trade Liberalization Program Implementation Act, § 8, Pub. L. No. 101-221, 103 Stat. 1339, 1348 (1989).

49. *United States—Customs User Fee, Report of the Panel adopted on 2 February 1988, General Agreement on Tariffs and Trade*, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 245 (35th Supp. 1989). Congress adjourned in November 1989, without enacting legislation to correct the GATT violation. Draft legislation proposed by the Treasury Department was described as "more a starting point for debate than a completed proposal." *See Treasury Unveils Draft Legislation to Make Customs User Fee GATT-Legal*, 6 Int'l Trade Rep. (BNA) 352 (Mar. 22, 1989).

50. *See GATT Council Adopts Dispute Panel Reports on U.S. Section 337, Korean Beef Quotas*, 6 Int'l Trade Rep. (BNA) 1466 (Nov. 15, 1989).

51. *See GATT Panel Rules U.S. Sugar Quotas Illegal, Urges U.S. to Revamp System*, 6 Int'l Trade Rep. (BNA) 767 (June 14, 1989). The United States reportedly hopes to delay implementation until after the scheduled completion later this year of the Uruguay Round of trade negotiations. *See U.S. Hopes to Have until End of Uruguay Round to Revise Sugar Quotas Found to Violate GATT*, 6 Int'l Trade Rep. (BNA) 945 (July 19, 1989).

52. *See GATT Council Adopts Dispute Panel Reports on U.S. Section 337, Korean Beef Quotas*, 6 Int'l Trade Rep. (BNA) 1466 (Nov. 15, 1989); 1988 Act, *supra* note 8, at § 305(a); 19 U.S.C.A. § 2415(a) (West 1978 & Supp. 1989).

53. *See Heinz Sees Difficulty in Changing U.S. Law Found to be Incompatible with GATT Rules*, 6 Int'l Trade Rep. (BNA) 1467 (Nov. 15, 1989), which stated: "Congress is likely to have trouble with the prospect of making substantive changes in Section 337 of the 1930 Tariff Act because of its role as the centerpiece of U.S. intellectual property law, Sen. John Heinz (R-Pa) told a business group Nov. 8." *Id.*

54. "An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." 1988 Act, *supra* note 8, at § 301(d)(3)(A); 19 U.S.C.A. § 2411(d)(3)(A) (West 1978 & Supp. 1989).

standard, too, important U.S. practices do not meet the criteria of Section 301. For example, the United States frequently denounces agricultural trade barriers imposed by other governments, asserting correctly that most of these schemes violate GATT.[55] At the same time, however, the charge cannot be turned back on U.S. agricultural barriers because, in 1955, the U.S. demanded and received a waiver of its GATT obligations for agricultural products.[56] This waiver is used to justify strict quotas on dairy products, wheat, peanuts, cotton, and sugar.[57] Thus, to this day, these U.S. import restrictions are permitted by GATT, while their counterparts in other countries are not. This is far from a reasonable situation, justifiable or not, and because it is not reasonable it too violates the standards of Section 301.

It is not necessary to contend that the world trading system is in ideal condition in order to question the wisdom of Section 301.[58] Certainly major improvements need to be made. These include not only better rules for governing trade in goods, but also rules for trade in services, and, in the view of many, stricter standards for the protection of intellectual property rights. Certainly, also, the GATT dispute settlement mechanism needs improvement.[59] Supporters of Section 301 point to all of these problems as justification for the statute.

But it is not necessary for the United States to privatize and automatize its retaliatory powers in order to improve the international trading system. Nor is it necessary for the United States to label

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55. *See, e.g., U.S., EC Agree to let GATT Panels Resolve Disputes Concerning Soybeans, Sugar Quotas*, 6 Int'l Trade Rep. (BNA) 649 (May 24, 1989) (concerning U.S. charges that EC soybean subsidies cut U.S. exports); *Canada Wins Time to Consider Panel Finding Against Ice Cream, Yogurt Import Policies*, 6 Int'l Trade Rep. (BNA) 1347 (Oct. 18, 1989).

56. *Waiver Granted to the United States in Connection with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act (of 1933), as amended, Decision of the Contracting Parties of GATT of Mar. 5, 1955, General Agreement on Tariffs and Trade*, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 32 (3d Supp. 1955). "The breadth of this waiver, coupled with the fact that the waiver was granted to the contracting party that was at one and the same time the world's largest trading nation and the most vocal proponent of freer international trade, constituted a grave blow to GATT's prestige." K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 260 (1970).

57. USTIC, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, ch. 99, subch. IV.

58. *See* Hudec, *supra* note 10, who most effectively questions the wisdom of Section 301 of the 1988 Act while contending that limited, principled disobedience to GATT may be helpful. *Id.*

59. For discussion of GATT dispute settlement, *see* Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31 (1987); Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987); Waincymer, *GATT Dispute Settlement: An Agenda for Evaluation and Reform*, 14 N.C.J. INT'L L. & COMM. REG. 81 (1989).

other countries as unfair traders in order to do so. Rather, the United States could contribute best to the improvement of the international trading system by using it: By routing its grievances through the system, and by accepting and acting on the legitimate complaints of others as quickly as it would have others accept and act on its own.