A Shift Toward Protectionism Under §301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law

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A SHIFT TOWARD PROTECTIONISM UNDER § 301
OF THE 1974 TRADE ACT: PROBLEMS OF
UNILATERAL TRADE RETALIATION UNDER
INTERNATIONAL LAW

I. INTRODUCTION

The United States government often portrays itself as the strongest advocate of free trade principles, condemning the protective trade policies of foreign governments. However, due to the enormous trade deficit experienced by the United States in the past decade, its free trade policy has changed significantly. A sharp contrast has emerged between the United States' tough talk on free trade and the protectionist actions of Congress and the Administration. This change of policy is most obviously reflected in the controversial Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act), and especially in the amendment of the unilateral trade retaliation measure of § 301 of the 1974 Trade Act.

The 1988 Trade Act introduced various measures intended to revitalize the stagnating competitive power of the United States in the international economic arena. According to authors Bello and Holmer, the most controversial provision in the 1988 Trade Act is

2. See infra note 64.
3. See infra notes 63-102 and accompanying text.
5. See infra notes 11, 13.
6. See Freedenberg, The 1988 Omnibus Trade Bill: Issues and Perspectives, 1989 B.Y.U. L. REV. 365, 365-70 (stating that significant changes were made, for example, to: the legal mechanism for addressing the unfair trade practices; the protection of intellectual property; the protection of domestic industry by the use of a § 201 escape clause, anti-dumping and countervailing duty laws and export control regulations). For further discussion of each area where the 1988 Trade Act provided significant changes, see id.
7. Judith Hippler Bello was the General Counsel to the Office of the United States
the amendment of § 301 of the Trade Act of 1974.\textsuperscript{8} Section 301,\textsuperscript{9} the unilateral trade retaliation provision, was originally introduced as a part of the Trade Act of 1974 to fight against "unfair"\textsuperscript{10} foreign trade practices.\textsuperscript{11} However, the 1988 Trade Act was characterized as a "fundamental departure from the direction U.S. trade policy has taken since the enactment of the Trade Act of 1974."\textsuperscript{12} Furthermore, the nature of the new § 301 is significantly different from the § 301 that was in place prior to the 1988 amendments.\textsuperscript{13}

The new § 301 proposals attracted a great deal of attention from United States' trading partners during the Congressional debate.\textsuperscript{14} The European Community (EC)\textsuperscript{15} and Japan severely criticized the introduction of one amendment within the new proposals, referred to as "Super 301,"\textsuperscript{16} which requires mandatory investiga-

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\textsuperscript{8} Id. at 2 (stating that at the heart of the bills before Congress was § 301 of the Trade Act of 1974 which was "the main U.S. trade law designed to pry open foreign markets to U.S. investment and exports of goods and services, and to achieve adequate and effective protection abroad for intellectual property rights.").

\textsuperscript{9} In this Note, the United States’ retaliation scheme against foreign trade practices, provided for in § 301 of the Trade Act of 1974 and which remained in force until the amendments were made in 1988, is referred to as "§ 301" unless otherwise indicated.

\textsuperscript{10} The terms “unfair” and “unfair practices” are broadly used in this Note to designate all acts, policies and practices that are actionable under § 301.


\textsuperscript{12} Freedenberg, supra note 6, at 365.


\textsuperscript{15} The European Community is a regional governmental international organization established in 1958. See T. Hartley, The Foundations of European Community Law 3 (1981). Current member countries include France, Germany, Italy, Belgium, the Netherlands, Luxembourg, the United Kingdom, Ireland, Denmark, Greece, Spain and Portugal. Id. at 3-5.

\textsuperscript{16} This amendment to § 301 has been characterized as the "Super 301" provision.
tions by the United States Trade Representative (USTR)\textsuperscript{17} of certain unfair trade practices of foreign countries.\textsuperscript{18} These countries criticized Super 301 on the grounds that it is contrary to the multilateral negotiation system provided for under the General Agreement on Tariffs and Trade (GATT).\textsuperscript{19}

Although it remains to be seen how Super 301 will be implemented, the statute's unilateral retaliation provision violates accepted public international law principles. Specifically, Super 301 ventures beyond traditional bases of prescriptive\textsuperscript{20} and enforcement\textsuperscript{21} jurisdiction.\textsuperscript{22} The new § 301, which incorporates Super 301, empowers the USTR to determine whether a foreign trade policy is "unfair" under a standard set by the United States.\textsuperscript{23} Section 301 re-

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17. The Office of the United States Trade Representative was established under 19 U.S.C. § 2171 (1982 & Supp. V 1987) within the Executive Office of the President. The USTR has primary responsibility for the conduct of international trade negotiations. See, e.g., Holmer, The Office of the Trade Representative: Recent Legal Developments, 20 INT'L LAW. 1351, 1351-59 (1986) (outlining the major legal issues that developed in 1985-86 regarding trade incentives and legislative issues).

18. See 19 U.S.C. § 2420(b) (1988) (regarding the initiation of USTR investigations); see also infra notes 128-39 (explaining that under Super 301 the USTR is required to initiate an investigation on its own motion against countries which were identified as priority countries by the Report of National Trade Estimate).


20. Prescriptive jurisdiction is a state act "usually in legislative form, whereby the State asserts the right to characterize conduct as delictual," i.e. wrong. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 1982 BRIT. Y.B. INT'L L. 1, 1; see infra note 224.

21. Enforcement jurisdiction is an act "designed to enforce the prescriptive jurisdiction" either by administrative or judicial action. Id.

22. Unless there is jurisdiction to prescribe, a country cannot have jurisdiction to enforce. See id. (discussing the basic principles for bases of jurisdiction); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 comment a (1987) [hereinafter RESTATEMENT (THIRD)] (noting that the limitations on a state's authority to adjudicate differ from the "limitations on a state's authority to enforce its law through administrative, executive or police action.").

quires the USTR to evaluate the economic policy of foreign countries. However, without a legitimate basis of prescriptive jurisdiction, the USTR's determination against allegedly "unfair" foreign trade practices should not be enforced because such interference with the national economic policy of a foreign country violates public international law.

This Note first analyzes, in Section II, the purposes and procedures of the original § 301 and the subsequent amendments and changes made by the new § 301, which embodies Super 301. In Section III, this Note examines the new § 301 under the framework of GATT and fundamental principles of public international law. This section suggests that the unilateral retaliation mechanism of § 301 violates the dispute settlement provisions of GATT and the spirit of the multilateralism upon which GATT is based, and that the new § 301 violates the principles of prescriptive and enforcement jurisdiction under public international law. In particular, the authority conferred to the USTR violates the territorial principle of prescriptive jurisdiction because the United States cannot legitimately exercise its jurisdiction when a sovereign state has concurrent jurisdiction. Although the new § 301 finds its basis of jurisdiction in effects produced within United States territory, this section violates the rules regarding concurrent jurisdiction expressed in the Restatement (Third) of Foreign Relations Law. Particularly problematic is the Super 301 mechanism, which authorizes the USTR to identify priority countries conducting unfair trade practices. The USTR's authority clearly violates the principle of reasonableness which limits prescriptive jurisdiction when another state has concurrent jurisdiction. This Note concludes that because § 301 violates public international law principles, Super 301 should be repealed.

24. See Bowett, supra note 20, at 19 (questioning the extent to which the United States may impose its economic or political views on foreign countries).
25. See infra notes 220-83 and accompanying text.
26. See infra notes 36-139 and accompanying text.
27. See infra notes 140-283 and accompanying text.
28. See infra notes 140-219 and accompanying text.
29. See infra notes 220-83 and accompanying text.
30. See id.
31. See infra notes 224-31 and accompanying text.
32. See infra notes 243-83 and accompanying text.
33. See infra notes 127-39 and accompanying text.
34. See infra notes 251-83 and accompanying text.
35. See infra notes 284-89 and accompanying text.
II. THE EVOLUTION OF THE UNILATERAL RETALIATION PROVISION

A. Section 301 Prior to 1988

1. Purposes and Functions

The unilateral retaliation provision of § 301 was originally enacted in 1974 and was amended in 1979, 1984 and 1988. Prior to the 1988 amendments, § 301 provided a retaliation mechanism against "unfair" foreign trade practices similar to the current statute but more flexible. The section's primary purpose was to authorize the President, under two situations, to take retaliatory action against certain foreign acts, policies or practices. First, § 301 authorized the President to take action when a foreign country violated a trade agreement, and consequently that country denied the United States the benefits of the trade agreement in question. Second, the President could take action against "unjustifiable, unreasonable or discriminatory" foreign practices which burdened or restricted United States commerce.

When the President determined that a foreign governmental practice was actionable under § 301 because it was either unreasonable or violated a trade agreement, he was authorized to take "all appropriate and feasible action within his power to enforce such rights." These broad powers enabled the President to unilaterally...
retaliate against foreign trade practices which hindered trade expansion. The § 301 retaliation mechanism was designed to protect "the nation's right to take political action in pursuit of national economic interests, by negotiating international agreements" against the prescribed acts, policies and practices of foreign governments. The provision was considered extremely political because the ultimate power to retaliate was conferred upon the President alone. Thus, the President weighed the merits of § 301 retaliation against other factors of international relations. The nature of § 301 began to change in 1985 when the United States Government started actively using § 301 to retaliate against foreign trade practices.

2. The Procedure of § 301 Investigations

Prior to 1988, any interested party could file a petition requesting a § 301 investigation, and the USTR had forty-five days to determine whether to initiate such an investigation. The President could also self-initiate a § 301 investigation on his own motion where no petition was filed by another party. In addition, the USTR was

authority conferred by § 301, prior to 1988, included the suspension of benefits of trade agreement concessions and the imposition of duties. Id. § 2411(b). Section 2411(b) provided, prior to the 1988 amendments, that:

Upon making a determination described in subsection (a) of this section, the President, in addition to taking action referred to in such subsection, may —
(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved;
(2) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

Id.


46. See 19 U.S.C. § 2411 (1982 & Supp. V 1987) (empowering the President to take retaliatory action against certain foreign acts, policies or practices). In response to pressure from Congress, the President, in collaboration with the USTR, has initiated numerous § 301 investigations since 1985. See Bello & Holmer, Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments, 7 NW. J. INT’L L. & BUS. 633 (1986) [hereinafter Bello & Holmer, Section 301] (illustrating the recent applications of § 301 and explaining the increased resort to the section); Bello & Holmer, The Heart of the 1988 Trade Act, supra note 4, at 12 (noting Senate approval of USTR’s advice that § 301 retaliation should be mandatory but not compulsory).


also authorized, by the 1984 amendment, to self-initiate § 301 investigations.⁵⁰ If an investigation was initiated, the USTR usually requested a consultation with the foreign country or multilateral organization, such as the EC, concerning the issues raised in the petition or the issues which the USTR deemed important.⁵¹ The consultation procedures included bilateral negotiations with the foreign government as well as GATT dispute settlement procedures provided for in GATT Articles XXII and XXIII.⁵² The majority of § 301 investigations were terminated without Presidential retaliation because bilateral or multilateral negotiations usually prompted improvements in the allegedly “unfair” practices.⁵³ Thus, the § 301 proceeding usually encouraged negotiations with foreign governments and often led to mutually acceptable trade dispute resolutions, rather than Presidential action.⁵⁴

If the negotiations failed, however, the President could take “all appropriate and feasible action.”⁵⁵ The threat of action enhanced the USTR’s negotiating posture by pressuring foreign governments to reach an acceptable solution to trade disputes. Thus, § 301 was designed to give the USTR leverage in trade negotiations.⁵⁶

If the negotiations did not lead to a settlement, the President had to determine whether the questionable trade practice was action-

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⁵⁰. See id. § 2412(c)(1) (authorizing the USTR to initiate a § 301 investigation when it is necessary to advise the President concerning the exercise of the President’s authority under § 301).

⁵¹. See id. § 2413(a). This section provided that: “On the date an affirmative determination is made [to initiate a § 301 investigation], the Trade Representative . . . shall request consultations with the foreign country or instrumentality concerned regarding issues raised in the petition or the determination of the Trade Representative” made through a self-initiated investigation. Id.

⁵². See infra notes 157-85 and accompanying text (discussing GATT Articles XXII and XXIII).

⁵³. See Office of the U.S. Trade Representative, Section 301 Table of Cases (December 14, 1989) [hereinafter Table of Cases] (on file at Hofstra Law Review). According to the Table of Cases, 68 cases were initiated between 1974 and 1988 prior to the enactment of the 1988 Trade Act on August 23, 1988. Id. at 1-34. Half of these cases were terminated pursuant to successful bilateral or multilateral negotiations which improved the allegedly unfair trade practice while five cases were terminated because the claim under § 301 was not justified or the petition was withdrawn. Id.

⁵⁴. Holmer & Bello, The 1988 Trade Bill: Savior or Scourge of the International Trading System?, 23 Int’l Law. 523, 527 (1989) (stating that the objective of § 301 was never retaliation; “rather, the credible threat of retaliation was intended to serve as a stick that, in combination with the carrot of an open U.S. market, could pry open foreign markets and thus further liberalize trade.”).


⁵⁶. Bello & Holmer, Section 301, supra note 46, at 646 n.77.
able before taking retaliatory action. In the few instances where
the President hesitantly determined that § 301 could be invoked, he
was very reluctant to proceed to retaliation because of international
political considerations. Section 301 retaliation was used only in
extreme cases and was once described as "the H-bomb of trade
policy." Despite the legal problems presented by the GATT system
and principles of international law, the President's self-restraint in
taking § 301 action kept the trading partners' criticism less visible
under the old § 301.

3. Section 301 Retaliatory Actions Taken Prior to the 1988
Trade Act

a. Prior to 1985.— Although Congress enacted § 301 in 1974,
the United States Government did not invoke § 301 investigations
very frequently until 1984, shortly after the United States trade
deficit dramatically increased. The President took retaliatory ac-
tion only twice prior to 1985.

The first case involved hides exported from Argentina and was

58. Note, Foreign Industrial Targeting: Section 301 of the Trade Act of 1974 As a
that the President was reluctant to take action under § 301 because of international political
considerations, which included: the negative impact that retaliation might have on third countries,
the hesitation to subject generally friendly countries to § 301 action, and limitations under
international trade agreements).
59. See infra notes 63-102 and accompanying text.
60. Comparing Major Trade Bills: Hearings on S. 490, S. 636 & H.R. 3 Before the
Senate Comm. on Finance, 100th Cong., 1st Sess. 19 (1987) (statement of Ambassador Clay-
ton Yeutter, U.S. Trade Representative).
61. For a discussion of these problems, see infra notes 140-283 and accompanying text.
62. See infra notes 63-102 and accompanying text (discussing the small number of in-
vestigations conducted prior to 1988).
63. See TABLE OF CASES, supra note 53, at 1-34 (showing that while 47 cases were
initiated during the eleven year period from 1974 to 1984, 21 cases were initiated during the
three year period from 1985 until the 1988 amendments were enacted).
64. The trade deficit of the United States in 1984 was $108 billion, almost twice as
much as the figure of the previous year, and the trade deficit continued to increase annually.
BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED
STATES 1989, at 786 [hereinafter 1989 STATISTICAL ABSTRACT]. The Bureau of the Census
gives the following figures for merchandise trade balance (in billions of dollars):

<table>
<thead>
<tr>
<th>Year</th>
<th>Balance</th>
</tr>
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<tbody>
<tr>
<td>1970</td>
<td>2.7</td>
</tr>
<tr>
<td>1975</td>
<td>9.1</td>
</tr>
<tr>
<td>1980</td>
<td>-24.2</td>
</tr>
<tr>
<td>1981</td>
<td>-27.6</td>
</tr>
<tr>
<td>1982</td>
<td>-31.8</td>
</tr>
<tr>
<td>1983</td>
<td>-57.5</td>
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<tr>
<td>1984</td>
<td>-107.9</td>
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<tr>
<td>1985</td>
<td>-132.1</td>
</tr>
<tr>
<td>1986</td>
<td>-152.7</td>
</tr>
<tr>
<td>1987</td>
<td>-152.1</td>
</tr>
</tbody>
</table>

Id.

65. See TABLE OF CASE, supra note 53.
initiated based on a petition filed by the National Tanner's Council. The petition alleged that Argentina breached a United States-Argentina hides agreement of 1979, which required Argentina to adopt an *ad valorem* tax on exports of hides to replace its embargo on exports and, in exchange, required the United States to reduce its duty on such products. This case was, therefore, a violation-of-a-trade-agreement case. In 1982, during the course of the § 301 investigation, President Reagan terminated the Agreement and retaliated by imposing a 5% *ad valorem* tariff on leather imported from Argentina.

The second § 301 retaliation case involved an allegedly "unreasonable" trade practice by Canada. In 1978, various American television licensees filed a petition alleging that certain provisions of the Canadian Income Tax Act were unreasonable. These provisions denied Canadian taxpayers deductions if they purchased advertising time from American, rather than Canadian, broadcasters. President Carter determined that the Canadian practice was unfair and declared that the appropriate response was to enact mirror legislation in the United States. This determination was carried out on October 30, 1984 as part of the Trade and Tariff Act of 1984.

b. Between 1985 and 1988.— Since 1985 when the United States' trade deficit began to increase rapidly, the President and the USTR have become more active in using § 301 investigations and § 301 actions to fight against "unfair" foreign trade practices.

67. *Ad valorem* is a tax imposed on the value of property. BLACK'S LAW DICTIONARY 48 (5th ed. 1979).
69. See *supra* note 42 and accompanying text. It should be noted that the President's proclamation was not specifically issued pursuant to § 301 of the Trade Act, 19 U.S.C. § 2411 (1982). See Proclamation No. 4993, 47 Fed. Reg. 49,625 (1982) (stating that action was taken pursuant to Sections 125 and 604 of the Trade Act, 19 U.S.C. §§ 2135, 2483 (1982)). Nonetheless, the President took retaliatory action as a result of the § 301 investigation. *Id.*
71. See *supra* note 43 and accompanying text (noting that the President could take action against unreasonable foreign practices).
75. See 1989 STATISTICAL ABSTRACT, *supra* note 64, at 786.
76. Bello & Holmer, *The Heart of the 1988 Trade Act, supra* note 4, at 10 n.51 (noting that beginning in 1985 President Reagan began to use § 301 more often than he had in the past).
President Reagan took retaliatory action in five cases between 1985 and 1988.\textsuperscript{77} Two of these cases were initiated prior to 1985, but the § 301 retaliation was taken after 1985.\textsuperscript{78} The three other actions were taken prior to the enactment of the 1988 Trade Act. These cases are briefly discussed below.

In the EC Citrus Tariff Preferences for Certain Mediterranean Countries case, a petition was filed in 1976 alleging that the EC's preferential tariffs had an adverse effect on the United States' citrus export to the EC.\textsuperscript{79} Nine years later in 1985, the President determined that the EC's practice was "unreasonable."\textsuperscript{80} The President retaliated by imposing up to a 40% \textit{ad valorem} duty on certain pasta from the EC.\textsuperscript{81} In the case of Non-Rubber Footwear Import Restrictions in Japan,\textsuperscript{82} the President decided to increase duties on certain imports of leather and footwear from Japan.\textsuperscript{83}

The EC Enlargement case was self-initiated by the USTR.\textsuperscript{84}

\begin{footnotesize}
\begin{enumerate}
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\end{enumerate}
\end{footnotesize}
That case involved quantitative restrictions on oilseeds and grains in Portugal and the withdrawal of tariff concessions on corn and sorghum in Spain. The President decided to impose import quotas on certain imports from the EC by suspending the tariff concession under GATT. However, this case clearly illustrates that § 301 retaliation may not provide the ultimate solution to a trade dispute. After the United States imposed the import quota, the United States and the EC continued to negotiate, and the two parties agreed to reach definitive settlement by December 31, 1986.

The negotiation, however, became prolonged and another formal investigation under § 301 was initiated on January 5, 1988. Based upon consultations between the EC and the United States, a GATT panel was established on May 19, 1989. As a result of substantial progress under GATT, the United States government delayed implementation of actions under § 301. Although § 301 worked to trigger negotiations with the EC, mere unilateral retaliation in the form of an import quota could not achieve the objective of terminating the EC subsidies. Thus, in this case, § 301 retaliation was not as effective as the GATT dispute settlement procedures to improve market access.

Another § 301 action was taken against Canada for its violation of an agreement with the United States to impose a 15% ad valorem tax on softwood lumber products exported from Canada. On December 30, 1986, President Reagan decided to impose an additional duty of 15% ad valorem on imports of Canadian softwood lumber products. Then, on May 26, 1987, the Canadian Government passed legislation imposing a 15% ad valorem tax on exports of softwood lumber products to the United States; the case was then resolved.

87. Bello & Holmer, Section 301, supra note 46, at 653-54.
90. Id.
91. Proclamation No. 5595, 52 Fed. Reg. 229 (1987) (Canada Softwood Lumber case). This action was taken on December 30, 1986, however, on the same day the U.S. Department of Commerce agreed to terminate a countervailing duty investigation after Canada agreed to impose such a tax and by January 8, 1987, the Secretary determined that Canada had begun to collect this tax. See Table of Cases, supra note 53, at 28 (Docket No. 301-58).
93. See Table of Cases, supra note 53, at 28.
The final example of § 301 action was the Japan Semiconductor case, which attracted a great deal of attention.\textsuperscript{94} The case was initiated in June 1985 upon a petition filed by the Semiconductor Industry Association.\textsuperscript{95} The United States and Japan reached an agreement after intensive bilateral consultation, and the Arrangement concerning Trade in Semiconductor Products was signed on September 2, 1986.\textsuperscript{96} This Arrangement provided for enhanced free trade in semiconductors based on market principles and the competitive positions of the semiconductor industries in the two countries.\textsuperscript{97} President Reagan alleged that the Japanese Government had failed to implement the Arrangement and, on April 17, 1987, he imposed 100\% \textit{ad valorem} custom duties on power hand tools, 18 and 19-inch color televisions, and low performance 16-bit desktop computers exported from Japan.\textsuperscript{98}

The 100\% duty amounted to a virtual import ban on these products and stirred tremendous attention in Japan.\textsuperscript{99} The duty imposed led Japan to immediately correct the noncompliance with the Arrangement of 1986.\textsuperscript{100} In response, the USTR suspended most of the retaliatory measures within less than seven months after the 100\% duty was imposed.\textsuperscript{101} This case illustrates how § 301 retaliation can work effectively when a foreign country relies heavily on exports to the United States.\textsuperscript{102}


\textsuperscript{96} See Japan Semiconductors, 51 Fed. Reg. 27,811 (1986) (determination); \textsc{Table of Cases, supra} note 53, at 19-20.

\textsuperscript{97} Japan Semiconductors, 52 Fed. Reg. 10,275 (1987) (notice of hearing). The two governments signed the agreement, named the U.S.-Japan Semiconductor Arrangement on September 2, 1986, in which the government of Japan committed:

1) To impress upon Japanese semiconductor producers and users the need to aggressively take advantage of increased market access opportunities in Japan for foreign-based semiconductor firms; and

2) to provide further support for expanded sales of foreign-produced semiconductors in Japan through establishment of a sales assistance organization and promotion of stable long-term relationships between Japanese purchasers and foreign-based semiconductor producers.

\textit{Id.}


\textsuperscript{99} Chira, \textit{supra} note 94, at col. 6.


\textsuperscript{102} This is true of the trade relationship between the United States and Japan. A study conducted by Japan's Ministry of International Trade and Industry (MITI) showed that the
B. The New § 301¹⁰³

1. Introduction of the "Mandatory" Retaliation Requirement

The most significant change made to § 301 by the 1988 Trade Act is the requirement of mandatory retaliation for violation-of-trade-agreement cases.¹⁰⁴ The 1988 Act was enacted to "pry open foreign markets to U.S. investment and exports of goods and services."¹⁰⁵ Therefore, Congress intended that § 301 retaliation be used solely for trade purposes and not be influenced by international politics.¹⁰⁶ Section 301 had to be fundamentally altered to serve this purpose, which Congress achieved by providing for mandatory action.¹⁰⁷ The President's discretionary power was taken away and the

Japanese economy's reliance on exports to the United States is far greater than the U.S. reliance on its exports to Japan. Taihe Ison Kukkiri: Moshi Nichibi-Boeki ga Tomattara [Clear Reliance on the United States: If the Trade Between Japan and United States Stopped], Asahi Shimbun, Sept. 29, 1989, at 9, col. 1. The MITI's analysis showed that if trading between the two countries stopped, the Japanese economy would suffer a 5% loss, whereas the United States economy would be affected by only 0.6%. Id. The study seems to support the vulnerable position of the Japanese Government as the vulnerable party in trade negotiations. Id.

¹⁰³. The amendment of § 301 has been discussed in Congress since 1985, Bello & Holmer, The Heart of the 1988 Trade Act, supra note 4, at 1, and many extreme amendments that never materialized in the 1988 Trade Act were introduced. For example, Representative Richard A. Gephardt introduced an amendment which authorized the USTR to take immediate steps to remove trade barriers in a country with excessive and unwarranted trade surpluses and to reduce such surpluses. Id. at 30. After a very lengthy debate in the House Ways and Means Committee and on the House floor, Congress adopted the provision entitled Identification of Trade Liberalization Priorities, Pub. L. No. 100-418, § 1302, 102 Stat. 1176-79 (codified at 19 U.S.C. § 2420 (1988)). See Bello & Holmer, The Heart of the 1988 Trade Act, supra note 4, at 35-37.


¹⁰⁶. See id. at 3 & n.10; 134 CONG. REc. H5532 (daily ed. July 13, 1988) (statement of Rep. Richardson) (stating that §301 retaliation was "intended to enhance USTR's position as the lead trade agency and to make it less likely that trade retaliation would be waived because of foreign policy, defense, or other considerations.").

¹⁰⁷. See 19 U.S.C. § 2411(a) (1988). This section, entitled "Mandatory action," provides that:

(1) If the United States Trade Representative determines under section 2414(a)(1) of this title 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 authorized in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate
USTR was compelled to retaliate when an act, policy, or practice of a foreign country violated a trade agreement with the United States.\textsuperscript{108}

Although the form of retaliation remains discretionary,\textsuperscript{109} the amount of retaliation must be equivalent in value to the burden or restriction imposed on United States commerce.\textsuperscript{110} The USTR, therefore, must first determine the monetary loss to the United States caused by the "unfair" trade practice of a foreign government. The USTR must then decide how to impose an equivalent burden on that foreign country.\textsuperscript{111}

2. Transfer of Authority from the President to the USTR

The new § 301 transfers authority from the President to the USTR,\textsuperscript{112} whereby the USTR must now determine: 1) whether unfair trade practices are actionable under § 301 and 2) whether retaliation is appropriate under the circumstances.\textsuperscript{113} The USTR was vested with these new powers to reduce the likelihood that trade benefits for a foreign country would be exchanged for nontrade benefits to the United States.\textsuperscript{114} The significance of the USTR's mandatory authority is still unclear but some commentators argue that there will be little difference because the USTR continues to "serve[] at the pleasure of the President, and therefore is unlikely to take ac-

\begin{itemize}
  \item[108.] See id.
  \item[109.] See id.
  \item[111.] See supra notes 63-102 (discussing past examples of retaliatory actions in which \textit{ad valorem} tax was imposed on foreign commerce as a result of foreign trade practices deemed to burden or restrict U.S. commerce).
  \item[112.] 19 U.S.C. § 2411(a)-(b) (1988). Both the power to determine whether foreign practices are actionable under § 301 and the power to take action pursuant to such determinations are under the authority of the USTR. \textit{Id.} “The President [does] not retain separate authority to take action on his own motion, but may direct the USTR to take section 301 action.” H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 551, reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1584.
  \item[113.] Bello & Holmer, \textit{The Heart of the 1988 Trade Act}, supra note 4, at 8 (describing how the final decision was made to transfer § 301 authority to the USTR).
  \item[114.] \textit{Id.} at 3 & n.10 (indicating that trade benefits might have been waived because of foreign policy, defense, or other nontrade considerations and that this issue was subject to an extensive debate in Congress).
\end{itemize}
tions of which the President disapproves."\textsuperscript{115}

However, Congress can impose more pressure on the USTR than on the President;\textsuperscript{116} therefore, it will be more difficult for the USTR to avoid taking retaliatory action. The USTR will not have the liberty, which the President had under the previous § 301,\textsuperscript{117} to refrain from taking retaliatory action when it determines that the alleged "unfair" practice is actionable under § 301. Therefore, the transfer of authority to the USTR will result in less flexible decision making under the new § 301. Coupled with mandatory retaliation, the new § 301 is less flexible and more provocative in the eyes of foreign governments.\textsuperscript{118}

The Administration, represented by the then Trade Representative, Ambassador Yeutter, was opposed to any amendment of § 301 because the USTR believed that the previous § 301 provided an adequate retaliatory mechanism against "unfair" foreign trade practices.\textsuperscript{119} Since its introduction in 1974, § 301 has been criticized by foreign countries because its unilateral character is contrary to the GATT system of multilateralism\textsuperscript{120} and arguably violates principles of public international law.\textsuperscript{121} Although a number of cases were initiated, the President decided not to take action in many cases because of other political considerations.\textsuperscript{122} The USTR, therefore, opposed

\textsuperscript{115} Id. at 10.

\textsuperscript{116} 134 CONG. REC H5536, H5545 (daily ed. July 13, 1988) (indicating that Congressmen think that "it would be easier for Congress to browbeat [the U.S. Trade Representative] with [their] parochial concerns than it would be the President."). This seems to be true because the current Trade Representative, Carla Hills, will be more vulnerable, than President Bush, to Congressional pressure.

\textsuperscript{117} E.g., TABLE OF CASES, supra note 53, at 21-22. In the case of Brazil Informatics, 51 Fed. Reg. 35,993 (1986), the President determined, on October 6, 1986, that Brazil's informatics policy was unreasonable. However, he suspended the investigation because he found that Brazil's policy had improved in these areas. Brazil Informatics, 52 Fed. Reg. 1,619 (1987); 52 Fed. Reg. 24,971 (1987). The investigation was finally terminated on October 6, 1989. Brazil Informatics, 54 Fed. Reg. 43,880 (1989).

\textsuperscript{118} Immediately after the 1988 Trade Act was passed, the EC delegate to GATT expressed the EC's serious concern about the new § 301 because "it reduces the president's scope for discretionary action." New U.S. Trade Law is Protectionist, European Community Tells GATT Council, 5 Int'l Trade Rep. (BNA) 1303 (Sept. 28, 1988).

\textsuperscript{119} See Bello & Holmer, The Heart of the 1988 Trade Act, supra note 4, at 3-4, 12-14, 31-32 (discussing the Administration's opposition to every amendment proposed by Congress).

\textsuperscript{120} See, e.g., Wright, supra note 14, at 539 (expressing the EC's longstanding opposition to § 301, which the EC deems contrary to GATT).

\textsuperscript{121} See, e.g., Hudec, Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment, 59 MINN. L. REV. 461, 526-28 (discussing the inconsistency between the original § 301 and GATT).

\textsuperscript{122} See supra note 58 and accompanying text.
removing the President's discretion to refrain from taking action. The USTR recognized that the President needed to retain discretion so that he could negotiate from a broader viewpoint.

In addition, the United States Administration opposed the amendments in light of the reaction of foreign governments. The Administration opposed the transfer of authority to the USTR because trading partners might perceive the transfer as evidence of a declining interest in trade by the United States. Opponents of the mandatory retaliation scheme felt that the provision "could easily do more harm than good by provoking nationalistic reactions in other countries and thereby reducing a foreign government's political ability and willingness to negotiate a satisfactory settlement."

3. Super 301: Identification of Trade Liberalization Priorities

The 1988 Trade Act introduced a new mechanism called Super 301 to apply § 301 to certain foreign unfair practices identified by the Report of National Trade Estimate (NTE). Under this provision, the USTR is required to identify United States trade liberalization priorities, including priority practices and countries, that will be subject to Super 301 investigation and trade negotiations.

124. See id.; see also Brown, U.S. Competitiveness in World Markets, 18 Int'l L. & Pol. 1075, 1079 (1986) (stating that there are many factors affecting the trade situation; therefore, it is necessary to take all factors into consideration rather than resorting to trade protectionism).
126. Id. at 13.
127. Other than the requirement of "mandatory" action discussed above, see supra notes 103-11, the Trade Act of 1988 had two significant amendments. One is Super 301 discussed in this section, and the other is Special 301 concerning intellectual property protection. See 19 U.S.C. § 2242 (1988); see also Bradley, supra note 16, at 131, 142.
128. Pub. L. No. 100-418, § 1302, 102 Stat. 1176-79 (codified at 19 U.S.C. § 2420 (1988)); cf. supra note 103 (referring to Congressional debate over various similar amendments). Although this provision is not referred to as Super 301 in the statute itself, commentators do refer to it as such. See supra note 16.
129. See 19 U.S.C § 2241 (1988) (requiring the USTR to "identify and analyze acts, policies or practices of each foreign country which constitute significant barriers to ... United States exports of goods or services.")
130. See 19 U.S.C. § 2420(a) (1988). This section provides:
(1) By no later than the date that is 30 days after the date in calendar year 1989, and also the date in calendar year 1990, on which the report required under section 2241(b) of this title is submitted to the appropriate Congressional committees, the Trade Representative shall identify United States trade liberalization priorities, including —
(A) priority practices, including barriers and trade distorting practices, the
though the self-initiated investigation was possible under § 301 prior to the 1988 amendments, the trade liberalization priority required the USTR, in 1989 and again in 1990, to initiate investigations against all major trade barriers and market distorting practices.

The first Super 301 decision was made on May 26, 1989. In this decision, the USTR identified six practices of three countries as priority practices requiring Super 301 investigation and negotiation. Many countries, beside those identified in the report, criticized this action by the United States. Since an annual report by

elimination of which are likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent;
(B) priority foreign countries that, on the basis of such report, satisfy the criteria in paragraph (2);
(C) estimate the total amount by which United States exports of goods and services to each foreign country identified under subparagraph (B) would have increased during the preceding calendar year if the priority practices of such country identified under subparagraph (A) did not exist.

Id. 131. See id. § 2420(c). This section provides that:
(1) In the consultations with a priority foreign country . . . that the Trade Representative is required to request . . . , the Trade Representative shall seek to negotiate an agreement which provides for—
(A) the elimination of, or compensation for, the priority practices identified under subsection (a)(1)(A) of this section by no later than the close of the 3-year period beginning on the date on which such investigation is initiated, and
(B) the reduction of such practices over a 3-year period with the expectation that United States exports to the foreign country will, as a result, increase incrementally during each year within such 3-year period.

135. Id. The identified practices were:
(i) Quantitative import restrictions by Brazil;
(ii) Exclusionary government procurement by Japan of satellites;
(iii) Exclusionary government procurement by Japan of supercomputers;
(iv) Technical barriers to trade in import of forest products in Japan;
(v) India’s trade-related investment measures;
(vi) India's barriers to trade in services.

Id. at 24,439.

136. See U.S. Trade Policy Attacked, supra note 19 (referring to the GATT Council meetings of June 1989 and stating that the countries which criticized the retaliatory measures included Yugoslavia, Peru, Pakistan, Egypt, New Zealand, Switzerland, South Korea, Romania, Nicaragua, Hungary, Australia, Israel and Czechoslovakia). The Organization of Economic Cooperation and Development (OECD) also criticized the protectionism reflected in Super 301 during the Council Meetings in May and June 1989. Nihon wo Nerai-Uchishita Bel
the USTR is required under Super 301, the USTR entered vigorous negotiations with the governments of Japan, India and Brazil to achieve substantial accomplishment within twelve months. In June 1990, the investigation against Japan was suspended and the investigations against Brazil and India were terminated.

III. SECTION 301 VIOLATES GATT AND INTERNATIONAL LAW

A. Violation of GATT

1. Fundamental Principles of the GATT System

The post-World War II international economy has been regulated by the basic principles established at the Bretton Woods Conference in 1944. These principles were reflected in the efforts to establish GATT, which provided a "framework for concrete negotiations on tariffs and other trade matters" in order to protect the "value of the tariff concessions." The basic premise behind establishing international cooperation in the post-war world economy was the belief among national leaders that it is "essential to prevent the..."
pursuit of self-interested national regulation of international trade in a manner that harms other nations and in a manner that, when combined with retaliatory actions, results in a sharp and chaotic restriction in the over-all level of international trade.”

The purposes of establishing GATT were: (1) to limit tariffs through the Most-Favored-Nation clause; (2) to protect the value of the tariff concessions against “nullification” by various non-tariff import barriers; (3) to establish a “‘code of trade conduct’ to channel protectionist devices away from certain types of barriers;” and (4) to provide “consultation procedures and joint action to carry out the basic purposes of the agreement.”

Contrary to these principles of international cooperation, the President was given, under the 1974 Trade Act, “broad authority to retaliate against both ‘unreasonable’ as well as ‘unjustifiable’ import restrictions which affect U.S. commerce.” This authority was transferred to the USTR by the new § 301. Additionally, the USTR is required to identify priority practices and priority countries.

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143. Id. § 1.3, at 9 (stating that such national restrictions include: “the imposition of quantitative restriction on imports in the 1920's and 1930's, high tariff laws such as the United States Smoot-Hawley tariff of 1931, the manipulation of currency exchange rates, and the constant changing of import regulations without adequate notice to traders.”).

144. Id. § 1.7, at 29; see also GATT, supra note 19, art. I, para. 1, at 1-2. This section of GATT provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . ., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, supra note 19, art. I, para. 1, at 1-2.

145. J. JACKSON, supra note 19, § 1.7, at 29; see also GATT, supra note 19, art. II, at 3-6 (entitled “Schedules of Concessions”).

146. J. JACKSON, supra note 19, § 1.7, at 29; see also GATT, supra note 19, art. III, at 7-9 (National Treatment on Internal Taxation and Regulation); id. art. VI, at 12-15 (Anti-dumping and Countervailing Duties); id. art. VII, at 15-18 (Valuation for Customs Purposes); id. art. VIII, at 18-19 (Fees and Formalities Connected with Importation and Exportation); id. art. IX, at 19-20 (Marks of Origin); id. art. X, at 21-22 (Publication and Administration of Trade Regulations); id. art. XI, at 22-24 (General Elimination of Quantitative Restrictions); id. art. XIII, at 29-32 (Non-discriminatory Administration of Quantitative Restrictions); id. art. XV, at 33-36 (Exchange Arrangements); id. art. XVI, at 36-37 (Subsidies); id. art. XVII, at 37-39 (State Trading Enterprises).

147. J. JACKSON, supra note 19, § 1.7, at 29; see also GATT, supra note 19, arts. XXII, XXIII, at 55-57.

148. S. REP. No. 1298, 93d Cong., 2d Sess. 163, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7301 (emphasis added); see also supra notes 36-46 (discussing the purposes and functions of § 301).

149. See supra notes 112-26 (discussing the transfer of authority from the President to the USTR).
based on statistical data from the NTE Report.\textsuperscript{150} Once priority countries have been identified, the USTR must negotiate with the priority countries to eliminate the priority practices which burden United States commerce.\textsuperscript{151} The statute allows the USTR to unilaterally pursue the national interest of the United States, and this was precisely what GATT was designed to prevent.\textsuperscript{152} Super 301, therefore, clearly contradicts the principles of multilateralism underlying GATT.\textsuperscript{153}

a. \textit{Purposes of the GATT Dispute Settlement Mechanism Under Article XXIII.}— Section 301 specifically violates the dispute settlement provisions of GATT.\textsuperscript{154} The original GATT dispute settlement clauses were based on a proposal drafted by the United States in the Charter of the International Trade Organization (ITO).\textsuperscript{155} The plan to establish ITO was never carried out; however, GATT, which was supposed to be a provisional measure until the establishment of ITO, has continued to exist to date.\textsuperscript{156}

The goals of GATT Articles XXII and XXIII are: (1) to establish a "dispute-settlement procedure, stressing the general obligation to consult on any matter relating to GATT;"\textsuperscript{157} (2) to assure compliance with GATT obligations;\textsuperscript{158} and (3) to "provide a means for en-

\textsuperscript{150} See 19 U.S.C. § 2420(a) (1988). This section is reprinted at supra note 130.

\textsuperscript{151} See 19 U.S.C. § 2420(c)(1) (1988). This section is reprinted at supra note 131. The language of Super 301 does not allow the USTR to exercise discretion, but requires it to pursue the § 301 procedure against any priority countries or practices. See 19 U.S.C. § 2420(b)-(c)(1) (1988). Congress made clear that the USTR is required to initiate a § 301 investigation of all acts identified under Super 301. See H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 578, reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1611. Furthermore, the USTR is expected to use all information, in addition to the National Trade Estimate (NTE) report which is relied upon to make priority identifications, to identify the barriers in foreign trade practices, and the USTR is also authorized to initiate investigations of these practices. Id.

\textsuperscript{152} See supra notes 141-47 and accompanying text (discussing the purposes of GATT).


\textsuperscript{154} See GATT, supra note 19, arts. XXII, XXIII, at 55-57.

\textsuperscript{155} J. JACKSON, supra note 19, § 8.3, at 166-69; see Bronz, The International Trade Organization Charter, 62 Harv. L. Rev. 1089, 1123-24 (1949) (discussing the fundamental principles of the Charter of ITO and outlining the development of these principles into the important rules governing international trade including the enforcement mechanism against nullification and impairment by one member country of benefits another country was entitled to receive under the Charter).

\textsuperscript{156} J. JACKSON, supra note 19, § 2.5, at 50.

\textsuperscript{157} Id. § 8.3, at 169.

\textsuperscript{158} Id.
suring continued reciprocity and balance of concessions.” The dispute settlement procedure provided in GATT intends to solve problems through negotiation and consultation “rather than ‘punishment,’ or imposing a ‘sanction,’ or obtaining ‘compensation.’” Thus, the mechanism of § 301 is a fundamental departure from basic GATT objectives. The USTR may withdraw any benefits to a country, which are provided under a trade agreement, when it determines that a trade practice of that country is unfair under the new § 301. When a prohibitive duty is imposed or mirror legislation is enacted, such action may be tantamount to a punishment or a sanction. Moreover, the duty may be compensatory since the degree of retaliation must be equivalent to the burden imposed on United States commerce.

b. Function of GATT Article XXIII.—Article XXIII applies when any benefit of GATT is being nullified or impaired by: “(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 article.”

159. Id. at 170.
160. Id. § 8.5, at 184.
162. See supra notes 63-102. The imposition of a 100 percent duty on unrelated goods, as was the case in Japan Semiconductors, 52 Fed. Reg. 13,419 (1987), is clearly a sanction for the industry affected by the § 301 action.
163. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 558, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1591 (stating that the amount of retaliation must be equivalent in value to the burden imposed on U.S. commerce).
164. Both Articles XXII and XXIII are dispute settlement provisions. See GATT, supra note 19, arts. XXII, XXIII, at 55-57. Article XXII provides for consultation between contracting parties, id. art. XXII, at 55, and under Article XXIII, CONTRACTING PARTIES may consult with any contracting party for a possible solution of the matter, id. art. XXIII, at 55-56. Article XXIII purports to solve the nullification and impairment of benefits to any contracting party and further provides the CONTRACTING PARTIES with authority to investigate and make recommendations. Id. art. XXIII, at 56. Articles XXII and XXIII are not necessarily connected and each can stand alone. J. JACKSON, supra note 19, § 8.5, at 178. Therefore, “procedures under Article XXII are not a prerequisite to procedures under Article XXIII.” Id. However, the circumstances which Super 301 considers to retaliate are similar to nullification and impairment under Article XXIII. See Hudec, supra note 121, at 515-22 (comparing the concept of nullification and impairment under GATT Article XXIII with the requirement to take actions under § 301). Thus, only Article XXIII will be considered in this section.

In the language of GATT documents, when the term CONTRACTING PARTIES is capitalized, it refers to the members of GATT acting jointly to make a GATT decision as a group. See GATT, supra note 19, art. XXV, at 62. The term “contracting parties” in lower case designates individual members acting on behalf of their country. See J. JACKSON, supra note 19, § 5.1, at 119. This distinction has been used in official GATT records and literature.
Agreement, or (c) the existence of any other situation . . . "165
Thus, Article XXIII can be invoked in a fairly broad range of circumstances. In addition, it may be invoked without any violations of GATT necessary.166 For instance, general global economic circumstances could present an occasion for requesting process under Article XXIII.167

In order to invoke Article XXIII, the complainant contracting party must first consult with the other contracting party or parties about the problem, and then make written representations or propos-

165. GATT, supra note 19, art. XXIII, para. 1, at 55-56. This Article of GATT provides that:
1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded 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 this 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 or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
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 this 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 shall take effect upon the sixtieth day following the day on which such notice is received by him.

Id. art. XXIII, at 55-57.

166. GATT, supra note 19, art. XXIII, para. 1(c), at 56 (allowing "any other situation" to be the reason of alleging that any benefit under the GATT system is being nullified and impaired).

167. J. JACKSON, supra note 19, § 8.5, at 180.
als to such parties. If the consultation fails, GATT CONTRACTING PARTIES begin to participate in the dispute settlement. First, the complaining contracting party requests the initiation of the Article XXIII procedure which can be a simple request to put the matter on the agenda of the Council Meeting. Second, a panel is appointed to hear the arguments of each party. Finally, the panel makes a recommendation in its Report to the CONTRACTING PARTIES. Usually the panel recommends that the offending practices cease if it finds that one nation actually violated GATT obligations. Throughout this procedure, efforts are made to achieve a conciliation between the disputing parties.

c. Past Practices of GATT Article XXIII.— Despite the dissatisfaction expressed by Congress with the achievements that GATT has produced, the United States succeeded in obtaining favorable findings through GATT negotiations. For example, the United States obtained a resolution regarding the disputes over Japan’s import quota on agricultural products. On February 2, 1989, after two years of GATT negotiations, Japan finally accepted the GATT panel’s report that Japan was imposing unfair import duties on twelve agricultural products, including dried vegetables, groundnuts and prepared bovine meat. Following the GATT finding, the United States was able to bilaterally negotiate with Japan, which agreed to end its import quotas by April 1, 1990.

In another case, the United States filed a complaint with GATT

168. See GATT, supra note 19, art. XXIII, para. 2, at 56-57 (requiring that written proposals be made to a contracting party before the formal dispute settlement procedures of Article XXIII, paragraph 2, can be invoked); see also J. Jackson, supra note 19, § 8.5, at 178 (noting that paragraph 1 of Article XXIII “provides another ‘consultation’ procedure which, in some ways, duplicates that of Article XXII.”).

169. GATT, supra note 19, art. XXIII, para. 2, at 56-57. For a discussion of the distinction between the terms CONTRACTING PARTIES and “contracting parties,” see supra note 164.

170. J. Jackson, supra note 19, § 8.4, at 176.

171. Id.

172. Id.

173. Id.

174. Id.

175. See Hudec, supra note 121, at 510-15 (discussing the arguments made by GATT critics).

176. See infra notes 177-82.


against Japan's import quota on beef and citrus products after bilateral negotiations failed. While the United States government was pursuing the GATT resolution, Florida Citrus Mutual, an American interest group, filed a petition under the old § 301. The investigation of Japan Citrus was initiated in May, 1988. The ultimate resolution was obtained through bilateral negotiations between the United States and Japan. The § 301 investigation was then terminated.

While proponents of § 301 trade retaliation would praise the value of § 301 in this case because it expedited the GATT negotiation and helped achieve the desired result, the negotiations were in fact disrupted by the initiation of § 301 investigations, and the bargaining balance was tipped by § 301 unilateralism.

Some United States trade practices that have been subject to GATT dispute settlement have resulted in adverse findings. The United States has tried to resist these negative findings but has been forced to accept the panel reports under international pressure.

2. Necessity of Compliance with GATT

a. International Law is Part of the Law Governing the United States.— Under United States legal principles, it cannot automatically be concluded that a federal statute which violates international

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180. See TABLE OF CASES, supra note 53, at 34 (Docket No. 301-66).
181. Id.
183. Foreign governments were obviously not satisfied with the results achieved by these methods. Consequently, some § 301 cases resurfaced a few years later because of unsatisfactory implementation by the foreign government, even though an agreement had been reached under the GATT negotiation.
law is invalid.\textsuperscript{186} Under the United States Constitution, treaties are the supreme law of the land.\textsuperscript{187} Moreover, the United States Supreme Court has recognized customary international law as United States law since the beginning of this century.\textsuperscript{188} Therefore, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."\textsuperscript{189} In addition, when there is a federal statute, it must be interpreted consistently with the principles of international law unless there is explicit evidence to the contrary.\textsuperscript{190}

Although the legislative history accompanying § 301 is silent on whether the statute explicitly was intended to supersede the principles of GATT, such an intention can fairly be inferred from the grant of unilateral retaliatory power to the President, and later, to the USTR.\textsuperscript{191}

Where there is an obvious conflict between a federal statute and international law, the courts have held that federal law supersedes.\textsuperscript{192} Federal law should not supersede GATT, however, because it is not in the United States' long-term interest to contravene GATT principles by a municipal law like § 301. There have been cases where the GATT panel held in favor of the United States, finding that a foreign country violated GATT, and the offending country ceased from the unfair practice based on the panel's finding.\textsuperscript{193}

Section 301 was created because Congress was not satisfied with
the way GATT protected tariff concessions against "unfair" trade practices. Nevertheless, the United States has been using the GATT dispute settlement procedure constantly, and has achieved the desired results in some cases. Moreover, the GATT dispute settlement mechanism has been used more actively in recent years than ever before. Under such circumstances, it is difficult to justify the reasons for legislating the new § 301, including Super 301, which are in direct conflict with GATT principles.

The government has been using the GATT dispute settlement procedure in a manner contrary to its fundamental principles because contracting parties are threatened with § 301 retaliation while negotiating with the United States. Fair negotiation between sovereign states is difficult to achieve under such a threat. It is contrary to the GATT principle of reciprocity to enter the negotiation with the leverage power given by § 301. The direct consultations with a trading partner under GATT, therefore, should be distinguished from the request for GATT consultation as a part of § 301 procedures, which includes identification under Super 301. The United States Government should not arbitrarily decide when to resort to the GATT dispute settlement mechanism while ignoring GATT's fundamental principles by imposing unilateral trade retaliation.

Although one can argue that GATT is merely a "general agreement" which does not have binding force like other formal treaties, during the course of GATT's 40 year history, many contracting parties have substantially complied with its provisions. Therefore, even if GATT is not recognized as a formal treaty under Article VI

195. See supra notes 175-82; see also Hudec, supra note 121, at 513 (noting that several successes in GATT cases occurred from 1969 to 1973).
198. See supra notes 140-63 and accompanying text.
199. See K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 335 (1970) (explaining that although GATT is merely a multilateral agreement, and not an organization, it has nevertheless been very successful over the years, due in part to creative institutional arrangements).
of the United States Constitution, the United States should comply with the fundamental principles of GATT that have developed into customary international law over time.\textsuperscript{200} The existence of customary international law is evidenced by "the general practice of States and the acceptance of the general practice as law,"\textsuperscript{201} the latter of which is referred to as \textit{opinio juris}.\textsuperscript{202} The GATT principles, particularly the most-favored-nation clause of Article I, have been the norm of international trade.\textsuperscript{203} In fact, international economic law has developed around GATT.\textsuperscript{204} Ninety-seven countries participate as contracting parties in GATT.\textsuperscript{205} Thus, it is fair to say that at least the basic principles of GATT have evolved into customary international law. Section 301, therefore, arguably violates customary international law, which the Supreme Court has determined binds the United States.\textsuperscript{206}

b. \textit{Law of Treaties Argument}.— The consultation mechanism of Articles XXII and XXIII of GATT\textsuperscript{207} provides dispute settlement procedures when contracting parties\textsuperscript{208} encounter matters relating to GATT.\textsuperscript{209} The disputes which § 301 has attempted to solve since 1974 squarely fall into the category of problems GATT addresses in Article XXIII.\textsuperscript{210} When a treaty containing a substantive obligation provides a dispute settlement provision, it arguably excludes the right to rely upon other methods.\textsuperscript{211} As a signatory of GATT, the United States should use GATT's dispute settlement procedure rather than resorting to unilateral retaliation as outlined in the new § 301.\textsuperscript{212} Article 26 of the Vienna Convention on the Law of Treaties...
ties codifies the doctrine of *pacta sunt servanda*, one of the most important principles of public international law. The Article requires that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” According to the Article’s legislative history, “the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*.”

Past practice shows that the United States is willing to impose extremely high discriminatory duties under § 301. Although, strictly speaking, GATT is not a treaty, the United States violated the standard of good faith by enacting Super 301 because Super 301 clearly opposes the fundamental GATT most-favored-nation clause. Furthermore, according to the interpretation of the USTR, violations of GATT itself are subject to violation-of-trade-agreement cases under § 301. Therefore, § 301 clearly ignores the dispute settlement mechanism contained in GATT Articles XXII and XXIII in cases where the United States’ rights under GATT are affected by another country’s allegedly “unfair” practices.

B. *Section 301 Violates Public International Limits of State Jurisdiction*

1. *Necessity of International Law Analysis*

Not only does § 301 violate GATT, it also violates fundamental international law governing state jurisdiction. Section 301’s primary purpose is to enforce the rights of the United States in international trade. Enforcing § 301 very often requires the foreign country subject to the statute to alter its trade policy. When that occurs, the United States is, thus, exercising enforcement jurisdiction to change

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217. *See supra* notes 66-102 and accompanying text; *infra* note 218.
218. For example, in the Japan Semiconductors case, the United States violated the most-favored-nation clause of Article I of GATT by imposing a one hundred percent tariff on certain products originating in Japan. *See GATT, supra* note 19, art I, para. 1, at 1-2; Japan Semiconductors, 52 Fed. Reg. 3,419 (1987) (determination).
219. Bello & Holmer, *Section 301, supra* note 46, at 635.
220. *See supra* notes 44-45 and accompanying text.
extraterritorial economic activities. Under public international law, a country must have prescriptive jurisdiction to enforce its jurisdiction over extraterritorial activities. To enforce § 301 actions, the United States must have jurisdiction to prescribe § 301. Without legitimate prescriptive jurisdiction, the USTR ambiguously imposes what it believes is appropriate trade policy on foreign governments.

Enforcement jurisdiction can be observed in the following § 301 cases: EC Citrus Tariff Preferences for Certain Mediterranean Countries (Docket No. 301-11), see TABLE OF CASES, supra note 53, at 3-4 (requiring the change of EC’s export policy); Canada Border Broadcasting (Docket No. 301-15), see id. at 7 (requiring a change in Canadian tax policy); Japan Semiconductors (Docket No. 301-48), see id. at 19-20 (requiring the change of the Japanese government’s procurement policy).

In order to take mandatory action, the USTR must find that the alleged foreign practice denies benefits to the United States under any trade agreement, 19 U.S.C. § 2411(a)(1)(B)(i) (1988), or is “unjustifiable,” id. § 2411(a)(1)(B)(ii). Under the statute, an “unjustifiable” practice is one in violation of the international legal rights of the United States, such as denial of national or most-favored-nation treatment. Id. § 2411(d)(4). Because the mandatory action is taken by application of trade agreements, the dispute is likely to involve interpretation of the trade agreement in question. It is questionable whether the USTR has the appropriate authority to interpret the agreement. For example, the interpretation of the GATT agreement is delegated to CONTRACTING PARTIES under Article XXIII. In such a case, the interpretive function should appropriately be given to the dispute settlement provision of the trade agreement. Since the USTR is a party directly involved in the dispute, a fair and impartial outcome cannot be guaranteed.

The “unreasonable” practice cases under which the USTR is authorized to take discretionary action are more troublesome. The USTR is authorized to take discretionary action when a foreign trade practice is either “unreasonable” or “discriminatory.” Id. § 2411(b). The statute provides a lengthy list of practices which are considered to be “unreasonable” and actionable under Super 301, but basically anything that the USTR finds “unfair and inequitable” is unreasonable. Id. § 2411(d)(3)(A). The new § 301 provides an extensive list of practices which the United States considers “unreasonable.” Id. § 2411(d)(3). Among others, the practice of export targeting is explicitly considered to be “unreasonable.” Although a targeting policy which amounts to subsidies prohibited under Article XVI of GATT would be in violation of GATT and consequently “unreasonable,” export targeting is generally accepted under GATT as a legitimate exercise of sovereign power in economic policy. See Note, supra note 58, at 489-92.

Another area focused on by the new § 301 is the area of workers’ rights. 19 U.S.C. § 2411(d)(3)(B)(iii) (1988). It is considered “unreasonable” for a foreign country to be engaged in a persistent pattern of conduct that denies workers the rights of association or of collective bargaining. Id. The practices subject to Super 301 action also include forced or compulsory labor, failure to provide a minimum age for the employment of children, or failure to provide standards for minimum wages, hours of work, and occupational safety and health of workers. Id. The legislative history indicates that Congress did not intend to apply these provisions to countries whose economies had not reached a level to consider these factors. H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 569, reprinted in 1988 CODE CONG. & ADMIN. NEWS 1547, 1602. From the viewpoint of foreign governments, it is unpredictable when the USTR will consider that collective bargaining rights should be granted to the workers of that country. However, workers’ rights are a matter for the sovereign state to decide. Although the
2. Jurisdictional Basis of § 301

a. Jurisdiction Based on the Effects Doctrine.— Unless the United States has legitimate prescriptive jurisdiction, it cannot enforce the new § 301, including Super 301 priority identification. The language of the new § 301 does not explicitly provide for prescriptive jurisdiction. However, jurisdiction is inferred through the "Effects Doctrine."226

The USTR may take mandatory action if the Trade Representative finds that "an act, policy, or practice of a foreign country ... violates, ... or otherwise denies benefits to the United States under, any trade agreement."226 Similarly, before it takes a discretionary action, the USTR must find that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or re-

| 224. | Restatement (Third), supra note 22, § 401 comment a. Professor Bowett summarizes the character of jurisdiction as follows: Jurisdiction is a manifestation of State sovereignty. It has been defined as "the capacity of a State under international law to prescribe or to enforce a rule of law." There is, of course, a necessary distinction to be drawn between prescriptive jurisdiction and enforcement jurisdiction. The former embraces those acts by a State, usually in legislative form, whereby the State asserts the right to characterize conduct as delictual. Examples would be the enactment of criminal, civil, commercial codes, or regulations governing tax or currency transactions. The latter embraces acts designed to enforce the prescriptive jurisdiction, either by way of administrative action such as arrest or seizure or by way of judicial action through the courts or even administrative agencies of a State. The relationship between the two kinds of jurisdiction is reasonably clear. There can be no enforcement jurisdiction unless there is prescriptive jurisdiction; yet there may be a prescriptive jurisdiction without the possibility of an enforcement jurisdiction, as, for example, where the accused is outside the territory of the prescribing State and not amenable to extradition. Thus, jurisdiction hinges, fundamentally, on the power to prescribe. . . .

225. See infra notes 228-35 and accompanying text.

stricts United States commerce.”\textsuperscript{227} The USTR is, thus, required to find effects of foreign trade practices within the territory of the United States; i.e., the denial of benefits and a burden or restriction on United States commerce. Both the United States judiciary\textsuperscript{228} and international law\textsuperscript{228} acknowledge that effects within a territory caused by actions outside the territory are sufficient to confer legitimate prescriptive jurisdiction.\textsuperscript{230} This is known as the “Effects Doctrine.”\textsuperscript{231}

b. Development of the Effects Doctrine.— The Effects Doctrine, first formulated in United States v. Aluminum Co. of America (Alcoa),\textsuperscript{232} enabled the United States to apply its antitrust laws to an anticompetitive agreement made outside the territory of the United States. The Doctrine grants jurisdiction even though the individuals are not subject to personal jurisdiction in the United States.\textsuperscript{233} Departing from the traditional application of objective territorial principle jurisdiction,\textsuperscript{234} the Alcoa Effects Doctrine required that in order for the United States to exercise jurisdiction, the acts involved must have: (1) been clearly unlawful, had they been performed within the

\begin{itemize}
\item \textsuperscript{227} Id. § 2411(b)(1) (emphasis added).
\item \textsuperscript{228} See United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). Judge Learned Hand formulated the Effect Doctrine in applying the antitrust law of the United States to “the conduct outside the United States of persons not in allegiance to it.” Id. at 443. Judge Hand stated that “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” Id.; see also Restatement (Third), supra note 22, § 402 (explaining that “[s]ubject to § 403, a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.”).
\item \textsuperscript{229} Bowett, supra note 20, at 7; see The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (holding that Turkey could try a French seaman for acts committed in international waters where a collision that occurred killed a Turkish citizen).
\item \textsuperscript{230} Under international law, the bases for jurisdiction to prescribe are found in (1) the territorial principle, (2) the nationality (or personality) principle, (3) the protective principle, and (4) the universality principle. Bowett, supra note 20, at 4-14.
\item \textsuperscript{232} 148 F.2d 416 (2d Cir. 1945); see sources cited supra note 231.
\item \textsuperscript{233} Alcoa, 148 F.2d at 443 (holding that Congress intended to impose liability under the Sherman Act to conduct outside the United States' personal jurisdiction as long as such conduct has consequences within U.S. borders).
\item \textsuperscript{234} Norton, supra note 231, at 579 (defining the objective territorial principle as the jurisdiction based on “an offense commenced outside the [country] but consummated within its territory.”).
\end{itemize}
United States; (2) materially affected the foreign trade or commerce of the United States; and (3) been intended to affect commerce in the United States.235

Since Alcoa, the Effects Doctrine has been used in numerous cases, but its application has been somewhat varied.236 Shortly after Alcoa, some courts applied the Effects Doctrine so that a mere finding of actual effects, regardless of their magnitude was adequate to apply United States antitrust laws extraterritorially.237 However, the Restatement (Second) of Foreign Relations Law required that the effect must be substantial.238 Similarly, in extraterritorial application of United States securities law, the Effects Doctrine was used several times to justify application of the law.239

In Timberlane Lumber Co. v. Bank of America,240 Judge Choy of the Ninth Circuit provided a new formula for the Effects Doctrine. In addition to requiring intended and substantial effects within the country exercising jurisdiction, Timberlane held explicitly, for the first time, that it is necessary to consider the interests of the other countries involved.241 Under the Timberlane test, the country exercising its prescriptive jurisdiction must find (1) an actual or intended effect within its territory; (2) an actual violation of law; and (3) sufficiently strong linkage with the activity subject to its extrater-

235. Alcoa, 148 F.2d at 444.
236. See Norton, supra note 231, at 580-82, 588-90 (discussing different applications of the Effects Doctrine).
238. Restatement (Second) of Foreign Relations Law § 18 (1965) [hereinafter Restatement (Second)]. This section provides the general formula of the Effects Doctrine as follows:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . .

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id. (emphasis added).
239. See Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).
240. 549 F.2d 597 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1985).
241. Id. at 613. Timberlane notes that other courts have also considered the interests of foreign countries in an implicit manner. Id. at 612.
ritorial jurisdiction.242

The Timberlane approach is reflected in the Restatement (Third) of Foreign Relations Law by the principle of reasonableness.243 Rather than setting out the elements of the Effects Doctrine, as did the Restatement (Second),244 the Restatement (Third) only

242. Id. at 613; see also Norton, supra note 231, at 588. Joseph Norton sets out the Timberlane test as follows:
(i) Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?
(ii) Is the alleged restraint of such a type and magnitude so as to be cognisable as a violation of United States antitrust laws?
(iii) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States, be asserted to cover it?
Norton, supra note 231, at 588.

243. Restatement (Third), supra note 22, § 403. This section, entitled “Limitation on Jurisdiction to Prescribe,” provides that:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if the state’s interest is clearly greater.

Id.

244. Restatement (Second), supra note 238, § 18. This section is reprinted at supra note 238.
provides that "[s]ubject to § 403, a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." The Restatement (Third) then relies on the principle of reasonableness reflected in § 403 to determine the outer limit of United States extraterritorial jurisdiction.

The heart of the Restatement approach is, thus, the balancing of interests of international comity. The new § 301 must also be examined from that perspective. When there is concurrent jurisdiction between the United States and the country allegedly engaged in an unfair trade practice, the issue is which country has a stronger link to and a greater interest in the activity subject to § 301 investigation. If the United States and a sovereign country are economically interdependent, the country's trade is likely to have "effects" within the United States and these effects may adversely impact certain industries in the United States. However, the effects alone do not justify the exercise of prescriptive jurisdiction under the Restatement approach. This is a trade policy concern of a sovereign country or of an international governmental organization. Even under the Effects Doctrine, the United States must exercise its jurisdiction within the limits permitted under international law.

3. Solutions to Concurrent Jurisdiction
   a. Examination of § 301 Under the Restatement Approach.—Under current state law the following test determines whether extraterritorial assertion of United States jurisdiction is justified:

   (1) Whether there is an actual or intended effect on American commerce caused by the activity originated in the foreign territory;

245. Restatement (Third), supra note 22, § 402(1)(a).
246. See id.
247. See supra notes 63-102. The countries under § 301 investigation also had at least as much interest as the United States with respect to the act, policy or practice involved. That is why most of these countries entered vigorous bilateral or multilateral negotiations. According to the Table of Cases, supra note 53, about 50% of the cases involved these types of negotiations.
248. See supra note 246 and accompanying text.
249. See Table of Cases, supra note 53 (showing that the subject of § 301 investigations are sovereign states).
250. Id. (showing that some § 301 investigations are targeted toward the European Community).
251. See Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976),
(2) Whether the effect is substantial within the United States;\textsuperscript{252} and

(3) Whether the United States' interests are "sufficiently strong vis-à-vis those of other nations" involved so that it is reasonable for the United States to assert prescriptive jurisdiction.\textsuperscript{253}

Before § 301 will apply, the USTR must find that a foreign trade practice denies the United States certain rights,\textsuperscript{254} and thus the section is only applicable if that trade practice has an effect upon the foreign commerce of the United States.\textsuperscript{255} The first element, therefore, is met under § 301. In addition, the magnitude of the effect within the United States is deemed substantial since the United States' trade deficit grew to over 150 billion dollars per year in 1987, the year before the 1988 Trade Act was enacted.\textsuperscript{256} Thus, the second element is met.

The real test, therefore, will focus on the third prong; that is, whether the interests of the United States are strong enough, vis-à-vis those of other nations, so that it is reasonable for the United States to assert prescriptive jurisdiction. Section 403 of the Restatement (Third) of Foreign Relations Law considers eight factors in determining the reasonableness of the exercise of jurisdiction.\textsuperscript{257} The factors set out in § 403 are by no means exhaustive,\textsuperscript{258} nor clear cut; however, such vagueness reflects the difficulty in determining which country's trade interests actually override in a situation of concurrent jurisdiction.\textsuperscript{259} Section 403(2)(a) of the Restatement relies on

\footnotesize{\textsuperscript{Certificate denied, 472 U.S. 1032 (1985). This is the first prong of the Timberlane test. \textit{Id.}}

\footnotesize{\textsuperscript{252} \textit{See Timberlane}, 549 F.2d at 613. This second prong of the Timberlane test is formulated so as to question whether the activity is sufficient to invoke the federal statute. \textit{Id.} However, in cases questioning whether the United States has power to enact a statute which purports to regulate a foreign act, policy or practice, the question must be formulated to determine the magnitude of the effect.}

\footnotesize{\textsuperscript{253} \textit{Id.} The Timberlane court specified that this element is only applicable where the dispute involves an international setting. \textit{Id.} This element is always present when determining the reasonableness of extraterritorial jurisdiction. \textit{See id.}}

\footnotesize{\textsuperscript{254} 19 U.S.C. § 2411(a) (1988). This section is reprinted in \textit{supra} note 107.}

\footnotesize{\textsuperscript{255} \textit{See supra} notes 226-27 and accompanying text.}

\footnotesize{\textsuperscript{256} \textit{See supra} note 64 (noting the trade surplus and deficit of the United States since 1970). In the case of Super 301, the priority countries and practices are determined according to the statistical data of the NTE Report. \textit{See} 19 U.S.C. §§ 2241, 2420 (1988). The substantiability of the effect is, therefore, guaranteed in statistics.}

\footnotesize{\textsuperscript{257} \textit{Restatement} (Third), \textit{supra} note 22, § 403(2)(a)-(h); \textit{see supra} note 243. For a discussion of these factors, see \textit{infra} notes 258-75 and accompanying text.}

\footnotesize{\textsuperscript{258} \textit{Id.} § 403 comment b.}

\footnotesize{\textsuperscript{259} It is the position of some United States courts that international comity is not
the Timberlane test, examining the linkage between the regulating state and the extraterritorial activity in terms of the magnitude of the effect.\textsuperscript{260} Section 403(2)(b) and (c) of the Restatement considers the extent to which the countries involved have interests in the questioned activity.\textsuperscript{261}

Section 403(2)(d) considers the "existence of justified expectations that might be protected or hurt by the regulation."\textsuperscript{262} Foreign governments engaged in economic or trade policy do not expect unilateral retaliation by the United States especially where GATT provides the dispute resolution mechanism.\textsuperscript{263}

Section 403(2)(e) and (f) of the Restatement (Third) further considers the importance and the consistency of the regulation under an international system.\textsuperscript{264} The expectation of foreign governments is further curtailed under the USTR's authority in the new § 301.\textsuperscript{265} The USTR considers the impact of the foreign practice, basing its decision substantially on the NTE Report as provided in Super 301.\textsuperscript{266} However, "even though the effect may be substantial in the U.S., it may be far more substantial abroad."\textsuperscript{267} Should the USTR be permitted to act under Super 301, merely because there is a substantial effect within its territory, regardless of the effect of retaliation in the country where Super 301 is invoked?

In "unfair" trade practice cases before GATT, GATT's ability to make necessary judgments has been questioned.\textsuperscript{268} Inevitably, the alleged "unfair" trade practice will involve "some nontrade reason for the trade-restricting local regulation."\textsuperscript{269} Although GATT has to judge whether the nontrade reason is sufficient to justify the alleged

merely a matter of "discretion and courtesy" but reflects a "sense of obligation among states."\textsuperscript{Id.} § 403 comment a.

\textsuperscript{260} See id. § 403(2)(a); supra notes 243-45 and accompanying text.

\textsuperscript{261} See Restatement (Third), supra note 22, § 403(2)(b)-(c); supra note 243.

\textsuperscript{262} Restatement (Third), supra note 22, § 403(2)(d); see supra note 243.

\textsuperscript{263} See supra notes 154-85 and accompanying text (discussing the GATT dispute resolution mechanism and cases which utilized such a procedure).

\textsuperscript{264} See Restatement (Third), supra note 22, § 403(2)(e)-(f); supra note 243.

\textsuperscript{265} A country does not have enforcement jurisdiction when it lacks prescriptive jurisdiction, Bowett, supra note 20, at 1, but the enforcement aspect of the new § 301 makes it more difficult to justify the prescriptive jurisdiction of the United States.

\textsuperscript{266} See 19 U.S.C. § 2411(c) (1988) (setting forth the scope of the USTR's authority to take action); id. § 2420 (requiring the USTR to take into account the NTE Report which must be made each year pursuant to 19 U.S.C. § 2241 (1988)).

\textsuperscript{267} Bowett, supra note 20, at 20.

\textsuperscript{268} See Hudec, supra note 121, at 502.

\textsuperscript{269} Id.
practice, 270 "GATT cannot second-guess national governments unless the community feels strongly that its judgment is legitimate." 271

Despite these shortcomings, there is no guarantee that the USTR's ability to evaluate another state's governmental policy is any better than GATT's ability. However, GATT compensates for its weaknesses by strongly encouraging parties to settle their disputes through direct consultation, rather than by GATT panel recommendation. 272 This explains why, until 1985, the President was reluctant to act under § 301. He preferred that decisions be made from a broader perspective which evaluated the overall impact of the § 301 action. 273 Super 301 took this discretion away from the USTR, and thereby made it more difficult to justify jurisdiction based on the Effects Doctrine. Furthermore, § 301 imposes unilateral retaliation by the United States without balancing the competing interests as required under § 403 of the Restatement (Third).

Section 403(2)(g) and (h) considers the extent of another country's interest. 274 Section 301 attempts to regulate the foreign "act, policy or practice" itself. 275 It is arguable that the foreign government's interest in its own act, policy or practice cannot be less than the interest of the United States despite the effect within the United States. Considering all of the factors enumerated in § 403 of the Restatement (Third), it is reasonable to conclude that the interests of foreign governments exceed those of the United States even though the United States has justifiable interests in the matter.

When more than one country has a reasonable basis of jurisdiction, § 403(3) of the Restatement (Third) provides that a "state should defer to the other state if that state's interest is clearly greater." 276 Therefore, in a situation where an unfair trade practice involves a foreign government's act, policy or practice, the United States should defer to the other state because the statute directly challenges the other state's foreign policy. The United States is not left without a remedy when it defers to the foreign government because the GATT system provides the alternative dispute settlement mechanism with which the other government should comply. 277

270. See GATT, supra note 19, art. XXIII, at 55-57; supra note 165.
272. See supra notes 168-74 and accompanying text.
273. See supra notes 51-62 and accompanying text.
274. Restatement (Third), supra note 22, § 403(2)(g)-(h); supra note 243.
276. Restatement (Third), supra note 22, § 403(3); supra note 243.
277. See supra notes 164-74 and accompanying text.
Based upon these considerations, § 301 cannot be justified because the United States lacks legitimate prescriptive jurisdiction.

b. The Limitation of the Balancing Interest Approach Under the Restatement.—Section 301 cannot be justified under the rule of reasonableness adopted by the Restatement, which relied on the Timberlane decision.\textsuperscript{276} Foreign countries criticize this approach, which requires self-restraint in the assertion of extraterritorial jurisdiction, because it merely proves the lack of international standards regulating such jurisdiction.\textsuperscript{279} These critics point out that it is inherently difficult for a forum state to balance the interests of countries which assert concurrent jurisdiction.\textsuperscript{280} Professor Bowett suggests that the balancing of interests cannot be achieved by legislation;\textsuperscript{281} instead, it must be achieved by either judicial intervention or through negotiations. In the case of trade disputes, which are often very political,\textsuperscript{282} problems should be solved through negotiations as provided for in GATT.\textsuperscript{283} Instead of exercising unilateral jurisdiction under § 301, the United States should resort to the GATT dispute settlement mechanism. For all of the foregoing reasons, § 301 should be repealed.

IV. CONCLUSION

Although Super 301 presents numerous problems under international law,\textsuperscript{284} Congress has consistently expressed its willingness to impose "a credible threat of retaliation whenever a foreign nation treats the commerce of the United States unfairly . . . whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade."\textsuperscript{285} However, since the United States is bound by the rules of international law,\textsuperscript{286} the integrity of its legal system is undermined by enacting a statute which clearly violates the princi-

\begin{itemize}
\item \textsuperscript{276} See supra notes 240-76 and accompanying text.
\item \textsuperscript{279} See, e.g., Bowett, supra note 20, at 21; S. YAMAMOTO, KOKUSAI-HO [INTERNATIONAL LAW] 206-07 (1985).
\item \textsuperscript{280} See Bowett, supra note 20, at 20-25.
\item \textsuperscript{281} Id. at 25.
\item \textsuperscript{282} See generally Eichmann & Horlick, Political Questions in International Trade: Judicial Review of Section 301?, 10 Mich. J. Int'l L. 735 (1989) (concluding that judicial review of § 301 actions is a distinct possibility).
\item \textsuperscript{283} Bowett, supra note 20, at 25.
\item \textsuperscript{284} See supra notes 140-283 and accompanying text.
\item \textsuperscript{286} See supra notes 186-206, 220-23 and accompanying text.
\end{itemize}
This is especially true where the United States lacks jurisdiction to prescribe. Super 301 should, therefore, be repealed and the United States government should concentrate its efforts on both bilateral and multilateral negotiation in order to solve trade disputes.

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287. See supra notes 140-53 and accompanying text.
288. See supra notes 224-25, 247-77 and accompanying text.
289. The original mechanism of § 301 may remain to the extent that it allows the U.S. Government to collect information from private industries which indicates where the government should focus its trade negotiation efforts. See Comment, supra note 153, at 499 n.50.