Section 301 and U.S. Trade Law: The Limited Impact of the 1988 Omnibus Trade and Competitiveness Act on American Obligations under GATT

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INTRODUCTION

A. Overview

In 1988, President Reagan signed the Omnibus Trade and Competitiveness Act (OTCA), a broad set of trade laws overlying a sizable preexisting legal framework which included Section 301 of the Trade Act of 1974.1 The OTCA changed some U.S. trade law provisions while leaving other areas undisturbed. Foreign trading partners reacted sharply to the passage and implementation of the OTCA, arguing that it conflicted with American obligations under the General Agreement on Tariffs and Trade (GATT).2 Although no trading partner has formally challenged the OTCA under GATT thus far, the potential for conflict exists.

This Comment will briefly summarize GATT and Section 301 before turning to the principal question of whether the unilateral retaliatory provisions the OTCA adds to Section 301 conflict with American obligations under the GATT accord. The analysis will cover potential GATT challenges to Section 301, U.S. legal options, and strategic ramifications.

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2. General Agreement on Tariffs and Trade, Oct 30, 1947, 61 Stat pts 5-6, TIAS No 1700 (“GATT”).
B. Background on GATT

1. GATT Origin, History, and Importance

The United States and 21 other nations signed the GATT accords in 1946 as a temporary measure to stabilize global trade in the aftermath of World War II.³ No one expected GATT to become a permanent agreement, much less an organization.⁴ Instead, GATT’s creators established a parental body, the International Trade Organization (ITO), to assume a broad range of duties that included the enforcement of GATT until a permanent legal structure could be established.⁵ GATT soon became permanent by default, however, when the ITO collapsed for lack of U.S. Senate ratification.⁶ Through necessity, GATT has since become an unofficial international organization⁷ employing a staff of roughly 200 professionals.⁸ GATT has also become the primary multilateral agreement on trade in goods in the Western world.⁹

2. General GATT Principles

The GATT accords¹⁰ have one main goal: promoting world trade. GATT’s central tenet for promoting trade is a “most-favored-nation” (MFN) clause in Article I which imposes one fundamental requirement for customs duties and charges on imports and exports:

any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.¹¹

⁴. Id at 396.
⁵. Id at 397.
¹⁰. See Jackson & Davey at 296 (cited in note 7). GATT is not one agreement but is instead a patchwork of many separate agreements.
¹¹. GATT, Art I (cited in note 2).
GATT contains other articles specifying additional requirements and goals for member nations, some of which will be discussed below.

3. Dispute Resolution Mechanisms Under GATT

Instead of employing one mechanism for settling disputes, GATT has developed more than 30 separate procedures which depend upon the type of trade affected. These procedures involve varying degrees of formality. Some are complex while others stipulate little more than that the parties involved should meet and attempt to settle their differences. Some involve creating GATT panels that make "interpretations" of GATT articles or issue reports. GATT rules do not clearly determine the extent to which a GATT panel interpretation binds a nation, and the issue has never been forced.

When GATT does take action, the primary sanction available is the retaliatory suspension of trade obligations toward an offending party. This retaliation almost always operates on an unofficial basis, however. GATT has approved "formal retaliation" only once and chose a tariff-related penalty.

C. Summary of U.S. Trade Law and Section 301

1. Origin, History, and Importance of Section 301

The U.S. government has long regulated foreign trade. The first substantive bill to pass Congress in 1789 involved foreign trade; it erected tariff barriers as high as 50% on some items to preserve American independence. Throughout most of American history, Congress largely controlled trade policy, but Franklin Roosevelt caused a significant shift

13. Id at 335.
14. Id at 313.
15. Id.
16. Id at 334.
17. The Netherlands had complained about U.S. cheese import restrictions, and GATT allowed the Netherlands to withdraw trade concessions of equivalent value. Robert E. Hudec, Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment, 59 Minn L Rev 461, 505-07 (1975). GATT occasionally allows withdrawal or suspension of concessions for reasons unrelated to retaliation, and GATT members sometimes resort to these measures as a means of "informal" retaliation. See notes 109-119 and accompanying text discussing Article XIX of GATT and "emergency" protection for troubled industries.
toward stronger presidential authority during the Great Depression. Roosevelt secured presidential power to negotiate tariff-cutting agreements and extend MFN status to trading partners without consulting Congress. For a time, international trade came largely under presidential control.

Congress began to reassert power in the 1960s, however, when legislators started to complain that presidents were doing little to stop foreign trading partners from harming American interests. In 1962, Congress passed Section 252(c) of the Trade Expansion Act of 1962, a provision which allowed the president to suspend trade benefits accorded to any nation whose import restrictions "directly or indirectly substantially burden U.S. commerce." Congress then turned to GATT but questioned GATT's ability to stay neutral and ensure prompt action on U.S. complaints involving proliferating bilateral and free trade agreements. As a result, Congress reacted to these concerns by creating Section 301 as part of the Trade Act of 1974.

Section 301 has consistently generated more complaints among foreign trading partners than any other area of U.S. trade law. It established formal mechanisms to coordinate the governmental and private sectors toward the common goal of promoting U.S. exports. Although U.S. citi-

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21. Id at 655. See also Cooper, Trade Policy and Foreign Policy: U.S. Trade Policies in a Changing World Economy (1987) for discussion on the Hawley-Smoot (or Smoot-Hawley) Tariff Act of 1930:

The most disastrous single mistake any American president has made in international relations was Herbert Hoover's signing of the Hawley-Smoot Tariff Act into law in June 1930. The sharp increase in American tariffs, the apparent indifference of the U.S. authorities to the implications of their actions for foreigners, and the foreign retaliation that quickly followed, as threatened, helped convert what would have been otherwise a normal economic downturn into a major world depression. The sharp decline in foreign trade and economic activity in turn undermined the position of the moderates with respect to nationalists in Japanese politics and paved the way for the electoral victory of the Nazis in Germany in 1932. Japan promptly invaded China in 1931, and the basis for the Second World War was laid.


23. See id at 654-57.


25. Hudec, 59 Minn L Rev at 513-14 (cited in note 17). From 1969 to 1973, although the U.S. successfully took several complaints to GATT, many legislators believed that American success in GATT owed more to American forcefulness than to GATT's dispute-solving machinery. Many legislators today suspect that some GATT members are quietly satisfied with broad GATT language that encourages the avoidance of responsibility. See also Jackson & Davey at 298 (cited in note 7): "It has been said that GATT is 'riddled with exceptions,' and that 'a lawyer could drive a four-horse team through any obligation that anybody had.'"


zens cannot compel the removal of trade barriers in foreign markets.\textsuperscript{28} Section 301 requires the U.S. government to attempt to open foreign markets where appropriate.\textsuperscript{29} "Section 301 allows U.S. parties to attack, in the United States, the acts, policies, or practices of foreign governments or their instrumentalities that adversely affect U.S. commerce including, but not limited to, barriers to U.S. export commerce."\textsuperscript{30} As discussed below, when the U.S. government chooses to apply a remedy, Section 301 offers a number of options.\textsuperscript{31}

The first version of Section 301 contained provocative language that Congress watered down in later versions.\textsuperscript{32} However, Section 301 has remained ambiguous as to whether or to what extent it authorizes the U.S. to violate GATT.\textsuperscript{33} Congress contemplated but ultimately rejected a requirement that the president consider U.S. international obligations before taking Section 301 actions against foreign trading partners.\textsuperscript{34} However, Section 301 as enacted in 1974 contained no explicit language sanctioning conflict with the principles of GATT.\textsuperscript{35}

Whether Congress and the president will maintain the GATT-consistency of Section 301 is an open question. Presidential restraint in the use of Section 301 has been the most significant factor thus far in preventing significant clashes between GATT and Section 301.\textsuperscript{36} The actual use of Section 301 as a tool has been less significant than its potential application. As Holmer & Bello explain:

Unilateral action—retaliation—was never conceived as the objective of Section 301; rather, the credible threat of retaliation was intended to serve as a stick that, in combination with the

\textsuperscript{29} Id at 579.
\textsuperscript{30} Id at 573, citing 19 USC § 2411 (Supp 1980).
\textsuperscript{31} See notes 44-51 and accompanying text.
\textsuperscript{32} For example, both houses of Congress considered granting authority to the president to violate several GATT articles when faced with "unreasonable" foreign import restrictions. "Many GATT articles, such as Article I (MFN principle), Article III (taxes after importing), Article XII (balance of payments safeguards), or Article XXIV (regional trade associations) are either inappropriate in today's economic world or are being observed more often in the breach. . . ." Hudec, 59 Minn L Rev at 517 (cited in note 17) (quoting S Rep No 93-1298, 93d Cong, 2d Sess 162 (1974)).
\textsuperscript{33} Id at 516-17.
\textsuperscript{34} Id at 516.
\textsuperscript{35} Id at 516.
\textsuperscript{36} Id at 517.
carrot of an open U.S. trade market, could pry open foreign markets and thus further liberalize trade.  

2. Substantive Requirements of a Section 301 Petition

Although either the U.S. Trade Representative (USTR) or private parties may initiate Section 301 actions, most actions stem from petitions made by private parties. Petitioning parties must prove (1) proper subject matter jurisdiction for the USTR; (2) proper standing as interested parties; (3) injury resulting from the foreign trade practice; and (4) a substantive violation of Section 301. Jurisdiction, standing, and injury are generally easy hurdles; the real test in most cases is whether a party can show a substantive violation of Section 301.

Petitioners can establish a substantive violation of Section 301 by showing foreign government conduct which violates international agreements or is discriminatory, unjustifiable, or unreasonable. Section 301 complaints against violations of international agreements, by definition, cannot be inconsistent with GATT. Because Section 301 and GATT employ similar definitions of “discrimination,” U.S. allegations of discrimination under Section 301 are unlikely to conflict with GATT. For the same reason, Section 301 complaints against practices deemed “unjust-

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38. Comment, 81 Nw U L Rev at 501 (cited in note 21). See also Holmer & Bello, 23 Intl Law at 529-30 (cited in note 37). Self-initiation of investigations was unprecedented until President Reagan and the USTR began the practice in 1985. See also Marco C.E.J. Bronckers, Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community, and United States Law 185 (1985) (“Selective Safeguard Measures”). The rationale for allowing the USTR to initiate investigations was that U.S. businesses needed to be able to complain about foreign government practices without incurring the wrath of those governments and that the USTR could thus act as a buffer. Bronckers suggests, however, that foreign governments are generally aware of the sources of most complaints in any case.  
40. Id at 500-502. Section 301 has subject matter jurisdiction over a wide range of restrictive foreign governmental practices concerning goods and services. For example, Section 301 petition targets have included rice, silk, leather, cigars, tobacco products, steel, semiconductors, and restrictions on foreign attorneys. Likewise, the requirement of proper standing presents few obstacles for most parties. The required showing of injury also contains a broad stipulation that a cause of action exists if a foreign practice burdens U.S. commerce. As of 1987, no Section 301 complaint had ever been dismissed for insufficient showing of injury. Id at 502. See also Fisher & Steinhardt, 14 L & Policy Intl Bus at 630-31 (cited in note 28) (comparing the “injury” test of Section 301 with other U.S. trade statutes and concluding that the test under Section 301 is more easily satisfied).  
41. 19 USC § 2411(a) (Supp 1986).  
42. Nevertheless, conflict with GATT could arise. See Fisher & Steinhardt, 14 L & Policy Intl Bus at 600 (cited in note 28) (commenting on the uncertain definition of discrimination under U.S. trade law: “[R]estrictions which uniquely discriminate against U.S. exports are


"unjustifiable" are also unlikely to conflict with GATT. Ultimately, Section 301 complaints against allegedly "unreasonable" practices are the most likely source of conflict with GATT, a matter discussed below.

3. Remedies under Section 301

The president has broad powers and options under Section 301. The president can unilaterally suspend United States trade concessions or impose duties or other restrictions on the products or services of offending nations. The president can also employ "any diplomatic, political, or economic leverage" available. The president can act on a nondiscriminatory, industry-specific basis or may target specific countries. Generally, however, U.S. presidents have refrained from taking drastic action:

In operation . . . Section 301 is likely to be more disappointing to petitioners than internationalists. Frequently, the retaliation chosen by the president will be nothing more than multilateral consultations under the auspices of the most relevant trade organizations.

Private parties with trade grievances will often ignore Section 301 and resort to other U.S. statutes that supply remedies for specific trade problems. A U.S. petitioner with a patent or trademark grievance, for example, might employ a specific provision for that area. Some U.S. trade statutes, such as those relating to intellectual property, anti-dumping or countervailing duties, partly overlap with Section 301. Typi-

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43. The Senate Finance Committee Report accompanying the Trade Agreements Act of 1979 defined "unjustifiable" to mean any restriction "inconsistent" with international agreements. Id at 597 (citing S Rep No 249, 96th Cong, 1st Sess 4 (1979), reprinted in (1979) USCCAN 390). Hudec, 59 Minn L Rev at 518 (cited in note 17), states more categorically that "unjustifiable" is defined in GATT and cannot create a legal conflict with Section 301.


45. Id.

46. Id.

47. Id at 690.

48. See id at 629-30 (discussing Section 337 of the Trade and Tariff Act of 1930, 19 USC § 1337(a) (1976), which broadly outlaws "unfair trade practices" and generally targets intellectual property issues. See also Comment, 81 NW U L REV at 507-08 (cited in note 24).

49. Countervailing duty laws tax imports deemed to have been improperly subsidized by foreign governments.

50. Private parties may prefer Section 301 for other reasons. See, for example, Selective Safeguard Measures at 203 (cited in note 38): "Section 301 appears to have a lower admissibility threshold, compared to the countervailing duty, anti-dumping, and escape clause remedies." Additionally, a Section 301 claimant need not show industry-wide injury.
cally, U.S. statutory remedies mirror those available under international accords.  

4. Legislative History of the 1988 OTCA

The Omnibus Trade & Competitiveness Act of 1988 (OTCA),\(^\text{52}\) conceived in 1985, went through extensive hearings and numerous House and Senate versions before passage in 1988.\(^\text{53}\) Holmer & Bello observe that “the conference appointed to produce a trade bill may have been the largest, most complicated legislative effort ever undertaken.”\(^\text{54}\) Congress assigned nearly 200 members of the Senate and House to seventeen separate subconferences.\(^\text{55}\) The compromise bill that emerged in 1988, more than 1000 pages in length, was heralded as “unprecedented in scope and scale.”\(^\text{56}\)

Congress aimed the OTCA largely at adjustment rather than outright protectionism.\(^\text{57}\) For example, the OTCA allocated nearly $1 billion to help dislocated workers.\(^\text{58}\) Congress ultimately resisted the temptation to enact a number of aggressive provisions. Congress also refrained from allowing easy access to Section 201, a provision discussed below which allows emergency trade barriers for seriously troubled U.S. industries. Congress further refrained from enacting a particularly powerful antidumping provision.\(^\text{59}\)

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51. See, for example, Comment, 81 Nw U L Rev at 512 (cited in note 24), citing Office of Intl Sector, Dept of Commerce, An Examination of the Adequacy of U.S. Trade Laws as They Affect the Competitiveness of High Technology Industries 37 18 (1983), stating that U.S. countervailing duties are in compliance with the International Subsidies Code. Additionally, Section 201 under 19 USC § 2251 offers an emergency escape option similar to Article XIX of GATT which will be discussed below.


56. Aho, 22 Cornell Intl L J at 26 (cited in note 8).


58. Id.

59. Id at 660-61. Birenbaum discusses the movement of the OTCA toward moderation in scope and detail. In 1985 and 1986, the trade bill looked certain to be aggressive, and bills passed by Congress were denounced by President Reagan as “Sons of Smoot-Hawley” or “Rambo-esque.” Several factors helped to water down the final version, however: the fall of the dollar, more aggressive use of Section 301 by the executive branch, and a number of influential figures renewing a call for multilateral cooperation through GATT. Finally, the 1987 stock market crash helped to prevent the OTCA from becoming a more protectionist bill. “It caused Congress
The OTCA broadly overhauls a range of U.S. trade provisions including Sections 301 and 201, revising some areas and leaving others unchanged. The OTCA continues the singular focus of Section 301 on the opening of markets for U.S. exports. Mostly, the OTCA expresses legislative frustration over trade problems while carefully refraining from upsetting established balances. For example, the USTR receives a symbolic transfer of power, but ultimate authority remains with the president. The OTCA prods the president to act more decisively on trade problems under Section 301 but leaves the president with final discretion. Although the OTCA may appear at first glance sometimes to require mandatory retaliation under Section 301, the president retains the power to halt the process.

I. GATT Challenges to Section 301

Foreign trading partners can attempt to challenge the GATT- legality of Section 301 on two grounds, both of which predate the OTCA. First, a trading partner can allege that Section 301 violates the multilateral principles of the GATT accords. Second, a trading partner can charge that Section 301 is discriminatory. Here, a trading partner can allege that Section 301 discriminates against "open" countries, i.e., countries that allow the gathering of information essential for a Section 301 investigation and complaint. Alternatively, a trading partner can allege that political or
other factors cause Section 301 investigations to discriminate among nations that allow an open flow of information.65

A. Does Section 301 Violate the GATT Principle of Multilateralism?

1. The Meaning of Multilateralism

Although GATT's articles do not define "multilateralism" or set out minimum requirements for compliance, the principle of multilateralism is central to the GATT accords. Multilateralism presumes that GATT members will take trade grievances to GATT or to some other appropriate international body. It also presumes that members will refrain from entering into bilateral or multilateral agreements that exclude other members and will refrain from taking unilateral retaliatory actions.

In reality, most GATT members do not have exemplary multilateral records. Multilateralism remains viable, however, because no country wants to oppose a united GATT body. Countries thus have an incentive to make their laws follow the GATT accords.

Although the OTCA changes to Section 301 have generated new informal complaints,66 Section 301 has always provoked criticism from trading partners.67 Although informal reaction is not conclusive, it is relevant in assessing the GATT-consistency of Section 301 because foreign trading partners will be the judges should GATT litigation occur. In formal terms, Section 301 has a spotless record: no GATT panel has ever declared that any part of the statute violated the multilateral tenets of the GATT accords.68 The analysis below will focus on whether the OTCA amendments to Section 301 are likely to result in a formal GATT censure of U.S. trade policy.

65. Foreign trading partners might also challenge Section 301 in forums outside of GATT. The U.S. has signed a number of international treaties and agreements imposing obligations upon the U.S. See generally Fisher & Steinhardt, 14 L & Policy Intl Bus at 569 (cited in note 28). Additionally, if the U.S. were to enter a period where a moderate Congress found itself restraining a protectionist president, foreign trading partners might be able to obtain judicial review of retaliatory actions taken under Section 301. See generally Erwin P. Eichmann and Gary N. Horlick, Political Questions in International Trade: Judicial Review of Section 301? 10 Mich J Intl L 735 (1989).

66. India, Japan, and members of the European Community have separately threatened to take Section 301 to GATT. See Dick K. Nanto, Japan's Response to the Omnibus Trade Act, 1989 BYU L Rev 517.

67. See, for example, Selective Safeguard Measures at 168 (cited in note 38). U.S. trading partners, notably members of the European Community, complained bitterly when Section 301 was first created in 1974.

68. GATT has resorted to formal retaliation on only one occasion; Section 301 did not exist at the time.
2. *Moderate Language and Action Under the OTCA*

In several key areas, the OTCA has retained or improved the GATT-consistency of Section 301. First, Congress preserved presidential authority to negotiate directly with trading partners. Second, Congress rejected amendments that would have occasionally called for mandatory retaliation. Third, Congress refrained from passing several other provisions that might have threatened the GATT-consistency of the OTCA. Finally, and significantly, the executive branch has exercised restraint in applying Section 301.

The first principal feature of the OTCA, the renewal of presidential "fast-track" authority to negotiate and conclude trade agreements,\(^69\) is sufficiently important that Holmer & Bello termed it the "centerpiece" of the OTCA.\(^70\) "Fast-track" authority, first granted in the Trade Act of 1974,\(^71\) enhances the U.S. commitment to multilateralism by helping to reduce the frustrations foreign nations face in negotiating with the American system of divided governmental authority. Before 1974, Congress sometimes unraveled agreements worked out at length between the executive branch and foreign trading partners. Fast track authority makes congressional approval both more rapid and more likely.\(^72\) Congress granted it to better enable U.S. negotiators to expand GATT into new areas.\(^73\) By renewing fast-track authority, Congress continues to demonstrate a desire that the U.S. cooperate closely with its trading partners.

In a second important concession to multilateralism, the OTCA stops short of requiring mandatory retaliation under Section 301. During early legislative debate, both houses wanted mandatory retaliation in a broad range of areas but eventually settled for a different result: more

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69. Birenbaum, 10 U Pa J Intl Bus L at 658 (cited in note 18). Fast-track authority was extended until May 31, 1991, and can be renewed for two additional years pending congressional approval.

70. Holmer & Bello, 23 Intl Law at 526 (cited in note 37); Birenbaum, 10 U Pa J Intl Bus L at 658 (cited in note 18).

71. Holmer & Bello, 23 Intl Law at 526.

72. Id.

73. See notes 170-76 and accompanying text discussing negotiation in new areas. See also Hollings, NY Times A15 (March 26, 1991) (cited in note 19).

Some members of Congress have opposed the granting of fast-track powers. For example, Senator Hollings, opposing the grant of fast-track authority to negotiate the United States-Mexico free trade agreement pointed out that Soviet arms agreements must withstand congressional scrutiny and that Congress is explicitly charged with regulating trade under the Commerce Clause.
aggressive enforcement of existing trade law coupled with greater transparency in the application of Section 301.\textsuperscript{74}

Congress has opted for more traditional, more political means of limiting executive discretion: tight time tables for action, transparency in the form of reports and published findings, legislative policy directives, and political pressure points in the form of waiver decisions. A determined president could resist all of the above legally, but would do so—assuming continued, massive deficits—at his political peril.\textsuperscript{75}

When the USTR finds that a foreign trading partner has not violated any international trade agreement, the USTR retains unlimited power to forgo retaliation under Section 301.\textsuperscript{76} When the USTR finds a violation of U.S. rights under an international trade agreement, the OTCA on its face appears to require mandatory investigation, and where applicable, mandatory retaliation under Section 301.\textsuperscript{77} This is the so-called “Super 301” procedure.\textsuperscript{78} Ultimately, however, the USTR retains authority to waive even a mandatory action on several grounds. For example, the USTR can waive action if a GATT panel finds that U.S. rights under the accords have not been violated.\textsuperscript{79} In short, at least to the extent that the USTR and the president forgo unilateral action, the OTCA additions to Section 301 on “mandatory retaliation” are consistent with U.S. obligations under the GATT accords.

\textsuperscript{74} Birenbaum, 10 U Pa J Intl Bus L at 657 (cited in note 18). See also Selective Safeguard Measures at 199 (cited in note 38), discussing proposed amendments to previous trade bills aimed at curtailing the president's power to halt retaliation. Notably, Sen. Dole in 1979 attempted unsuccessfully to bring Section 301 under the jurisdiction of the International Trade Commission (ITC), an independent agency. Dole proposed giving the president the power to review ITC actions but leaving Congress with final say.

\textsuperscript{75} Birenbaum, 10 U Pa J Intl Bus L at 658 (cited in note 18).


\textsuperscript{77} 19 USC § 2411(a) (1990).


\textsuperscript{79} 19 USC § 2411(b) (1990). Under the statute, the USTR may also suspend mandatory retaliation if the targeted nation agrees to halt the objectionable practice or provides compensation, if the USTR determines in “extraordinary” cases that Section 301 action would hurt more than help the economy, or if the USTR determines that a Section 301 action would seriously harm national security. Suspension of retaliation is not necessarily permanent. See also Bradley, The “Super 301” Process at 1 (cited in note 76): “If non-compliance with the agreement is later found, the USTR must continue the investigation as though it had not been suspended.”
Third, Congress refrained from attaching a number of additional amendments to the OTCA that would have threatened GATT-consistency. Some of these proposals, relating to areas such as customs fraud, countervailing duties, and anti-dumping, would not have fallen directly under Section 301 and are beyond the scope of this paper.80 One proposal that would have come under Section 301 was the controversial “Gephardt Amendment.” This amendment would have required targeted nations to reduce “excessive and unwarranted” trade surpluses with the United States by ten percent per year.81 In summary, the OTCA could easily have become a stronger and more provocative bill.

If Section 301 remains GATT-consistent after passage of the OTCA, the most significant factor will probably be the restraint of the president and the USTR in using Section 301’s retaliatory authority. The USTR in 1989 threatened to initiate but eventually decided against “Super 301” investigations of Indian insurance and investment restrictions, Brazilian import barriers and licensing requirements, and Japanese policies on forest products and government procurement of satellites and supercomputers.82 Because no GATT member has challenged Section 301, the statute arguably remains consistent with the multilateral principle of the accords.83

80. See Holmer & Bello, 23 Intl Law at 525 (cited in note 38). Congress considered but ultimately rejected amendments which would have created a broader definition for “subsidy” in the countervailing duty laws and applied the laws to non-market economies. Congress resisted the temptation to establish a private cause of action in U.S. courts for anti-dumping and to provide relief against diversionary “upstream” or “downstream” dumping in violation of existing international rules. Congress also decided against allowing a private cause of action in U.S. courts for customs fraud and chose not to pass a provision which would have excluded all repeat offenders of U.S. customs laws from U.S. markets. The authors list other provisions kept out of the OTCA.

81. Id at 530. However, see Julia Christine Bliss, The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response, 20 L & Policy Intl Bus 501, 522 (1989), arguing that the bill contains a “Gephardt element,” establishing the precedent of responding to the trade practices of a foreign country on an aggregate basis.

82. U.S. Confirms End of Super 301 Dispute, Jiji Press Ticker Service (Oct. 3, 1990). See also Svernlov, 31 Harv Intl L J at 362 (cited in note 78): “The combination of a lobbying blitz and a last-minute flurry of trade concessions enabled South Korea and Taiwan to narrowly escape being named to the [priority] list.” Svernlov adds, at 366, that Japan had to be on the list to appease Congress, and other countries were added so as not to single out Japan.

83. In short, whereas the use of Super 301 might create a cause of action under GATT, the threatened use of the statute would appear to offer no cause of action under the accords. If unilateral retaliation could be analogized to battery under tort law, perhaps threatened unilateral retaliation would compare with assault. GATT members coerced into granting overly generous trade concessions might welcome such a cause of action. However, a formal rule would probably be unprecedented in diplomacy, detrimental to dialogue, and difficult to apply.
B. Does Section 301 Violate the GATT Principle of Nondiscrimination?

1. The Problem of Discrimination

Article I of GATT sets forth the principle of nondiscrimination, which, along with multilateralism, is central to the GATT accords. The Article I nondiscrimination provision contains a most-favored-nation (MFN) clause requiring that new trade concessions offered to one GATT member be extended equally to all other GATT members. GATT does not enforce unconditional MFN rules, however. According to one explanation,

Unconditional MFN requires that one nation agree to 'extend to another the most favorable trade concessions [the former] has granted, or may grant, to any third country' in some other future or existing agreement, regardless of whether the latter nation is giving the former nation any future concessions in return.

GATT sometimes allows deviation from pure nondiscrimination, such as in "free-trade" agreements where parties extend concessions only on a reciprocal basis. In another deviation, GATT does not require equal trade barriers among all nations; it only requires equal treatment in granting new concessions.

Discrimination under GATT might take one of two forms. First, Section 301 could violate GATT by discriminating against "open" countries, i.e., countries which allow the free flow of information necessary for investigating a Section 301 complaint. There is an ironic twist to this form of discrimination: "open" trading partners may be unfairly singled out for Section 301 actions. This is because "closed" countries (i.e., those which impede or eliminate reliable sources of information) may cripple

84. GATT, Art I (cited in note 2).
85. Aho at 27 (cited in note 8).
87. See Jackson & Davey at 300-01 (cited in note 7). A nation is allowed to maintain a discriminatory trade law if the law existed before the nation joined GATT and if the law does not allow flexibility in application (e.g., presidential discretion).
89. Id at 110. China and Syria, for example, bar all access to information on alleged labor rights abuses, potentially actionable under Section 301.
the fact-finding process. At least one country has complained informally about the matter.\textsuperscript{90}

Moreover, when "closed" countries limit communication, the potential unreliability of the remaining sources of information may lead to discrimination under GATT in one of two ways. First, because closed countries are likely to have fewer whistle-blowers,\textsuperscript{91} labor rights abuses in closed countries are less likely to come to the attention of the USTR. Second, in a closed country, biased sources of information may be more able to skew the fact-finding process. Although investigations in open countries are also vulnerable to bias, the USTR in closed countries may have no other means of collecting corroborating data. Consequently, the USTR may be more inclined to drop investigations against closed countries and thus potentially discriminate under GATT.\textsuperscript{92}

Regardless of whether Section 301 discriminates against open countries, Section 301 may also discriminate among open countries. Such discrimination may be deliberate and politically motivated. When the USTR wants to favor a country, for example,

The primary tactic has been refusal to review a petition, and in cases in which a petition is reviewed, the USTR has issued evasive decisions. . . . The decisions often rely upon unsupported assertions by the government being investigated and appear to interpret the law such that some progress . . . is sufficient for compliance.\textsuperscript{93}

A Section 301 investigation by itself is arguably a form of retaliation because it is politically embarrassing and requires responses that are expensive to administer.\textsuperscript{94} Section 301’s choice of investigatory targets

\textsuperscript{90} Id at 111-12. Taiwan raised the objection in connection with Section 301 treatment of labor rights issues.

\textsuperscript{91} According to a former AFL-CIO staff member, dissidents and labor rights leaders often provide the only information available on labor rights abuses in closed countries. Id at 110 (quoting a telephone interview with a former staff member of the AFL-CIO Free Trade Union Institute).

\textsuperscript{92} It is difficult to know whether the issue of discrimination between open and closed countries arises only in the area of labor rights or whether the issue threatens the GATT-consistency of Section 301 investigations unrelated to labor. Labor rights violations are a new cause of action under Section 301, having been introduced by the OTCA. Whether Section 301 has taken a step toward discriminating between open and closed countries may therefore depend upon whether labor rights issues are more likely than other trade issues to involve biased sources of information.

\textsuperscript{93} Note, 65 NYU L Rev at 119 (cited in note 64).

\textsuperscript{94} See Comment, 81 Nw U L Rev at 524 (cited in note 24): “Administrative costs include the procedural costs of preparing petitions, conducting investigations, and conducting negotiations.” See also John H. Jackson, Perspectives on the Jurisprudence of International
depends upon the initiative of private parties or the USTR\textsuperscript{95} who must in turn rely upon whatever information is available. Section 301's present method of selecting investigatory targets, by allowing potentially inaccurate or insufficient information to create bias against some nations, may thus be inadvertently discriminatory under GATT.\textsuperscript{96}

2. OTCA's Effect on Reducing Section 301 Discrimination

If Section 301 discriminates under GATT, the question becomes how to improve the statute's consistency with the GATT accords. One possible way of ameliorating discrimination between open and closed countries might be to establish looser evidentiary requirements for Section 301 investigations against closed countries. To reduce other potentially discriminatory aspects of Section 301, several additional suggestions have been made. One partial remedy, considered by Congress before passage of the OTCA, would be a regular and automatic review of all trading partners.\textsuperscript{97} An automatic, country-specific review might preempt claims that Section 301 authorized the executive branch to rely on insufficient or inaccurate information in selecting targets for investigation. When a trade issue aroused public passions, automatic review might ensure that the issue received attention while simultaneously protecting the Section 301 process from the political winds of the moment. However, automatic review would probably not eliminate concerns about deliberate discrimination and would probably be costly.\textsuperscript{98}

Another suggested remedy would be to have an impartial international agency gather information for Section 301 actions.\textsuperscript{99} GATT itself would be a natural fact-finding body for disputes involving trade in goods, although most GATT members would probably be unwilling to reorganize the GATT apparatus to serve U.S. retaliatory goals.

One final suggestion for improving GATT-consistency would be to require a more precise articulation of USTR rules and policies under Sec-

96. See id at 112.
97. Id.
98. See Comment, 81 Nw U L Rev at 528-33 (cited in note 24). The administrative costs would probably escalate if the USTR began investigating nontariff barriers. See id at 528-30 (describing cases where the USTR has attempted to address "strategic trade barriers"). As tariff barriers are broken down, attention almost inevitably turns to nontariff barriers; however, the USTR does not presently employ staff around the world for investigating such trade problems.
tion 301. Any set of detailed rules would still leave opportunities for Congress to insert discriminatory trip wires into Section 301. However, a more transparent and predictable process might reduce the ability of the executive branch to discriminate intentionally while also giving foreign governments better opportunities to suggest ways of eliminating inadvertent discrimination.

If an open investigatory process reduces discrimination, Section 301 has made steady progress toward compliance with GATT. In 1974, Congress considered but ultimately decided against requiring the president to publish all retaliatory measures and accompanying rationales. The Trade and Tariff Act of 1984 added a requirement that the USTR prepare annual reports identifying and estimating the impact of significant foreign trade barriers, and where appropriate, articulating reasons for not taking action under Section 301.

The OTCA has intensified the reporting requirements. The USTR must now report on foreign compliance with the Subsidies Code, for example, and must continue to estimate the value of trade lost due to significant barriers. The USTR must also identify "priority practices" and "priority countries," and upon so finding, must initiate investigations within 21 days. Furthermore, the Treasury must give Congress a written report on exchange rate policy. These reporting requirements accompany the ones already contained in the statutory procedure for halting "mandatory" retaliation. Moreover, the statute now defines the key word "unreasonable" in considerably greater detail. Ironically, many members of Congress supporting stricter reporting requirements were motivated more by a desire to prompt retaliation than by any urge to promote consistency with GATT. Nevertheless, the OTCA reporting

100. See id at 124 (again discussing Section 301 only in the context of labor rights). The author posits sample questions for the USTR to resolve: "Could there be and what would establish a prima facie case of labor violations? What constitutes 'taking steps' to ameliorate labor rights conditions? What is required to show a proximate link between rights violations and an effect or burden on United States commerce?"

103. Id (citing Trade Act of 1974, Pub L No 93-618, 88 Stat 1978 (1974)).
104. Svernlov, 31 Harv Intl L J at 361 (cited in note 78). See also Holmer & Bello, 23 Intl Law at 529 (cited in note 37) (adding that the number of investigations required under Super 301 is unspecified).
requirements bring greater openness to Section 301, arguably making the statute less discriminatory than before.

II. UNITED STATES LEGAL OPTIONS

When the U.S. wants to take action in a trade area potentially involving Section 301, three options exist. First, where applicable, the U.S. can forgo Section 301 and opt for provisions existing under both GATT and U.S. law that allow temporary protection for seriously troubled industries. Second, the U.S. can avoid Section 301 and complain under Article XXIII of GATT that a trading partner has taken actions that nullify or impair trade benefits under the GATT accords. Third, the U.S. can employ Section 301 and take retaliatory action on grounds that a trading partner has behaved in an "unreasonable" manner.

A. Avoiding Section 301

1. Emergency Escape Clauses: Section 201 & Article XIX

When the executive branch wants to temporarily protect seriously troubled American industries without resorting to Section 301 retaliation, Article XIX of GATT and Section 201 of the Trade Act of 1974 offer alternatives which predate the OTCA. Both options allow the U.S. to suspend trade benefits. Although Section 201 does not require a compensatory grant of concessions, countries employing Article XIX generally do this as a matter of course. When countries employing Article XIX fail to offer compensatory concessions, Article XIX(3) allows affected countries to withdraw their own concessions of equivalent value. Article XIX(3) is rarely invoked and carries an implication of sanction, but the U.S. has used Article XIX(3) to such effect.

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112. Id.
113. See id at 535-39, describing "the Cattle War." After a sharp drop in U.S. cattle prices prompted a surge in exports to Canada, the Canadians reacted with a tariff, a health restriction, and finally an Article XIX withdrawal of import concessions. The U.S. responded by blasting Canada under Section 252 of the U.S. trade law for allegedly violating Article XI of GATT. In its domestic justification for action, the U.S. did not mention its rights under Article XIX(3). When the U.S. reported the action to GATT several days later, however, the U.S. cited only Article XIX(3) while omitting mention of Article XI. The Article XIX(3) action thus implied but did not declare a retaliatory motive.
The OTCA overhaul of U.S. trade law brings little change to Section 201. As before, Section 201 can be applied only with the joint approval of the president and the International Trade Commission. Section 201 may irritate trading partners if overused but will not violate the GATT accords. In fact, the theme of Section 201—adjustment rather than protectionism—may offer opportunities to reduce the political tension surrounding Section 301 by temporarily removing some matters from Section 301 jurisdiction. Where the executive branch is willing to forgo rhetoric to protect a seriously troubled domestic industry, Section 201 can help the GATT-consistency of Section 301 by defusing the retaliatory character of the Section 301 process.

2. Article XXIII of GATT: Nullification & Impairment

A second alternative to using Section 301 is to make a claim of "nullification and impairment" under GATT. Under Article XXIII, a member-nation has a cause of action whenever any "benefit" accorded under GATT has been "nullified" or "impaired" by another member-nation. Nullification and impairment can be a cause of action under GATT whether or not the disputed benefit arose from GATT negotiations or not. The following notes provide additional context:

115. Id at 532.
116. See Hudec, 59 Minn L Rev at 523 (cited in note 17): "Retaliation of this kind would obviously be the "cleanest" from a GATT point of view. There is no question as to the right to retaliate, or the right to act unilaterally."
117. Holmer & Bello, 23 Intl Law at 528 (cited in note 37).
118. See Selective Safeguard Measures at 209 (cited in note 38) (describing the U.S. taking a defensive remedy to avoid a Section 301 offensive action).
120. GATT, Art XXIII(1) (cited in note 2) reads as follows: "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 a result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another 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."
See also Hudec, 59 Minn L Rev at 474-77 (cited in note 17) (discussing "benefit").
121. GATT, Art XXIII(1)(b).
any other formal accord.¹²² Not defined at the time of GATT's creation, nullification and impairment became "a grant of common-law jurisdiction to fashion a definition as disputed cases arose."¹²³

Early resolutions of nullification and impairment issues quickly established that the doctrine at a minimum applied whenever a country "reasonably anticipated" the continuation of an existing trade benefit.¹²⁴ In a typical dispute occurring in 1952, Norway based a successful cause of action on a claim that German negotiators had recognized and promised to address an imbalance involving Norwegian sardines.¹²⁵ Norway won by showing reliance-inducing conduct on the part of the German negotiators.¹²⁶

GATT's remedies for nullification and impairment may take the form of a legal ruling, a recommendation for corrective action, or an authorization for the injured country to withdraw reciprocal trade concessions.¹²⁷ GATT was designed to authorize only "compensatory" restrictions and not "sanctions,"¹²⁸ relying instead on a sense of community to enforce results.¹²⁹ The formal remedy for nullification and impairment is the same whether or not a GATT panel finds "legal" violations.¹³⁰

Several conditions may preempt a claim of nullification and impairment. First, under the "reasonable anticipation" test, a cause of action disappears if a benefit was withdrawn long ago or has long appeared likely to be withdrawn.¹³¹ Second, a claim of nullification and impairment must show an "imbalance of reciprocity, [meaning that] the complaining party must show that it has paid for the benefits impaired."¹³² Perhaps the most significant limitation on nullification and impairment is that the vast majority of claims brought to GATT have only concerned benefits in the

¹²². GATT, Art XXIII(1)(c). See also Hudec, 59 Minn L Rev at 471-77 (cited in note 17) (describing early debate over the nullification and impairment doctrine). Most countries were reluctant to grant strong coercive power to GATT, especially when the nullification doctrine was vaguely defined. Some countries wanted to limit the scope of nullification and impairment to breaches of clearly defined legal obligations. A number of countries also wanted to limit the remedy to calls for consultations whenever no violation of the GATT charter was involved.
¹²⁴. Id at 486-87.
¹²⁵. Id at 491-93.
¹²⁶. Id at 482.
¹²⁷. GATT, Art XXIII(2) (cited in note 2).
¹²⁹. Id at 481-82.
¹³⁰. Id at 468.
¹³¹. Id at 530.
¹³². Id at 503.
form of tariff concessions. On the other hand, nothing would appear to bar a claim against a nontariff barrier: the doctrine could conceivably cover "any new measure which had the effect of raising the level of artificial disadvantage which might be said to impair that benefit." In 1961, Uruguay tried to extend the doctrine into nontariff areas, and more recently the U.S. has declared that unfair labor practices could constitute a nullification claim under existing provisions.

Past GATT negotiations have probably emphasized tariffs because tariffs are more easily measured and compared than nontariff barriers. Moreover, at least until recently, GATT's tendency to focus on the tariff aspects of nullification and impairment has probably advanced U.S. interests. Global tariffs are now lower, however, and pressing this area in the case of many nations will no longer be practical. Significantly, Japan's tariffs now average roughly 3%, the lowest level in the developed world.

As a result, the U.S. is focusing on the many remaining nontariff barriers. The U.S. receives criticism for imposing nontariff barriers such as Voluntary Restraint Agreements, but the U.S. and other countries have been discussing nontariff barriers in GATT since the Tokyo Round. If productive, this focus on nontariff barriers in GATT could significantly reduce the urge to rely on unilateral measures under Section 301.

133. Id at 500. See also id at 524-25: "In nonviolation cases, the claim of tariff concessions is really the only established theory there is."
134. Id at 487 (emphasis in the original).
135. Id at 497. Uruguay declared that 15 countries were committing 562 trade restrictions, each affecting a major Uruguayan export. This marks GATT's only formal experience with a nullification claim extending beyond tariff issues. The GATT panel decided against Uruguay not because Uruguay alleged nontariff claims but because Uruguay refused to take a specific legal stand on any of its grievances or support its complaints with sufficient evidence.
137. See Hudec, 59 Minn L Rev at 500 (cited in note 17): "The concentration on tariffs is understandable. The tariff concession is different from other GATT legal obligations, because it is the only obligation paid for in cash."
138. According to Hudec, id at 525,
   It should be possible to channel many grievances into this narrower [tariff] type of concession claim. If there were, for example, a grievance based upon some legal but 'unreasonable' local regulation affecting a wide range of U.S. products, U.S. officials could simply search out one or more tariff concessions arguably nullified by the offending regulation.
140. Selective Safeguard Measures at 167 (cited in note 38).
B. *Using Section 301 on “Unreasonable” Trade Practices*

When the U.S. is unable or unwilling to take action under Section 201 or GATT Articles XIX or XXIII, the remaining legal option is unilateral retaliation under statutes covering selected subject areas\(^{142}\) or more generally under Section 301. Section 301 mostly overlaps with international law.\(^{143}\) One option created under the Trade Act of 1974, however,\(^{144}\)—the right of retaliation against “unreasonable” foreign trade practices—has always held the potential for conflict with GATT.\(^{145}\) The definition supplied by Congress in 1984 declared “unreasonable” to mean any practice which denies fair or equitable market opportunities, opportunities for the establishment of an enterprise, or provision of adequate and effective protection of intellectual property rights.\(^{146}\)

This definition may have generated more questions than it answered.\(^{147}\)

The OTCA expands the definition of “unreasonable” from 74 to 403 words\(^{148}\) and creates new potential for conflict with GATT. First, “unreasonable” now includes “export targeting,” a term encompassing any government plan or scheme consisting of a combination of coordinated actions... that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.\(^{149}\)

No article of GATT appears to forbid export targeting. Consequently, Section 301’s cause of action against export targeting, if used, would probably violate GATT’s principle of multilateralism.

Second, the concept of “unreasonable” under the OTCA has now been expanded to permit a revocation of certain U.S.-conferred trade and

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142. See, for example, Section 337 of the Tariff Act of 1930 pertaining to intellectual property issues.
143. See notes 41-43 and accompanying text.
144. *Selective Safeguard Measures* at 167 (cited in note 38).
145. Robert Hudec wrote in 1975 that retaliation against “unreasonable” trading practices could go beyond GATT rules and was thus “the most questionable form of retaliation by GATT standards.” Hudec, 59 Minn L Rev at 518, 525 (cited in note 17). See also Fisher & Steinhardt, 14 L & Policy Intl Bus at 597 (cited in note 28).
147. See Comment, 81 NW U L Rev at 504 (cited in note 24) (discussing possible interpretations of the 1984 language).
developmental benefits against foreign countries that allow labor rights abuses. These abuses may include any pattern of persistent conduct that denies workers the right of association or collective bargaining, permits forced labor, or fails to provide minimum standards for work hours, child labor, health, or safety. The rationale for this cause of action is that "suppression of foreign worker rights causes injury to U.S. workers and industry through the medium of international trade and investment." Before 1988, GATT members were immune from U.S. laws against foreign labor rights abuses. The OTCA changes to Section 301 do not compel the USTR to retaliate against labor rights abuses. The OTCA’s Section 301 labor rights provisions affect GATT members for the first time, however, and if used, would probably violate the GATT accords.

III. STRATEGIC DIRECTIONS FOR SECTION 301

A. Drawbacks of Section 301

Several arguments favor limiting the scope of Section 301. Some critics believe Section 301 focuses on fairness at the expense of results. Moreover, the OTCA labor rights provisions face strong foreign opposition, and the U.S. could jeopardize economic advantages by pushing the issue. Finally, Section 301 may conflict with foreign aid policies.

Some opponents of Section 301 argue that focusing on fairness, while emotionally satisfying, does nothing to solve U.S. trade problems. "Fairness is a potent political concept, and the perceived lack of it can mobilize deep resentment in otherwise trade-indifferent Americans," says one critic who adds, "[t]here is no reason whatever to think that 'fair' or even free trade will inevitably result in balanced trade for any particular coun-

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152. Note, 27 Colum J Transnatl L at 454 (cited in note 150). See also Note, 65 NYU L Rev at 105 (cited in note 64) (citing legislative desire that "the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade").


154. The OTCA revision of Section 301 gives the USTR a vaguely-worded option of overlooking labor rights abuses when "such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country." 19 USC § 2411(b)(3)(C)(i)(II).

Critics of Section 301 often blame savings and investment patterns for U.S. trade imbalances.\textsuperscript{157}

The greatest hesitation in using Section 301 is that foreign trading partners may retaliate and thus compromise the advantages of the MFN system. MFN relies on the theory that imports should come from the cheapest source.\textsuperscript{158} MFN is also simpler to administer than a tariff system, requiring less legislative, legal, and official effort.\textsuperscript{159} In practical terms, MFN allows U.S. firms to gain access to foreign export markets, and the U.S. government thus has strong incentives to avoid provoking GATT retaliation.

Theoretically, the U.S. could target labor rights abuses under Section 301 in such a way as to minimize conflict with GATT. One suggested approach is to focus Section 301 on union rights. According to this argument, targeting union rights best avoids protectionism or violation of foreign sovereignty, since union rights require only cessation of state action as opposed to mandating minimum wages, maximum hours, or health standards.\textsuperscript{160}

Nevertheless, the labor rights provisions in Section 301 have the potential to provoke strong retaliation. One problem is that the provisions appear hypocritical to many GATT members, partly as the U.S. has only recently adopted many of the required changes.\textsuperscript{161} An additional foreign concern is that labor rights provisions may conceal ulterior protectionist motives.\textsuperscript{162} Many trading partners appear willing to sacrifice U.S. markets to avoid Section 301 labor requirements.\textsuperscript{163} In any case, when the U.S. in 1987 proposed to establish an advisory committee in GATT to deal with labor issues, most members were reluctant to cooperate.\textsuperscript{164} Most members of GATT would probably be unsympathetic

\textsuperscript{156} Morris, 6 Brookings Review at 18, 21 (cited in note 86).
\textsuperscript{157} Id at 18. See also Svernlov, 31 Harv Intl L J at 366 (cited in note 78): "The trade deficit is largely driven by the federal deficit and the corollary tendency for the United States government and public to consume rather than save."
\textsuperscript{158} Aho, 22 Cornell Intl L J at 27 (cited in note 8).
\textsuperscript{159} Id at 28.
\textsuperscript{160} See Note, 27 Colum J Transnatl L at 461-63 (cited in note 150) (citing authority).
\textsuperscript{161} See Note, Labor Law Preemption Under Section 301: New Rules for an Old Game, 40 Syracuse L Rev 1279, 1279 (1989). Few workplace regulations protected individual rights of U.S. workers before the NLRA in 1935, and much existing regulation has been enacted within the past ten years.
\textsuperscript{162} Note, 65 NYU L Rev at 94 (cited in note 64).
\textsuperscript{163} Id at 107. See also Note, 27 Colum J Transnatl L at 448-449 (cited in note 150).
\textsuperscript{164} Note, 65 NYU L Rev at 94 (cited in note 64).
toward an American attempt to target labor rights abuses under Section 301.

Beyond the disadvantages of conflicting with GATT, one final hesitation in using Section 301 is that trade retaliation may undercut U.S. foreign aid policies. In some cases, perhaps the appropriate question is whether the law should allow a U.S. industry or company to influence or override foreign aid goals. Recently, for example, the administration temporarily placed India on the Super 301 list for restricting foreign insurance companies.\textsuperscript{165} Although India may have had valid reasons for protecting domestic insurance and limiting the outflow of foreign capital, Section 301 does not require the USTR to determine whether trade retaliation conflicts with foreign aid goals. Arguably, Section 301 investigations should call for such a showing.

B. Using Section 301 to Improve Drawbacks of GATT

Although Section 301 has shortcomings, the drawbacks of GATT do much to explain the congressional urge to act in the trade area. GATT can be frustratingly slow; one senator recently dubbed it "the Gentlemen's Agreement to Talk and Talk."\textsuperscript{166} Moreover, the United States often disagrees with GATT's results.\textsuperscript{167} GATT may also be outmoded. Some critics note that GATT was promulgated at a time of rapid trade expansion that is no longer occurring.\textsuperscript{168} Critics have long faulted GATT for encouraging parties to base negotiations on existing tariffs, a system which has favored parties already having high tariffs.\textsuperscript{169} GATT's recent successes in leveling global tariffs, however, have sharpened attention on remaining nontariff barriers. Whether GATT remains viable will depend on how well GATT responds to nontariff problems.


\textsuperscript{167} See for example Jackson & Davey at 311 (cited in note 7). According to the authors, "the United States is increasingly outvoted in a GATT with 91 members, over two-thirds of which are developing countries, and over two-thirds of which are formally associated in one status or another with the European Community.

\textsuperscript{168} See \textit{Selective Safeguard Measures} at 212-17 (cited in note 38) (arguing that GATT was created in response to the Great Depression).

\textsuperscript{169} Id at 171-72.
Until now, GATT has covered only trade in goods.\(^{170}\) GATT ignores substantial areas of international commerce, only some of which are covered by multilateral mechanisms such as the International Monetary Fund (IMF) or the Multilateral Trade Negotiation (MTN) Codes.\(^{171}\) Other areas are largely devoid of law. The president has fast-track\(^{172}\) authority to negotiate the main U.S. objectives in the Uruguay Round: improving GATT rules for agriculture and expanding GATT to cover services, intellectual property, and investment.\(^{173}\) However, achieving agreement promises to be difficult. "Certain developing countries remain opposed to assuming almost any new obligations in GATT regarding, for example, trade in services, intellectual property protection, and, almost without exception, investment."\(^{174}\) Moreover, the 1992 European Community merger is preoccupying Europe\(^{175}\) and recently helped cause a temporary collapse of negotiations in the Uruguay Round. All of these issues remain unsettled.\(^{176}\)

Typical investment restrictions have included stipulations on ownership, location, and introduction of technology.\(^{177}\) International investment has long seemed an intractable area in which investment rules have been weak, nonexistent, or unenforceable.\(^{178}\) For example, the United States has argued that export performance requirements inflate world market supplies and thus act as subsidies forbidden under GATT, while local content requirements violate GATT by acting as tariffs or quotas.\(^{179}\) The United States has further argued that both restrictions violate Article III of GATT, the national treatment provision requiring equality in domestic law and prohibiting internal quantitative regulations for protective purposes.\(^{180}\) However, the United States has been unable to persuade

\(^{170}\) See Fisher & Steinhardt, 14 L & Policy Intl Bus at 640 (cited in note 28). For example, one exception exists for the motion picture industry.

\(^{171}\) See generally id.

\(^{172}\) See Holmer & Bello, 23 Intl Law at 526 (cited in note 37) (discussing the scope of presidential fast-track authority). See also Birenbaum, 10 U Pa J Intl Bus L at 658 (cited in note 18).


\(^{175}\) Id at 20.

\(^{176}\) NY Times A14 (April 4, 1991).

\(^{177}\) See Fisher & Steinhardt, 14 L & Policy Intl Bus at 593-94 (cited in note 28).

\(^{178}\) Id at 594, 665-687 (describing cases and bills involving Section 301 in connection with investment issues and the use of Section 301 to eliminate foreign restrictions on U.S. investment).

\(^{179}\) Id at 675.

\(^{180}\) Id at 675-78. See generally John H. Jackson, National Treatment Obligations and Nontariff Barriers, 10 Mich J Intl L 207 (1989).
GATT to apply greater enforcement in these areas.\textsuperscript{181} Moreover, while the OECD and other accords sometimes bring order to investment, they have not traditionally helped U.S. companies facing foreign restraints.\textsuperscript{182}

Furthermore, in "service" areas, the U.S. has so far been unable to expand the scope of GATT. Less developed countries, for example, have been reluctant to divert attention from trade barriers still affecting goods, and Europe has even considered unilateral retaliation over service issues. In addition to being ignored under GATT, service issues receive little coverage under most U.S. trade agreements, MTN codes, or Friendship, Commerce, and Navigation treaties.\textsuperscript{183} Loose treaties address service issues arising in shipping and insurance, but no established system exists for addressing claims.\textsuperscript{184}

In the absence of international law or cooperation in the areas of service, investment, intellectual property, and agriculture, unilateral retaliation becomes a tempting option for U.S. policymakers. Section 301 explicitly covers intellectual property,\textsuperscript{185} and since 1979 Congress has evinced a clear intent to extend Section 301 into service areas as well.\textsuperscript{186} Section 301 actions in these areas would be outside the scope of GATT but could nevertheless provoke foreign retaliation.

Given that the scope of Section 301 extends beyond GATT, the question is whether Section 301 can ultimately help the U.S. address shortcomings in the world trade order. At a minimum, Section 301 has probably acted as a safety valve for venting congressional frustration: Passing stern measures but giving final say to moderate presidents has prevented the U.S. from pursuing more drastic unilateral solutions.\textsuperscript{187}

Two final observations deserve mention. First, using Section 301 does not necessarily require taking actual retaliatory steps. Potential retaliation may be an effective prod. "More than any other U.S. trade law, Section 301 works through feints and threats, rather than through formal legal processes."\textsuperscript{188} Similarly, "the most effective action that can
be taken by a foreign country fearing the 'sting' of Section 301 would be (1) to ensure that its market is truly open to imports, and (2) to join the United States and other trading partners in pushing for meaningful progress in [GATT].”

Second, Section 301 is most effective when combined with clear and reasonable demands. Articulating the right demands, never a simple task, has become increasingly complicated as U.S. negotiators turn their attention from comparatively well-resolved, straightforward tariff problems to unfamiliar and politically sensitive areas. At this stage, effective communication is essential. Section 301 can help by prodding U.S. trading partners into recognizing trade problems more quickly than they would under the cumbersome machinery of GATT. Section 301, when used properly, can thus lead to better rules for global trade.

All evidence indicates that Section 301 has made significant recent progress toward achieving these ends. As Holmer & Bello state:

The United States has been criticized for its aggressive use of Section 301. Yet on net, the results of this program in the last three years have been substantially more open, freer trade, widely benefitting producers and exporters in third countries as well as in the United States.

Holmer & Bello might have added that Section 301 has achieved these ends while staying within the confines of GATT. Perhaps Section 301 has succeeded largely by being less aggressive than appearances suggest.

CONCLUSION

In summary, the OTCA does not fundamentally alter the relationship between Section 301 and the GATT accords. When trade issues arise, executive options remain the same: escape clauses, GATT nullifica-
tion and impairment, and unilateral retaliation under Section 301. The OTCA increases potential executive ability to violate GATT under Section 301, but the OTCA does not compel such violations. Meanwhile, the executive branch has carefully kept Section 301 within the boundaries of nondiscrimination and multilateralism. In short, the OTCA additions to Section 301 have raised a political stir but not a GATT violation. Tensions in trade are acute, giving Section 301 the potential to backfire with undesirable results. Nevertheless, the statute is gradually achieving its ends—and reducing the need for its own existence—by prying open export markets and securing a multilateral mandate to expand and strengthen international trade law.