COMMENTS

THE OMNIBUS TRADE BILL OF 1988: "SUPER 301" AND ITS EFFECTS ON THE MULTILATERAL TRADE SYSTEM UNDER THE GATT

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1. INTRODUCTION

Since the 1960's, there has been an escalating movement in Congress to urge United States Presidents to retaliate against trading partners who engage in "unfair" trade practices. The growing United States trade deficit has increased the internal pressure to adopt "protectionist" trade measures. The source of most of this pressure is domestic industries who complain that United States businesses and workers face foreign competitors who have obtained benefits from their governments' policies. It is doubtful, however, that protectionist policies will either improve the trade deficit problem in the United States or increase the


1 The United States' trade deficit increased from $36.45 billion in 1982 to $158.88 billion in 1987. Since 1987, though, the trade deficit has been showing signs of declining. In 1988 the trade deficit was $126.78 billion and in 1989 the trade deficit was $114.87 billion. This is a decrease of almost $12 billion between 1988 and 1989. International Monetary Fund, 43 INTERNATIONAL FINANCIAL STATISTICS, Sept. 1990, at 550.

2 The House Subcommittee on Oversight and Investigation studied United States companies exporting products to foreign markets and found 751 specific trade barriers to United States exports. "As a consequence, the United States has experienced a series of record trade deficits, forcing thousands of firms to close and causing widespread unemployment." HOUSE COMMITTEE OF ENERGY AND COMMERCE, TRADE LAW MODERNIZATION ACT, H.R. REP. NO. 468, 99th Cong., 2d Sess., pt. 1 at 5 (1986).

3 United States Trade Representative (USTR) Carla Hills commented that the trade deficit is the product of broader economic factors than foreign nations' barriers to trade. Since trade barriers contribute only slightly to the problem, trade liberalization efforts will not erase the United States' trade deficit. USTR Hills Says Trade Deficit Will Stay Until Nation Tackles Inability to Save, [6 Current Reports] Int'l Trade Rep. (BNA) No. 19, at 575 (May 10, 1989).

[T]he trade deficit is a product of broader economic factors, including the rate of savings, spending, and taxes. "Were there any message to be given
overall welfare of United States citizens. More important, such policies implemented unilaterally alienate the United States from its trading partners.

The United States is a member of the General Agreement on Tariffs and Trade ("GATT"), a multinational agreement that is a forum for active discussion of world trade issues by its members. One of the central premises underlying the formation of the GATT is that trade disputes are best solved in a multilateral forum. The United States has become dissatisfied, however, with the internal dispute resolution procedures of the GATT and has decided that unilateral action might obtain better results. In response to domestic pressure, Congress has repeatedly strengthened section 301, a trade law giving the Executive Branch discretionary authority to retaliate unilaterally against foreign nations for unfair trade practices. The Omnibus Trade and Competitiveness Act of 1988 went a step further and mandated that the Executive retaliate in a broad range of circumstances. The House Committee on Ways and Means recognized section 301's potential conflict with international agreements, but decided it was justified because "our competitiveness is being undermined by policies and practices which the rules of the GATT and other agreements do not adequately discipline."

One of the major changes in the 1988 amendment to section 301 was the addition of section 310, commonly referred to as "Super 301." The difference between "Super 301" and section 301 is that "[s]ection 301 deals with disputes about specific goods, whereas Super 301 is used to the American people... it is a recognition that we really must save more, which means the federal government must spend less, but also the American people must save more... We could open all the markets that we have enumerated and it would not correct our trade deficit... [T]o tell the American people that if all you do is open these various markets the trade deficit will go away, that is not true."

Id. (quoting USTR Carla Hills).

"Most trade scholars and economists still accept the idea that free trade will increase consumer welfare even if it harms particular producers in particular countries." Gadbaw, International Property and Int'l Trade: Merger or Marriage of Convenience?, 22 Vand. J. Transnat'L L. 223, 224 n.63 (1989).


* See infra notes 12-34 and accompanying text.


to accuse countries of a broad range of unfair trade practices.”

“Super 301” makes mandatory the identification of certain trade liberalization priorities by the United States Trade Representative ("USTR") and further removes trade disputes from the mechanisms of the GATT.

This Comment will examine “Super 301” and the way in which its application contributes to increasing bilateralism in world trade. The first section will set out the purposes and relevant provisions of the GATT. The second section will discuss the origins of the section 301 remedy, the procedures for identifying “unfair” foreign trade practices, and retaliation under the new “Super 301.” It will also examine three countries under “Super 301” investigation in 1989: Brazil, India, and Japan. The third section will focus on the inconsistencies between section 301’s unilateral approach and the multilateral GATT. Finally, this Comment will consider the harmful effects of “Super 301” on both multilateral trade and U.S. competitiveness. This Comment will conclude that the “Super 301” process is an illegal resort to unilateral action when GATT rules are involved in the trade disputes. Further, even when the substantive provisions of GATT are not at issue, “Super 301” is a particularly dangerous policy in an increasingly interdependent world trade arena.

2. AN OVERVIEW OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

2.1. Historical Origins

The GATT is a set of rules governing international trade. It was passed in the wake of World War II and was designed to eliminate many of the problems fostered by existing bilateral trade agreements. Most of the text of the GATT originated in the negotiations for the

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10 Nothing to Lose but Its Chains: The ITO That Never Was, ECONOMIST, Sept. 22, 1990, at 7 [hereinafter Nothing to Lose].
11 Jagdish Dhagwat, an economics professor at Columbia University, says that “a worrisome development in U.S. policy is the ‘trend to unilateralism’ as evidenced by the Super 301 designations . . . . [T]his ‘amounts to taking the law into our hands’ and should be taken before the General Agreement on Tariffs and Trade where the Super 301 process would be declared illegal.” United States Should Resist Pressures For Managed Trade Policy, Analysts Say, [6 Current Reports] Int'l Trade Rep. (BNA) No. 49, at 1273 (Oct. 4, 1989).
13 For example, the Smoot-Hawley Tariff Act, see 46 Stat. 590 (1930), set off a world trade war, as the United States' trading partners responded to high duties by raising barriers to trade against the United States and eventually against each other.
creation of the International Trade Organization (ITO). The charter creating the ITO was never ratified by all member nations. Instead an interim arrangement, the GATT, was settled on by the participating governments, which adapted ITO's mandate in international trade relations.\textsuperscript{14} During the first thirty years of GATT’s existence, governments reduced the average tariff on manufactured goods from 40 percent in 1947 to less than 10 percent by the mid-1970’s. Today the average current tariff is about 5 percent.\textsuperscript{15} Tariff liberalization propelled rapid growth in world trade.\textsuperscript{16} The GATT has been modified several times since its inception.\textsuperscript{17} At the Tokyo Round negotiations\textsuperscript{18} a number of multilateral agreements covering non-tariff restrictions such as procurement, subsidies and technical barriers were adopted. The most recent negotiations, the Uruguay Round, began in September 1986.\textsuperscript{19} Negotiators are seeking to reduce remaining tariffs by 30 percent, to strengthen existing trade rules and to extend the GATT to trade in services, strengthen intellectual property rights protection, and expand international foreign investment rules.\textsuperscript{20} It is important to note that the

\textsuperscript{14} The negotiating history of ITO is relied on as evidence of the negotiators' intent for the purpose of interpreting the GATT. See A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 11-21 (2d ed. 1983).

\textsuperscript{15} Nothing to Lose, supra note 10, at 7.

\textsuperscript{16} "Between 1950 and 1975 the volume of trade expanded by as much as 500%, against an increase in global output of 220%." Id.

\textsuperscript{17} The current version of the GATT is found in 4 GENERAL AGREEMENT OF TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter GATT].

\textsuperscript{18} Article XXVIII of the GATT provides that the conditions of trade should be discussed and agreed upon within a multilateral framework through periodic negotiations. See AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. Doc. No. 153, 96th Cong., 1st Sess., pt. 1, at 7 (1979).


\textsuperscript{20} See GATT’s Dunkel Criticizes U.S. Section 301, Urges Strong Commitment to Uruguay Round, [7 Current Reports] Int’l Trade Rep. (BNA) No. 22, at 766 (May 30, 1990). The biggest problem in the Uruguay Round has been the European Community’s and United States’ inability to reach agreement on agriculture reform. See
GATT is both a set of rules governing international trade and an institution administering those rules and overseeing multilateral trade negotiations.

2.2. Most-Favored-Nation Obligation under the GATT

One of the most important principles of the GATT is the Most-Favored-Nation ("MFN") obligation. Generally, unless a nation has made a treaty or agreement, there is no obligation under customary international law to extend non-discriminatory treatment to other nations. The MFN provision in article I of the GATT is effectively a rule of non-discrimination among all member countries. Each contracting party to the GATT is obligated to treat all other contracting parties and their goods no less favorably than any other nation. Thus, unilateral retaliation such as that authorized, and in some cases mandated, by section 301 violates the GATT by destroying MFN.

2.3. Dispute Resolution Procedures of the GATT

The GATT provides a method in articles XXII and XXIII for the resolution of disputes between the contracting parties. The goal of article XXII is to provide a framework for consultations among the parties, stressing general obligations to consult on any matter relating to GATT. Article XXIII plays an important role in obtaining com-

Dancing from Bad to Worse, ECONOMIST, Nov. 17, 1990, at 25.

21 The League of Nations' Committees recognized that the MFN obligation would be applied only by agreement. See Recommendations of the Economic Committee Relating to Tariff Policy and the Most-Favoured-Nation Clause; League of Nations Doc. E.805 II Economic and Financial, II.B.1. at 6 (1933). See also J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 527 (1977) [hereinafter LEGAL PROBLEMS].


The United States became a party in 1979 to an "Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the (GATT)." See RESTATEMENT, supra note 22, § 806 n.1.

24 GATT, supra note 17, at article XXII. Consultation is authorized in a two-step process: first, individual consultations between contracting parties; second, referral to the contracting parties jointly. See also LAW OF THE GATT, supra note 12, at 175.
pliance with GATT obligations.

Under article XXIII the complaining party is first required to "make written representations or proposals to the other contracting party . . . concerned." If no satisfactory accord is reached, the Contracting Parties then have a duty to promptly investigate and make appropriate recommendations or give a ruling on the matter to the Contracting Parties. If a party to a dispute fails to comply with a decision, the Contracting Parties have the power, but not the duty, to authorize a member nation to suspend the application of concessions or other obligations. Enforcement is limited to purely compensatory retaliation.

A contracting party is entitled to pursue article XXIII procedures whenever it considers that either a "benefit accruing to it . . . is being nullified or impaired" or "the attainment of any objective of the Agreement is being impeded" because of:

(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation.

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26 GATT, supra note 17, at article XXIII(1).
27 The members of the GATT, the contracting parties, when acting together, become the Contracting Parties. See GATT, supra note 17, at art. XXV(1).
28 GATT, supra note 17, at art. XXIII(2).
29 See GATT, supra note 17, at art. XXIII(2). There has only been one complaint to the Contracting Parties that resulted in suspension of concessions under article XXIII. GATT, 1st Supp. BISD 32 (1953), followed by a series of decisions ending at GATT, 7th Supp. BISD 23 (1959); see list, in index of GATT, 14th Supp. BISD 213 (1966) (Netherlands Complaint against the United States for dairy import restrictions).
30 The use of sanctions as a retaliatory measure is prohibited under the GATT. The most drastic measure authorized by article XXIII is the suspension of concessions or obligations under the Agreement. Referring to the negotiating history of the ITO as authoritative evidence of negotiators' intent under the GATT, sanctions are not a permissible retaliatory measure. "The idea of sanctions was considered at length in a drafting subcommittee, but ultimately the draftsmen concluded that the governments would not accept an international organization with such powers. The remedy for both legal violations and nonviolation nullification and impairment would have to be compensatory." See Hudec, Retaliation Against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment, 59 MINN. L. REV., 461, 467 n.15 (1975) [hereinafter GATT Nullification and Impairment].
31 See generally id. at 485-505. The concept of "nullification and impairment" is not well defined. It does "seem to imply that there must be some sort of injury to a contracting party before it has the right to invoke Article XXIII . . . ." LAW OF THE GATT, supra note 12, at 181-83.
32 The full text of article XXIII reads:

1. If any contracting party should consider that any benefit accruing to it
Article XXIII thus permits any contracting party to claim "nullification or impairment" of GATT rights as a result of either a violation of GATT rules or any other measure that has the effect of denying the contracting party rights for which it bargained, even in the absence of a direct GATT breach. In fact, general economic circumstances in the world could present an occasion for an article XXIII application for proceedings by a contracting party.\(^3\)

The all-encompassing language of article XXIII permits a contracting party to seek resolution of any trade dispute under the proceedings of the GATT. However, the GATT arguably has exclusive jurisdiction only over disputes that involve substantive provisions of the GATT. "[T]he existence of clauses outlining methods of dispute settlement or enforcement in the same treaty containing the substantive obli-

directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of the Agreement, or
(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations of proposals to the other contracting party or parties to which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of the Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

GATT, *supra* note 17, at art. XXIII.

\(^3\) See *Law of the GATT*, *supra* note 12, at 180.
gations can be argued to exclude the right to rely upon other methods. . . .”34 such a situation exists under the GATT. Articles XXII and XX-III are central to settling disputes between GATT members regarding the substantive provisions of that treaty. Therefore, in cases of trade disputes falling within the scope of the GATT, the United States' resort to its own laws rather than international law under the GATT may be regarded as a violation of United States obligations under the GATT.

In addition, the broad language of article XXIII allows a contracting party to request proceedings in cases where the trade dispute does not involve allegations of a GATT breach. Under such circumstances, however, article XXIII is not an exclusive remedy.

3. SECTION 301 LEGISLATION: ITS EVOLUTION AND INCONSISTENCY WITH THE GATT

3.1. The Purpose of Section 301

The purpose of section 301 is the elimination or reduction of action by foreign governments that are in violation of GATT provisions and that create and maintain barriers to the import of United States products.35 It is the sole trade remedy aimed principally at facilitating United States export of goods and services to foreign markets.36 The United States has been a member of the General Agreement on Tariffs and Trade since 1947, and as such has certain rights of access to foreign markets.37 The United States has been a member of the General Agreement on Tariffs and Trade since 1947, and as such has certain rights of access to foreign markets. Congress felt that other countries were not upholding their obligations under the GATT, and was dissatisfied with the results of the GATT's internal mechanisms for dispute resolution.38 By grant-

34 Id. at 163-64.
36 Most other U.S. trade remedies are oriented toward imports. See, e.g., antidumping laws, 19 U.S.C. § 1673, which imposes duties on foreign imports that are sold at less than market value. The U.S. International Trade Commission must find that a United States industry is materially damaged to impose duties. When the Commerce Department finds there is dumping, an antidumping order will be issued and a duty imposed equal to the difference between the fair market value and the value of the imported product. These laws are consistent with article VI of the GATT.

Countervailing duty laws, 19 U.S.C. § 303, are imposed when the Commerce Department finds that imports into the United States are subsidized unfairly by their government and the International Trade Commission finds material injury to United States industry. The procedures involved comply with International Subsidies Code and the right to take unilateral action against subsidies is recognized under international law. See also Section 301 Against Japanese Gov't, supra note 23, at 511-12.
37 In December, 1985 the United States International Trade Commission reported
ing the President retaliatory authority outside of the GATT, section 301 was designed to compel the United States' trading partners to provide reciprocal trading opportunities and to deter the erection of, and to eliminate already existing, non-tariff barriers to United States exports.

3.2. Section 301: Its Origins and Evolution

The retaliatory action mandated by section 301 against "unfair" foreign trade practices has been progressively strengthened by Congress. Through successive amendments "the authority has been expanded to cover all measures covered by trade agreements and all forms of unfair practices by foreign governments which burden or restrict trade with the United States." This has been done to address concerns with the GATT dispute resolution process raised by the Senate Finance Committee on an investigation of the GATT dispute settlement mechanisms and their relationship to United States trade law. Three main problems with the GATT dispute resolution process have been alleged: (1) the time required to complete a case is too long, (2) there are too many opportunities for the "defendant" country to obstruct the process, and (3) implementation of the GATT decision is uncertain. U.S. INT’L TRADE COMM’N, PUB. NO. 1793, INVESTIGATION No. 332-212, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS (1985).

Non-tariff barriers were not contemplated by the original drafters of the GATT. See GATT Nullification and Impairment, *supra* note 30, at 510-14. There are a variety of non-tariff barriers erected by importing nations. In general, they are "government or private business practices that distort trade flows by either directly or indirectly providing domestic production with an advantage over foreign goods." Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 99th Cong., 2d Sess., Unfair Foreign Trade Practices 17 (Comm. Print 1986).

Trade barriers receiving the largest number of complaints from private sector respondents to a subcommittee request for information regarding barriers to U.S. trade included the following:

1. Import Licensing Practices: developing country officials can control the flow of imports by using their discretionary power to issue import permits.
2. Discriminatory Product Standards: product standards whose primary purpose is to protect the public health, safety or welfare are imposed discriminatorily.
3. Embargoes or Bans on Imports: used as an instrument of trade control.
4. Government Subsidies: low cost loans, concessionary export financing, cash payments, tax breaks, etc.
5. Offset and Barter Requirements: foreign governments may require exporters to sell specified quantities of the purchaser’s products or purchase specified quantities of a purchaser’s products as a condition of sale.
6. Local Content Requirements: specified amounts of local materials, labor, or products are required to be purchased or employed with the sale of a U.S. exported product.

*Id.* at 19-20.

*For a discussion of the retaliatory authority of the Executive Branch, see generally Legal Problems, *supra* note 21.*
U.S. commerce, including those affecting services trade and investment flows, as well as goods.\footnote{40} The trend is for Congress to increase the number of mandatory areas of investigation and retaliation with which the Executive Branch must comply.

Section 301 has its origins in section 252(c) of the Trade Expansion Act of 1962.\footnote{41} Under section 252(c) the President had authority to "suspend, withdraw, or prevent the application of benefits of trade agreement concessions . . ."\footnote{42} in response to unjustifiable foreign import restrictions or unreasonable import restrictions that substantially burden United States commerce. Owing to the view that this provision was confining, section 301 of the Trade Act of 1974 repealed section 252(c) and modified the President's power.\footnote{43} Under the 1974 version of section 301 the President was authorized not merely to suspend concessions, but to institute retaliatory action\footnote{44} when he determined that a foreign country maintained a trade policy that was "unjustifiable, unreasonable, or discriminatory and burden[ed] or restrict[ed] United States commerce."\footnote{45} In addition, the scope of section 301 was expanded to cover additional discriminatory practices such as export subsidies and embargoes and restrictions on services related to trade.\footnote{46}

Section 301 was amended in the Trade Agreements Act of 1979.\footnote{47} The changes further expanded Presidential authority to "respond to any act, policy, or practice . . . inconsistent with the provisions of . . . any trade agreement."\footnote{48} Again, in 1984 section 301 was amended through the Trade and Tariff Act.\footnote{49} Pressure from the service and in-
vestment industries brought these sectors under the protection of section 301.60

3.3. The Omnibus Trade and Competitiveness Act of 198861

Continuing dissatisfaction with enforcement of the GATT and political pressure from industrialists within the United States prompted further revision of section 301 in the Omnibus Trade and Competitiveness Act of 1988. The changes were designed to strengthen what Congress believed to be the inadequate trade law for dealing with foreign industries’ targeting policies.62 Congress justified these changes “because current national policy is ill-equipped to bring about changes in our trade relations,” and because it was dissatisfied with the Administration’s “slavish devotion to rules of the GATT which few of our trading partners take seriously.”63 The amended version of section 301 creates circumstances in which retaliation is mandated64 and imposes strict time limits for consultations and determinations regardless of GATT proceedings.65 It also divests the President of investigatory and retaliatory power and transfers it to the United States Trade Representative.66 Also, the Trade Act created “Super 301,” the newest addition to the United States arsenal. The remainder of this Comment will focus on “Super 301” and the issues it raises with regard to the GATT.


60 See Opening Up Trade Barriers, supra note 35, at 184-190 for a summary of changes made to section 301 by the Trade and Tariff Act of 1984.


63 Id. at 5.

64 Under current law, when there is an affirmative determination that:

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country —

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

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action . . . .


65 Consultations with a foreign country are limited to a maximum of 150 days, after which the USTR has the earlier of 18 months from the initiation of or 30 days from the conclusion of a dispute resolution decision to negotiate a settlement. See 19 U.S.C. §§ 2413-14 (1988).

3.4. The "Super 301" Process: Mandatory Self-Initiation

Title III of the 1988 Trade Bill added a new subsection, section 310. This section is the provision commonly referred to as "Super 301." "Super 301" imposes new self-initiation requirements on the United States Trade Representative and eliminates much of the discretionary element of the earlier versions of section 301. Under the earlier versions of section 301 there were two methods by which investigations of foreign governments could be initiated: by private petition and by self-initiation. These two methods of initiation still exist; "Super 301" is an additional method of initiation.

"Super 301" requires the United States Trade Representative to report to Congress annually on United States trade liberalization priorities. The report shall list priority foreign countries, priority practices, and sectors of concern. Yeutter Asserts Proposed Changes in Section 301 Are Unnecessary, Would Harm U.S. Interest, [3 Current Reports] Int'l Trade Rep. (BNA) No. 30, at 940 (July 23, 1986). The GATT itself has no mechanism whereby individual complaints can access the dispute procedures. 19 U.S.C. § 2412(a), however, provides private parties with indirect access by permitting individuals to file a request with the USTR to take action under section 301. Such a request must be reviewed by the USTR and a decision whether to initiate an investigation must be made within 45 days. The United States Government then has discretion whether to direct these complaints to the GATT Contracting Parties. "Section 301 of the Trade Act of 1974 creates a unique relationship between United States law and the GATT dispute settlement process by permitting private parties to present a petition concerning trade problems to the United States government." U.S. INT'L TRADE COMM'N, Pub. No. 1793, Investigation No. 332-212, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements (1985).

Three "Super 301" investigations were initiated on June 21, 1989. The three priority countries were Japan, India, and Brazil. See infra notes 69-71. The USTR is mandated under "Super 301" to submit an annual report to Congress on the status of the investigations, the steps taken, and the results achieved.

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68 Clayton Yeutter, the USTR at the time, criticized proposals, like the one adopted, mandating retaliation and self-initiation and transferring administrative authority from the President to the USTR because they would ultimately harm United States interests:

To box us in by requiring self-initiation or retaliation would be a costly mistake, to the detriment of U.S. industry. And to deflate the importance of 301 by demoting the decisionmaker from the President to the trade representative would reduce the likelihood of favorable results from its use.


69 The GATT itself has no mechanism whereby individual complaints can access the dispute procedures. 19 U.S.C. § 2412(a), however, provides private parties with indirect access by permitting individuals to file a request with the USTR to take action under section 301. Such a request must be reviewed by the USTR and a decision whether to initiate an investigation must be made within 45 days. The United States Government then has discretion whether to direct these complaints to the GATT Contracting Parties. "Section 301 of the Trade Act of 1974 creates a unique relationship between United States law and the GATT dispute settlement process by permitting private parties to present a petition concerning trade problems to the United States government." U.S. INT'L TRADE COMM'N, Pub. No. 1793, Investigation No. 332-212, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements (1985).


The USTR has a specific directive to initiate an investigation of countries identified under 19 U.S.C. § 2242(a)(2) as denying adequate protection of intellectual property rights. This is known as "special 301." For a general discussion of intellectual property protection in the international marketplace, see Trade Regulated Aspects of Intellectual Property, 22 VAND. J. TRANSNAT'L L. 223 (1989).

61 Three "Super 301" investigations were initiated on June 21, 1989. The three priority countries were Japan, India, and Brazil. See infra notes 69-71.
62 The USTR is mandated under "Super 301" to submit an annual report to Congress.
tices\textsuperscript{64} with respect to each of these countries, and the projected increases in exports in the absence of these practices.\textsuperscript{68} In identifying a priority country, the number and pervasiveness of market barriers and unfair trade practices impeding United States exports, as well as the potential for improvement, should be taken into account.\textsuperscript{66} The USTR should list those priority practices which would most significantly increase exports if eliminated.\textsuperscript{67} The USTR must then initiate investigations of all priority practices for each of the priority countries listed in the report.\textsuperscript{68}

3.5. \textit{Priority Countries under “Super 301”}

In 1989 the USTR identified three countries which would be the subject of the “Super 301” process: Japan,\textsuperscript{69} Brazil,\textsuperscript{70} and India.\textsuperscript{71}


\textsuperscript{68} In identifying priority countries under 19 U.S.C. §§ 2420(a)(1)(B) and (a)(2) the USTR is directed to 29 U.S.C. § 2241(a)(1):

\begin{quote}
[T]he United States Trade Representative . . . shall—
(A) identify and analyze acts, policies, or practices of each foreign country which constitute significant barriers to, or distortions of—
(i) United States exports of goods or services . . ., and
(ii) foreign direct investment by United States persons, especially if such investment has implications for trade in goods or services.
\end{quote}


\textsuperscript{69} Under section 310, certain quantitative import restrictions maintained by the Government of Brazil were identified as “priority practices.” See 54 Fed. Reg. 24,438 (1989). Brazil maintains an import prohibition list which covers approximately 1,000 items, barring U.S. exports of agricultural items and manufactured goods, including meat, dairy products, plastics, chemicals, textiles, leather products, electronic items, motor vehicles, and furniture. Brazil also uses its licensing regime to implement company-specific and sectoral import quotas, which impede many important U.S. export items, including office machine parts, internal combustion engine parts, and electrical machinery. See 54 Fed. Reg. 26,135 (1989).

\textsuperscript{66} Investigations were initiated regarding India’s trade related investment mea-
3.5.1. Japan

"Super 301" in many respects was designed specifically as a tool to use against the Japanese trade surplus with the United States. There is widespread resentment toward Japan's economic strength and perceived unfair trade practices. However, Japan's trade surplus has fallen from 4.4 percent of gross domestic product in 1986 to only 2.4 percent of gross domestic product in the first half of 1989. In addition, its global surplus fell 90 percent in January 1990, and its imports of manufactured goods reached almost 50 percent of total imports into Japan in 1988.

In 1990, the United States and Japanese agreements in satellites, super-computers and wood products, and provisions by Japan to dismantle its structural barriers convinced USTR Hills to leave Japan off the "Super 301" list. In response, more than 70 House members signed a petition calling for Hills to change her opinion and urged that Japan be cited again under "Super 301" as an unfair trading nation. Legislation, known as the Levin-Specter bill, was introduced to force the designation of Japan as an unfair trading nation that discriminates against United States exports. The purpose of the Levin-Specter bill

sures requiring foreign investors to export a portion of what they produce, or to use locally-produced inputs. 54 Fed. Reg. 26,136 (1989). In addition, barriers to trade in services, for example, completely closing the market to foreign insurance companies, led the USTR to identify India as a priority country. 54 Fed. Reg. 26,135 (1989).

See Holland, Bashing, Bullying, Blaming Japan, U.S. Deals with a Deficit, L.A. Times (May 7, 1989), § 5, at 1, col. 1.


These are the three priority practices cited in 1989 under "Super 301." See supra note 69.


was to take away the administration's discretion under "Super 301" and to initiate an investigation of Japan in spite of the USTR's decision to the contrary. The bill would also extend the "Super 301" provision past 1990.

The Administration considers the Uruguay Round its first priority, while Congress sees implementing the 1988 Trade Act as it relates to Japan as coming first. As evidenced by the legislation and contingent debates, this is a major source of friction between the Executive and Legislative Branches. "If the Administration bows to the political expediency and follows the polls showing broad support for Japan-bashing protectionism, Congress will fill the policy vacuum with legislation inviting a replay of 1930's-type trade wars." The existence of legislation such as "Super 301" means that special interests and industries are going to push for its use in order to protect their own interests.

3.5.2. Brazil

The "Super 301" investigation of Brazil was based on its quantitative import restrictions, including import bans, quotas, and restrictive licensing regimes that inhibit imports of manufactured and agricultural products. The United States, as Brazil's largest trading partner, has frequently complained about Brazil's trade policies and their effects on the growing deficit the United States has in trade with Brazil. Brazil defended its restrictions based on article XVIII of the GATT which allows import controls for a fundamental balance-of-payments disequilibrium: "It is not by chance that Brazil is completely up to date on its debt-interest payments; Brazil is one of the few Latin American countries with a healthy trade surplus."

The United States alleged that Brazil's import restrictions did not

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80 See Trade Warriors, supra note 73, at 6.
81 Id. at 3.
82 See supra note 70.
84 See generally Law of the GATT, supra note 12, at 625-72.
85 Brooke, Brazil Cites Large Debt in Its Defense on Trade, N.Y. Times (May 27, 1989), § 1, at 31, col. 4 (quoting a Brazilian Government Official who works on debt negotiations). "Since 1982 there has been a dramatic change in the Brazilian balance of payments, wrought largely by the debt crisis with new loans from foreign commercial banks drying up. Brazil has found itself unable to meet scheduled debt repayments and has resorted to restructuring its debt while striving to achieve substantial trade surpluses." Economist Intelligence Unit, Brazil Country Profile 44.
qualify for the GATT exception for fundamental balance-of-payments disequilibrium under article XVIII. \(^8\) Under GATT article XVIII section B, \(^7\) developing countries with unstable currencies or massive external debts are eligible for a waiver that permits some import quota programs and other schemes aimed at protecting certain industries. This is an issue that clearly falls within the rules of the GATT. \(^8\)

Advocates of the "Super 301" investigation in the United States argued that the restrictive licensing practices of Brazil are inconsistent with GATT article XI \(^\text{90}\) and are not justified under either the article XII or article XVII exceptions for balance-of-payments problems.\(^\text{81}\)

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\(^8\) Article XVIII was specifically designed for developing countries. Developing countries are given the right to deviate from GATT provisions by using protective measures. See LAW OF THE GATT, supra note 12, at 649-56.

GATT article XVIII(1) states:

The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

GATT, supra note 17, at art. XVIII(1).

\(^7\) "In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party . . . may, . . . control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported." See generally LAW OF THE GATT, supra note 12, at 687-93.

\(^8\) Only "less-developed countries" or "developing countries" are eligible for article XVIII balance-of-payments exceptions. For a general definition of a "less-developed country," see LAW OF THE GATT, supra note 12, at 650-52.

\(^\text{90}\) The United States and the EC joined forces in a complaint against Brazil, claiming that the list of products for which import licenses are required because of balance-of-payments problems in that country is growing at an unacceptable rate. Brazil said this question should be discussed in GATT's balance-of-payments committee, and the United States and the EC did not press the point. See EC Claims U.S. Is Violating GATT Commitment Not To Take New Restrictive Trade Measures, [4 Current Reports] Int'l Trade Rep. (BNA) No. 25, at 824 (June 24, 1987).

\(^\text{91}\) Article XI(1) prohibits quantitative restrictions on imports implemented through the use of import licenses.

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

GATT, supra note 17, at art. XI(1).

Article XI(2) provides for exceptions for imports of agricultural products, but only where the importing nation is restricting the quantities of a like domestic product or substitute domestic product. See LAW OF THE GATT, supra note 12, at 733-77 for a discussion of agriculture waivers under the GATT.

\(^\text{91}\) Articles XII and XVIII are general exceptions to the broad prohibition on restrictions and authorize quantitative restrictions for balance-of-payments reasons.

The United States' position was that Brazil's licensing policies were indefensible.
The United States argues that because Brazil's trade surplus had grown over the past year, Brazil has not met the conditions necessary to avail itself of these exceptions. Their licensing policies, therefore, are alleged to be indefensible. On the other hand, while it is true that Brazil's trade surplus has grown, Brazil's overall balance-of-payments problem still persists.

The issue of the validity of Brazil's import restrictions involves the interpretation of a GATT provision and its applicability to the specific circumstances existing in Brazil. The United States' unilateral action against Brazil under "Super 301" is particularly troublesome since Brazil's justification for the import restrictions fell clearly within the scope of the GATT. Whether or not Brazil's quantitative import restrictions were valid under the balance-of-payments exceptions, and thus violative of the GATT, is a matter of debate. However, the GATT provides a means to resolve disagreements between its members that the United States has an obligation to use.

Like Japan, Brazil was not cited under "Super 301" in 1990 and the United States took no retaliatory action. Nevertheless, the threat of retaliation can do as much damage to free trade as actual retaliation. For United States importers of Brazilian products, the threat of retaliation is, in many ways, the commercial equivalent of actual retaliation because of the cost of uncertainty. To the degree that alternative suppliers are available, contracts dry up because of the risk that future prices will be significantly higher if tariffs are imposed. Thus, Brazilian exports suffer under United States trade policies that threaten retaliation, regardless of whether or not actual retaliation occurs.

under these exceptions. Article XII(3)(c) and article XVIII(10) require that quantitative restrictions be applied "to avoid unnecessary damage to the commercial or economic interest of any other contracting party." GATT, supra note 17, at arts. XI(3)(c)(i), XVII(10).

In addition, articles XII(2)(b) and XVIII(11) require that Brazil "progressively relax any restrictions applied . . . as conditions improve." GATT, supra note 17, at arts. XII(2)(b), XIII(11).


Some argue that the United States would not actually violate the GATT until unilateral sanctions were imposed. See Recent Developments, HARV. INT'L L.J. 359, 365 (1990).


Flexa de Lima, Brazil's chief negotiator, stated that an appeal may be made to the GATT for compensation for the harmful effects the threat of retaliation may cause to Brazilian exports. Brazil Says U.S. Action Under Super 301 Will Have "Negative Effect" on GATT Talks, [7 Current Reports] Int'l Trade Rep. (BNA) No. 6, at 668 (May 31, 1989).
3.5.3. India

India was the only country cited under "Super 301" in 1990. On April 27, 1990, President Bush renamed India as a priority country under "Super 301" for protecting its insurance industry and keeping out foreign investment. The reasons for citing India are that it is a potentially significant market for the United States and that India's restrictions damage its own economy. Yet, India ranks twenty-seventh in the list of the United States' main markets and its bilateral trade surplus of $850 million in 1989 accounts for less than 1 percent of the United States' overall trade deficit.

India was likely listed as a priority country in 1990 more for political expediency than for any unfair practices that have a significantly damaging effect on United States trade. The Bush Administration was reluctant to name any "Super 301" targets in 1990 because of the overriding importance of completing the Uruguay Round delineating other trade policies.

United States Trade Representative Hills chose not to retaliate against India despite a finding that its trade practices toward U.S. insurance providers and potential investors were "unreasonable." Hills instead decided that to retaliate at this point would be inappropriate because of the current Uruguay Round negotiations over ways to extend GATT rules to include trade in services and investment. She stated that she will negotiate to open India's markets through these trade talks.

4. How the Statutory Authority of "Super 301" Violates United States Obligations Under the GATT

4.1. Statutory Time Limits Conflict with GATT Dispute Resolution Procedures

One of the changes made by the 1988 amendment is the statutory imposition of strict time limits on the investigation process. If the for-
eign practice involves a trade agreement, such as the GATT, the USTR is limited to a maximum of eighteen months\textsuperscript{101} from the initiation of the investigation to negotiate an agreement with the foreign government to end the practice within three years or to compensate the United States.\textsuperscript{102} If such an agreement has not been reached within eighteen months, then the United States Trade Representative must take retaliatory action.\textsuperscript{103} This differs from the 1979 version where, after the conclusion of a GATT dispute resolution procedure, the USTR had thirty days to recommend what action, if any, the President should take.\textsuperscript{104} Action was to be taken only when deemed prudent by the President. Thus, the practice was generally for the USTR to recommend that the President follow the settlement reached under the GATT. This procedure posed little threat that the United States would make a unilateral determination and retaliate, but instead reinforced the GATT dispute resolution procedures. The primary purpose of section 301 was to provide a mechanism whereby private petitioners could access the GATT and voice their trade complaints.\textsuperscript{105}

The United States is obligated, as a signatory to the GATT, to resolve trade disputes that fall within the scope of the Agreement through the mechanisms provided under articles XXII and XXIII.\textsuperscript{106} “The practice in GATT... is to rely mainly upon the provisions of GATT itself for legal redress in cases of violation or other dispute.”\textsuperscript{107} The exclusive use of bilateral consultations in areas explicitly covered by GATT rules violates the United States' obligations under interna-

\textsuperscript{102} 19 U.S.C. § 2420(c) (1988).
\textsuperscript{105} See supra note 59.
\textsuperscript{106} See supra notes 24-34 and accompanying text.
\textsuperscript{107} LAW OF THE GATT, supra note 12, at 164.
tional law. A strict adherence to the time limits imposed by "Super 301" raises the possibility that the United States will make a unilateral determination supplanting the GATT dispute settlement proceedings and disregarding international obligations to resolve trade disputes multilaterally.

If such actions are seen to be GATT-inconsistent further problems would arise. When the United States argues that other countries should negotiate in good faith in a multilateral forum in order to avoid unilateral actions, such an argument will be less credible if we have already demonstrated a willingness to ignore our GATT obligations."

"Super 301" investigations may not always involve a trade agreement. In this situation the GATT does not have exclusive jurisdiction and the United States is free to negotiate bilaterally and proceed in any manner it wants. Actual retaliation may, however, still violate the GATT's MFN obligation. Furthermore, investigation and nego-

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108 The statute seems to require that the USTR request formal dispute resolution proceedings 150 days after the commencement of any investigation under section 301, including an investigation initiated pursuant to "Super 301," if the dispute involves a trade agreement. See 19 U.S.C. § 2413(a)(2) (1988). Nevertheless, no such request for proceedings was ever made. One could interpret this failure to request a formal dispute resolution proceeding not only as a violation of United States obligations under the GATT, but also a violation of United States statutory law.

109 See supra note 35 and accompanying text.


111 For example, the "Super 301" investigation of India's investment restrictions and barriers to trade in services do not involve GATT provisions. See supra note 71.

112 Under a section 301 investigation not involving a trade agreement, the USTR has 12 months from the initiation of the investigation in which to make a retaliatory decision. 19 U.S.C. § 2414(a)(2)(B) (1988).

113 A recent and ongoing dispute between the United States and Brazil illustrates one of the problems with unilateral retaliation, even where the substantive provisions of the GATT are not involved. The Pharmaceuticals case originated as a private petition filed by the Pharmaceutical Manufacturers Association alleging Brazil's failure to provide sufficient patent protection for U.S. pharmaceutical products. In response to the petition, President Reagan on October 20, 1988 imposed 100 percent tariffs, a total of $37 million in sanctions, on Brazilian imports into the United States. See United States Isolated as it Resists Call for Probe of Tariffs on Brazilian Goods, [5 Current Reports] Int'l Trade Rep. (BNA) No. 23, at 1415 (Oct. 26, 1988).

GATT refers in only a limited manner to intellectual property rights. See LAW OF THE GATT, supra note 12; INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS OR CONFLICT? 2 (R.M. Gadbaw & T. Richards eds. 1988). Thus, the United States is under no obligation to resort to the GATT dispute resolution procedures. However, the remedy chosen by President Reagan, punitive import duties, nonetheless violated MFN obligations under the GATT. Brazil's request that a GATT panel be formed to decide whether the punitive import duties levied on Brazilian pharmaceuticals were legal under GATT was blocked by the United States. See United States Isolated as it Resists Call for Probe of Tariffs on Brazilian Goods, [6 Current Reports] Int'l Trade Rep.
tiation of a non-GATT trade practice on a bilateral basis may not be a prudent policy for long-term goals of free trade:

Section 301 has caused frequent bilateral resolutions of trade disputes outside of the GATT framework. This process has created short-term solutions to many trade problems, frequently at the expense of long-term possibilities for more open trade, and to the detriment of GATT as an organ for international trade dispute resolution. 114

4.2. "Super 301" Reduces Discretion

"Super 301," unlike previous versions of section 301, does not recognize the need to take account of the current international legal framework. 115 Rather, it establishes a procedural framework that puts the Executive under constant pressure from Congress to act aggressively. The President is no longer granted broad discretion when deciding "appropriate and feasible" action. Political considerations are a vital component in trade negotiations. "[T]he United States must recognize that foreign practices and policies reflect delicate political balances that a foreign government may be unable or unwilling to disturb." 116 These complex foreign policy considerations are difficult, if not impossible, to balance through statutory requirements. The need to "balance the goal of obtaining relief for a particular group or industry against other goals such as maintaining positive relations with a given country" makes discretion an important ingredient in trade policy. "Super 301" eliminates much of the earlier flexibility in initiating investigations of foreign governments' trade practices and imposes rigid procedures that sharply contrast the "all appropriate and feasible action" language in previous versions of section 301.

115 "Trade legislation generally involves wide executive discretion because of the nature of international economic affairs and constitutional separation of powers concerns." Opening Up Trade Barriers, supra note 35, at 191. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (where the Supreme Court has upheld the President's exclusive power in international relations).
116 See supra notes 54-56 and accompanying text.
118 Id. at 1131.
The problems associated with the restriction of discretion by "Super 301" are particularly acute with respect to a developing nation, such as Brazil. Brazil is trying to meet its debt payments. Unless other countries are willing to cooperate, Brazil "has no choice but to control imports, which while hurting the country's development perspective, will at least help the balance of payments situation in the short run."119 The USTR should be granted flexibility in order to weigh the importance to the nation of reducing foreign barriers to United States imports with the desirability of Brazil's continuing ability to raise funds to pay its foreign debt.

Some discretion is maintained by the USTR.120 For example, the USTR is not required to act if there is a GATT determination that the rights of the United States are not being "nullified or impaired."121 Yet, in many instances, the policy of the United States is to avoid these dispute settlement proceedings. By restricting the consultation period to a maximum of eighteen months, the United States precludes any decision by a GATT panel from being rendered.122 It is now much more difficult to justify "unfair trade policies based on diplomatic or security concerns. Public identification of trade barriers abroad inevitably raises the visibility of trade issues."123 The clear intent of Congress was to urge the Executive to impose sanctions unilaterally on foreign nations' products if unfair trade practices are not eliminated. A protectionist-minded administration now has the tools to "get tough" with trading partners and presidents will find it more difficult to resist using these tools, particularly in a recession.

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120 19 U.S.C. § 2411(a)(2) (1988) states:

The Trade Representative is not required to take action under paragraph (1) in any case in which-
(A) the Contracting Parties to the General Agreement on Tariffs and Trade have determined, a panel of experts has reported to the Contracting Parties, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds that—
(i) the rights of the United States . . . are not being denied . . . .

Id.

121 The USTR is also not required to act if the foreign government agrees to end the practice or agrees to compensate the United States. In addition, if retaliation "would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action," 19 U.S.C. § 2411(a)(2)(B)(iv), or "would cause serious harm to the national security of the United States," 19 U.S.C. § 2411(a)(2)(B)(v), then it is not required.
122 See supra notes 24-34 and accompanying text.
123 TRADE WARRIORS, supra note 73, at 28.
4.3. Unilateral Retaliation Violates Most-Favored-Nation Obliga-
tions Under the GATT

The disturbing trend is to apply section 301 retaliation measures
independently of GATT obligations. The original section 252(c) con-
tained a requirement that the President "[h]ave due regard for the in-
ternational obligations of the United States." 124 Congress deleted this
requirement in the Trade Act of 1974 because, "the President ought to
be able to act or threaten to act under section 301 whether or not such
action would be entirely consistent with [international obligations]." 125
The 1988 amendment further circumvents the GATT by requiring, not
merely permitting as under earlier versions, retaliation when the rights
of the United States are unilaterally determined to be impaired.

The USTR has stated that retaliation is not the intended result of
the "Super 301" investigations. Instead, "Super 301" is to provide the
United States with leverage in settlement negotiations with the priority
country. 126 However, if consultations to eliminate the unfair trade prac-
tice are unsuccessful and no settlement is reached in the mandated time
period, the USTR's discretion has been reduced in deciding whether to
take action. The words of the statute and the legislative history indicate
that the USTR is to take some action within the Representative's
authority. 127

124 Trade Expansion Act, supra note 41. See also Opening Up Trade Barriers,
supra note 35 (summary of the changes the Trade and Tariff Act of 1984 made to
301).
126 USTR Hills, stated that "[n]one of us... wants to retaliate. If we are success-
ful in our negotiations we will not have to retaliate... [The Super 301 provision] is
the leverage to have more successful negotiations...." USTR Hills Says Trade Deficit
Will Stay Until Nation Tackles Inability to Save, [6 Current Reports] Int'l Trade Rep.
(BNA) No. 19, at 575 (May 10, 1989) (responding to remark by Dr. Michael Boskin,
Chairman of the President's Council of Economic Advisors, that if the United States
retaliates against its trade partners it will cause a worldwide recession).
127 The scope of the USTR's authority is delineated in 19 U.S.C. § 2411(c)(1). It
authorizes the Trade Representative to:

(A) suspend, withdraw, or prevent the application of, benefits of trade
agreement concessions . . . ;
(B) impose duties or other import restrictions on the goods of . . . such
foreign country . . . ; or
(C) enter into binding agreements with such foreign country that commit
such foreign country to—
(i) eliminate . . . the act, policy, or practice . . . ,
(ii) eliminate any burden or restriction on United States commerce .
. . . , or
(iii) provide the United States with compensatory trade benefits....


In addition, the USTR may restrict or deny access authorization to any services
At this point no retaliatory measures have been taken against foreign countries under "Super 301" investigation. The investigations against Japan and Brazil have been satisfactorily resolved. However, discriminatory unilateral action, such as that threatened if settlement is not reached, clearly violates GATT MFN obligations. It is distressing that Congress' apparent intent is to urge the Executive to violate the unconditional MFN on which GATT is based.

5. **"SUPER 301" APPLICATION AS A UNILATERAL MEASURE BY THE UNITED STATES IS A THREAT TO THE MULTILATERAL TRADE SYSTEM AND SHOULD NOT BE REAUTHORIZED**

Justification for measures such as "Super 301" is based on the United States trade deficit problem and declining U.S. world competitiveness. Yet, by ignoring the chronic budget deficit, Congress ignores the main source of the country's trade deficit. Economists say the "trade deficit stems primarily from the proclivity of the United States government to spend rather than to save. The most important element of the savings gap is the federal budget deficit . . . ." Prompted by pressure from protectionist-minded United States companies, members of Congress are increasingly looking outside the borders for a scapegoat for domestic economic woes.

The importance of exports in the United States economy is growing. "Net exports have been responsible for 90% of the economy's growth this year. A recent estimate . . . suggested that a successful con-

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128 See supra notes 21-23 and accompanying text.

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[T]he worst aspect of Super 301 is focus; it will divert attention from the profound domestic sources of America's manufacturing crisis. Put aside for a moment any notions of how open or closed the Japanese market is. When American manufacturers cannot compete or don't exist at home, the root problem is not foreign but domestic. Solving this problem will be a formidable challenge, requiring nothing less than an American brand of perestroika in both foreign and domestic policy.


132 Protectionism in general is something that business has promoted. Milton Friedman terms this "the suicidal impulse" of the United States business community that seeks government solutions, such as tariffs. "It's tragic that the business community . . . should over and over again be following policies which if carried out would end up destroying the very basis of its existence." *United States Should Resist Pressures for Managed Trade Policy, Analysts Say*, [6 Current Reports] Int'l Trade Rep. (BNA) No. 39, at 1273, 1274 (Oct. 4, 1989).
clusion of the Uruguay Round could add up to 5% ($300 billion) a year to America's GNP by the end of the century.'

Given the growing significance of foreign trade to the United States economy, the successful completion of the Uruguay Round and the continued viability of the multilateral trade system is of great consequence to the United States. "The power of the multilateral process enshrined in the GATT has been the ability to maximize the gains and minimize the adjustment costs from mutual reductions in trade barriers - usually resulting in larger gains than were expected." The threatened retaliation under "Super 301" may provide the USTR with leverage, enabling her to eliminate some of the trade barriers. However, a continuing disregard for the United States' obligation to resolve problems through the dispute resolution procedures may defeat the possibility for long-term improvements in the GATT framework.

The 1989 "Super 301" listings of Brazil, Japan and India as priority countries have raised the fear that the international trade system under the GATT is in jeopardy because of the United States' increasing unilateralism. It "has aroused a great deal of anxiety on the part of U.S. trading partners" and "has left some with doubts about U.S. allegiance to the multilateral system." The true danger from the

The same study calculated a Uruguay Round failure that led to increased trade restrictions could cut GNP by $100 billion. Dancing from Bad to Worse, Economist, Nov. 17, 1990, at 25.

Kim & Wheeler, At All Costs, Save GATT, Christian Sci. Monitor, Dec. 5, 1990, at 18 [hereinafter At All Costs]. "[O]ver time, negotiations have become increasingly painful. The easy gains possible through tariff liberalizations have been achieved. Now significant gains depend upon negotiating mutual modifications in member nations' domestic policies, leading to domestic political conflict as a result." Id.

"Super 301" has generated tension among the contracting parties as illustrated by the open criticism of United States' trade policy in the GATT Council meeting in Geneva on June 21, 1989. The meeting was filled with attacks on "Super 301." The United States had no support during the first morning of debates with other member nations' delegates saying, "that if the United States persists in using Section 301 of the Trade Act and its derivatives as a bilateral method of retaliation against other countries, it could sound the death knell for the ongoing Uruguay Round of GATT trade negotiations." U.S. Comes Under Attack Over Trade Policy at GATT Council Meeting, Defends Super 301, [6 Current Reports] Int'l Trade Rep. (BNA) No. 26, at 830 (June 28, 1989).

GATT Director General Arthur Dunkel expressed his view that unilateral trade laws, such as the United States' section 301, is the antithesis of the Uruguay Round's goal of increased trade liberalization. He stated that, "[t]he successful conclusion of the Uruguay Round is a must if we don't want to see trade and economic relations fall into the tragedy of bilateralism and unilateralism." GATT's Dunkel Criticizes U.S. Section 301, Urges Strong Commitment to Uruguay Round, [7 Current Reports] Int'l Trade Rep. (BNA) No. 22, at 766 (May 30, 1990).

United States' pro-export policies like "Super 301" is the perception that the "U.S. wants the best of all worlds — benefiting from multilateral agreements as well as from its own bilateral muscle." Threatening "priority countries" with retaliation can seriously damage the multilateral system under the GATT by prompting bilateral squabbling and reciprocal action. Even the threat of retaliation alone can impede multilateral negotiations such as the Uruguay Round.

United States Trade Representative Hills has emphasized that the current Uruguay Round multilateral trade negotiations are at the top of her agenda. However, a recent review of the United States' trade policies questioned the consistency between the United States' interest in improving GATT's rules under the Uruguay Round and its bilateral and unilateral objectives outside the GATT framework.

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137 Super 301, with All Fairness, Pleases and Displeases Evenly, METALS WK., July 24, 1989, at 3.
Hills acknowledged that the Super 301 process had offended some foreign governments to the point where bilateral progress has been impeded since then, saying, "[t]he bad news is that after the designation, the quality of talks has not been the same." Although significant progress in negotiations with several countries — most notably Korea — just prior to the May deadline kept them from being named to the Super 301 list, Hills said "that high plateau of progress just fell off a cliff" after Japan, Brazil, and India were named. "As we come into the fall, we're getting it back, but it's hard to start talks when you're starting with a lecture [from foreign governments]."

139 USTR Hills stated in the report to Congress of trade liberalization priorities that the highest priority is successful negotiations at the Uruguay Round. "[T]he highest trade liberalization priority identified by the USTR is to conclude successfully the Uruguay Round of multilateral trade negotiations." 54 Fed. Reg. 24,438 (1989).
140 In December 1988 the GATT Council agreed to review the trade policies of members to ensure compliance with GATT codes. The policies of developed nations will be reviewed every two years, the policies of sixteen newly industrialized nations every four years, and the policies of developing countries every six years. See GATT Officials Decide to Postpone Conclusions of Uruguay Round Midterm Review Until April, [5 Current Reports] Int'l Trade Rep. (BNA) No. 49, at 1617, 1619 (Dec. 14, 1988).
141 See supra note 37 for U.S. criticism of GATT dispute resolution procedures.

[T]he enactment of the 1988 Trade Act with language to strengthen Section 301 of the 1974 Trade Act and the so-called "Super 301" provision "has aroused a great deal of anxiety on the part of U.S. trading partners."
Recent uses of the retaliatory feature available to the United States under
The GATT secretariat characterized this perceived discrepancy as a "major concern for all the United States' trading partners." Many U.S. trading partners, especially the European Community ("EC"), are pressing hard for the elimination of section 301 as part of the talks. The EC Commission approved a proposal on March 12, 1990 to strengthen the GATT's dispute settlement procedures within the Uruguay Round. A pre-condition for any negotiation on this issue is, however, the conformity of all national legislation with GATT principles and rules, in particular the renouncing of all unilateral measures. Unilateral measures are described as "incompatible with the multilateral approach to dispute settlement," and although not specifically mentioned, "Super 301" is its prime objective.

A multilateral process is far superior to bilateral actions as a basis for trade negotiation and dispute resolution. It minimizes competitive distortions among countries, making it easier for all to reduce barriers. It keeps pressure on all countries to abide by the same rules. By use of third party dispute resolution and common, i.e. multilateral, agreement

Section 301, as in a dispute with the European Community over the use of hormones in beef and a conflict with Brazil over its alleged failure to honor U.S. pharmaceutical patents, have been interpreted by other GATT members as "a lack of commitment on the part of the United States to multilateral rules and procedures."

Id. (quoting the GATT secretariat).

"The European Community Ambassador Tran Van Tinh said, "[w]e cannot see GATT sink because of an error of U.S. judgment -- the U.S. is swimming against the tide of international trade policy.""


"The EC Commission's proposal "suggests changing the composition of GATT panels from diplomats to a relatively restricted list of trade specialists who 'have no link with national administrators,' but who do have sufficient legal, economic, and trade experience.""

"EC Trade Commissioner, Frans Andriessen, states that it is "impossible for the EC to agree to a reinforcement of a multilateral dispute settlement procedure within the Uruguay Round if all contracting parties do not reject the potential for unilateral action.""

Id. (quoting the GATT secretariat).
on the rules of the game, trade problems can be dealt with less confrontationally. Moreover, a multilateral approach tends to reduce the us versus them, "zero-sum," mentality that so dominates trade discussions in any event.\(^{148}\)

Every country engages in some form of discriminatory practice, but the proper forum for the settling of disputes over trade practices is the GATT. In sum, the dispute resolution procedures are to provide a means for "ensuring continued reciprocity and balance of concessions in the face of possibly changing circumstances,"\(^{149}\) and resort to other means, such as section 301's bilateral negotiations under the threat of unilateral retaliation, may jeopardize the multilateral cooperation necessary to ensure the continued viability of the GATT.

6. CONCLUSION

"Super 301" requires the USTR to initiate and conduct investigations without resorting to the GATT mechanisms for trade dispute resolution. There is a strong argument for the proposition that the GATT has exclusive jurisdiction over disputes involving its provisions. Investigations of trade practices which the United States alleges are violative of the GATT should therefore be pursued through articles XXII and XXIII, rather than bilaterally through "Super 301."

The argument that the United States does not have jurisdiction is less persuasive if the "Super 301" investigation involves an unfair trade practice that falls outside of the scope of the GATT, such as intellectual property, services, or investment disagreements. However, in such cases, the GATT does not preclude the United States from requesting formal dispute proceedings under article XXIII. Due to the possibility that a unilateral determination imposing sanctions on a contracting party may violate the United States' unconditional MFN obligations, the GATT may be a better forum for United States complaints. Most significantly, even without actual retaliation, "Super 301's" threat has generated much criticism from other GATT members with the potential that free trade objectives may be retarded rather than accelerated.

One of the mitigating factors in the clash between section 301 unilateralism and GATT principles "has been the historic caution and prudence of presidents in investigating section 301 claims and their attention to principles of international law when they have decided to

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\(^{148}\) *At All Costs*, supra note 134, at 18.

\(^{149}\) *Law of the GATT*, supra note 12, at 170 (footnote omitted).

https://scholarship.law.upenn.edu/jil/vol12/iss2/3
take more aggressive action.\textsuperscript{150} The mandatory self-initiation and mandatory retaliation requirements of “Super 301” take away from the Executive much of this flexibility and discretionary power, conflict more directly with the GATT, and pose a greater danger of obstructing progress in multinational trade negotiations.

The reduction of the trade deficit is an important priority for United States’ trade policy. However, “Super 301” is not the best method to achieve that end. Congress, unable to reach a politically acceptable remedy for fiscal deficits, “remains obsessed with questions of trade and foreign investment, both symptoms of domestic economic mismanagement and political stalemate.”\textsuperscript{151} It is essential that the effects of the United States’ unilateral actions under “Super 301” are not ignored, and that the trend toward unilateralism and disregard for the dispute resolution procedures under GATT ceases.

\textsuperscript{150} \textit{Section 301 Against Japanese Government}, supra note 23, at 517 (footnote omitted).

\textsuperscript{151} \textit{Trade Warriors}, supra note 73, at 2.