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# STRATEGY AND COMPLIANCE WITH BILATERAL TRADE DISPUTE SETTLEMENT AGREEMENTS: USTR'S SECTION 301 EXPERIENCE IN THE PACIFIC BASIN

*Michael P. Ryan\**

## INTRODUCTION

Covenants without the sword, said Hobbes, are but words. Indeed, an agreement between States that settles a trade dispute is only words unless the parties comply with its terms. Agreement compliance, however, can be achieved without the sword. Compliance with bilateral trade dispute settlement agreements depends upon strategy fitted to trade policy goals and effective execution of that strategy by trade negotiators. This paper draws from theories of interstate conflict, foreign policy, arms control, and bureaucratic politics in order to explain the American strategy of bilateral trade dispute settlement and compliance pursuant to section 301 of the Trade Act of 1974, as amended in 1979, 1984, and 1988<sup>1</sup> (section 301). Strategy and compliance with bilateral trade dispute settlement agreements is investigated through case studies of U.S.-initiated disputes with East Asian States regarding allegations of unfair trade practices.

This study examines three questions: What are the characteristics of an optimal bilateral trade dispute settlement agreement for the United States? What strategy does the Office of the United States Trade Representative (USTR) employ to negotiate an optimal settlement agreement? What are the characteristics of a U.S.-initiated trade dispute settlement agreement which receives substantial compliance?

Regarding the first question, the following argument is made here: an optimal trade dispute settlement agreement maximizes the attainment of national possession and milieu goals, and negotiation goals.

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1. 19 U.S.C. § 2411 (1988).

As to the second question, it will be shown here that USTR typically promotes milieu goals, such as strengthening of the norms of the General Agreement on Tariffs and Trade<sup>2</sup> (GATT) in support of possession goals such as commercial competitiveness. Finally, regarding the third question, a settlement agreement tends to receive substantial compliance when (1) expected trade behavior is clearly specified, (2) expected trade behavior is implementable, (3) effective monitoring procedures are specified in order to detect noncompliance, and (4) positive and/or negative incentives for compliance are offered.

The paper proceeds in five parts. First, the conceptual linkages among strategy, goals, and agreement compliance are developed. Second, the study research design and findings are reported. Third, the strategy of trade dispute settlement negotiation is discussed with regard to bureaucratic politics. Fourth, case evidence that illustrates the key study findings is reviewed. Finally, effective monitoring and the notion of unilateral surveillance within the context of the present GATT-based, multilateral trading system are explored.

## I. STRATEGY AND TRADE DISPUTE SETTLEMENT

National policy goals should drive the strategy of interstate conflict resolution.<sup>3</sup> Government trade negotiators, it follows, should aim to achieve national policy goals when attempting to settle bilateral disputes regarding unfair trade activity. Pursuing national policy goals through bilateral dispute settlement of unfair trade practices involves matters of both foreign and domestic policy for the State participants. The States attempt to settle their dispute within the context of their broader bilateral diplomatic relationship, while at the same time attempting to settle the dispute in a way that balances domestic policy needs against foreign policy demands.

National policy goals do not appear only as either foreign or domestic priorities. They also relate to power and wealth, or politics and economics, respectively. Thus, it is the contention of this study that bilateral trade dispute settlement relates to foreign and domestic politics and economics.

A State's foreign policy is itself goal-directed activity.<sup>4</sup> States, explains Arnold Wolfers, aim to achieve with their foreign policies two

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2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

3. The following analysis owes much to the theory of strategic bargaining expounded by Thomas Schelling in his seminal work, *THE STRATEGY OF CONFLICT* (1960).

4. Anderson, *Foreign Policy as a Goal Directed Activity*, 14 *PHIL. SOC. SCI.* 159 (1984).

types of goals: possession goals and milieu goals.<sup>5</sup> Possession goals involve enhancement or preservation of something to which the state attaches value, *i.e.*, a possession. Examples of possession goals include territory and tariff preferences. Milieu goals involve a State's attempt to shape conditions beyond its national boundaries, *i.e.*, its milieu. Examples of milieu goals include peace and support of international economic regimes.

Government trade negotiators have both possession and milieu goals. Possession goals of the trade negotiator include commercial competitiveness, full employment, economic growth, social stability, aggregate national income, price stability, adequate balance of international payments, resource mobility, equitable income distribution, and interest group support. Milieu goals of the trade negotiator include global welfare, free trade, fair trade, the GATT regime, stability, predictability, peace, and friendly diplomatic relations.<sup>6</sup>

However, the government trade negotiator as an implementer of foreign economic policy may not share with the policymaker all of these national goals. The trade negotiator's mission is more limited; as an international agent for the citizen, he must solve an international problem for the citizen. Thus, the trade negotiator has another, additional type of goal—negotiation goals.

First, posited from the theory of arms control, the negotiator will attempt to draft a settlement agreement that will receive substantial compliance.<sup>7</sup> A settlement agreement without substantial compliance invites renewal of the dispute. Second, posited from the theory of bargaining, the negotiator, mindful that the present trade dispute likely will not be the last, will also attempt to bargain in such a way that a relationship of mutual respect and trust—if not sympathy and warmth—between the counterparts is constructed.<sup>8</sup>

Under certain circumstances, however, the trade negotiator, in theory at least, may aim at drafting a settlement agreement that will not

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5. A. WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 73 (1962).

6. See generally Krasner, *State Power and the Structure of International Trade*, 28 *WORLD POL.* 317, 317-318 (1976); I. DESTLER, *MAKING FOREIGN ECONOMIC POLICY* 1-18 (1980) (case studies illustrate what goals trade negotiators have); S. LENWAY, *THE POLITICS OF U.S. INTERNATIONAL TRADE* (1985) (role of interest groups in defining U.S. national interest in trade policy); D. BALDWIN, *ECONOMIC STATECRAFT* 17 (1985) ("in any given attempt, states may—and usually do—pursue more than one goal with respect to more than one target"); Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 *INT'L ORG.* 179 (1988) (State institutions determine American trade policy).

7. See generally T. SCHELLING & M. HALPERIN, *STRATEGY AND ARMS CONTROL* (1985) (various aspects of arms control negotiations).

8. *E.g.*, I. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* 27-41 (1982).

find substantial compliance or may aim at antagonizing his or her counterpart negotiator. However, the trade dispute settlement cases studied here bear out the norm, not the exception.

Government trade negotiators, however, typically cannot achieve all of their goals. The goals are sometimes complementary, sometimes contradictory. Furthermore, the other protagonist may frustrate the achievement of some goals. Hence, dispute settlement agreements codify goal achievement trade-offs. Trade negotiators seek an optimal settlement agreement, *i.e.*, an agreement that maximizes national and negotiation goal attainment. The trade negotiator must assign values or weights to each national and negotiation goal when pursuing a maximizing strategy. Interviews suggest that trade negotiators assign values akin to "high," "medium," and "low" to their goals.<sup>9</sup> How trade negotiators value goals is discussed below in the section entitled Negotiation Strategy and Bureaucratic Politics.

Bilateral trade dispute settlement sufficiently resembles bilateral arms control treaty-making to suggest that arms control theory could be usefully applied to bilateral trade dispute settlement. For example, the purpose of both trade dispute settlement negotiation and arms control negotiation is to change the vital national policies of a sovereign State. In both trade dispute settlement and arms control, negotiators aim to ensure that agreed-upon policy changes actually do occur.

Arms control theory suggests that a treaty that meets with substantial compliance will possess certain characteristics. Arms control treaty compliance depends upon (1) the clear specification of expected behavior, (2) the adequacy of verification procedures in order to detect noncompliance, and (3) the existence of incentives for compliance.<sup>10</sup> As discussed below, under the test of the cases studied here, these characteristics from the arms control experience stand up well in bilateral trade dispute settlement.

However, an unstated premise of the arms control experience—the capacity of a government to implement its settlement commitments, *i.e.*, its expected behavior—must be explicitly added as a condition for substantial compliance in bilateral trade dispute settlement agreements. Bilateral trade dispute settlement involves a greater risk of noncompliance by the governments involved than arms control (which has primarily been between the Soviet Union and the United States). Though recent political problems in the Soviet Union raise questions about contemporary Soviet political capacity, the governments of the

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9. Interviews by author (Dec. 1989-Apr. 1990): Interviewees expressed comfort with the terms high, medium, and low.

10. See, *e.g.*, T. SCHELLING & M. HALPERIN, *supra* note 7.

Soviet Union and the United States in the post-World War II era have possessed the capacity to implement their settlement commitments. Trade policy changes, on the other hand, truly challenge national political capacity.

## II. RESEARCH DESIGN AND FINDINGS

This study employs the case study method of structured, focused comparison in order to analyze strategy and compliance with Pacific Basin trade dispute settlement agreements. Social science methodologists explain that the case study method is excellent for initial theory-building, even if conclusions remain tentative.<sup>11</sup>

This study examines only disputes involving allegations of unfair trade. Protectionist disputes which involve no claim of unfair practice, *i.e.*, safeguard or escape clause disputes, are not included in the study because in these types of disputes, the United States typically is not trying to change a foreign government's trade policy. Rather, the United States is simply trying to restrain imports in order to offer relief to domestic producers. The U.S. goal in disputes regarding unfair trade practices, on the other hand, is to change another government's trade policy. Remedies for unfair trade practices have included elimination of an import quota, lowering of a tariff, or making an import licensing procedure transparent. Hence, compliance issues come to the fore in a way that they do not in escape clause cases.

This study examines comparatively and intensively nine cases of U.S.-initiated trade disputes brought under section 301. (See Table 1.)

The nine section 301 cases studied here represent about forty-three percent of the twenty-one section 301 cases formally initiated against East Asian governments in the 1980s.<sup>12</sup> Only U.S.-initiated cases were studied in order to hold the asymmetrical power relationship of the trade disputants constant. Only Pacific Basin disputes were selected in order to hold the diplomatic and foreign policy milieu relatively constant. Only disputes initiated during the 1980s were selected in order to hold the U.S. domestic and international economic and political milieus relatively constant.

The cases were selected in order to vary the target State and market involvement. The cases involve three key East Asian States (Ja-

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11. George, *Case Studies and Theory Development: The Method of Structured, Focused Comparison*, in *DIPLOMACY: NEW APPROACHES IN HISTORY, THEORY, AND POLICY* 43-68 (P. Lauren ed. 1979); Achen & Snidal, *Deterrence Theory and Comparative Case Studies*, 41 *WORLD POL.* 143, 146-47 (1989).

12. U.S. TRADE REPRESENTATIVE, SECTION 301 TABLE OF CASES, Reference Int'l Trade Rep. (BNA) 49:0841 (April 19, 1990).

*Table 1*  
CASE STUDIES

state	market	301 case # (USTR)	unfair activity	initiation & resolution dates
Japan	footwear	36	quota	10-25-82 12-01-85
Japan	tobacco	50	tariff	09-16-85 10-03-86
Japan	semiconductor	48	access*	06-14-85 07-31-86
Korea	insurance	51	access	09-16-85 07-21-86
Korea	intell. prop.	52	protect	11-04-85 07-21-86
Korea	footwear	37	customs	10-25-82 03-31-84
Korea	beef	65	quota	03-18-88 11-13-89
Taiwan	footwear	38	tariff	10-25-82 03-31-84
Taiwan	rice	43	subsidy	07-13-83 03-22-84

\* Note: This study does not consider the dumping parts of this case.

pan, Korea, and Taiwan) and a variety of types of markets (manufacturing, high technology, agriculture, service, and information-based). The research design, then, makes the study manageable but also limits the conclusions. Because the conclusions here are drawn from cases in which the two States have an asymmetrical interstate power relationship (*i.e.*, U.S.-East Asian State), they may be applied with some confidence to similar situations but should be applied only with great care to different situations. For example, compliance in U.S.-European Community trade dispute settlement and cases where the United States is a respondent await further research.

Each case study includes investigation about the business reasons for bringing the case to the U.S. government, the filing of the legal petitions which formally brought the case before the U.S. government, the U.S. government decision to initiate the case, the U.S. government investigation, the U.S. intrabureaucracy bargaining, the interstate negotiations, the dispute-resolving agreement, and the compliance record.

The nine cases are summarized here:

*Japan, Korea, Taiwan footwear* (three cases): Lawyers for the Footwear Industries of America, Inc., the Amalgamated Clothing and Textile Workers International Union, and the United Food and Commercial Workers International Union filed a massive section 301 petition with USTR in October 1982.<sup>13</sup> The petition, the text of which alone ran to nearly 175 pages, complained of unfair trade policies toward non-rubber footwear by the governments of Brazil, Taiwan, Korea, Japan, the European Community as a whole, as well as France, Italy, Spain, and the United Kingdom separately. Footwear Industries charged that these governments engaged in policies of excessive tariffs, quotas, restrictive licensing practices, and subsidies.

*Japan tobacco*: USTR initiated a section 301 action against Japan for its import policies regarding tobacco in September 1985.<sup>14</sup> Ambassador Clayton Yeutter announced at the time of the initiation that, despite some Japanese policy steps to liberalize their tobacco market, Japan persistently maintained high tariffs, imposed discriminatory rules on marketing, advertising, and distribution, and held a monopoly on the importation and sale of tobacco products.<sup>15</sup> The dispute centered on the activities of the State-owned tobacco company, Japan Tobacco Inc., and five partially State-owned tobacco distribution companies, the Tobacco Haiso companies. Japan Tobacco possessed a monopoly on the import, distribution, and sale of all tobacco products in the country.

*Japan semiconductor*: The (American) Semiconductor Industry Association (SIA) filed a section 301 petition with USTR in June 1985.<sup>16</sup> SIA charged the Japanese government with a wide range of unfair practices, from overt barriers such as quotas and tariffs, to more subtle non-tariff barriers. SIA contended that the Japanese government had identified semiconductors as an industry essential to its national economic development and security and had targeted it as an industry to be promoted. The Japanese government, said SIA, had encouraged a small number of large, integrated electronics firms, such as Hitachi,

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13. Petition for Relief under Section 301 of the Trade Act of 1974 as Amended on Behalf of Footwear Industries Association of America, Inc., Amalgamated Clothing and Textile Workers Union and United Food and Commercial Workers International Union, T. Shannon, L. Howard, & M. Kershaw of the law firm of Collier, Shannon, Rill & Scott (October 1982) [hereinafter Footwear Petition].

14. Japan's Practice with respect to the Manufacture, Importation, and Sale of Tobacco Products, 50 Fed. Reg. 37609 (1985) (initiation of investigation under section 301).

15. *Id.*

16. Petition of the Semiconductor Industry Association before the Section 301 Committee, Office of the United States Trade Representative, A. Wolff, R. Gadbaw, T. Howell, & T. Richards of the law firm of Dewey Ballantine (June 1985).

NEC, Matsushita, Fujitsu, and Toshiba, to interlink their research, development, production, and sales of semiconductors so that U.S. firms could sell in Japan only certain types of semiconductors not produced by Japanese firms and only when there were spot market shortages. SIA claimed that despite aggressive marketing efforts by U.S. firms and despite its dominance of American, European, and all other semiconductor markets, the U.S. market presence in Japan in 1985 remained what it had been in 1975—about ten percent.

*Korea insurance:* USTR initiated a section 301 investigation against South Korean insurance trade policies and practices in September 1985.<sup>17</sup> Several American insurance companies charged that Korean government licensing restrictions prohibited them from competing in the Korean life insurance and compulsory insurance markets. Compulsory insurance is insurance required by the Korean government of Korean citizens as a matter of national public policy.<sup>18</sup> The American companies charged that the 1981 agreement between the United States and Korea to open the Korean fire insurance market had been thwarted by Korean government tolerance of the close business relationships among Korean insurance companies and banks. Korean banks, according to American firms, “directed” their customers to purchase fire insurance from Korean companies.<sup>19</sup>

*Korea intellectual property:* USTR initiated a section 301 investigation against South Korea's policies and practices regarding the protection of intellectual property rights.<sup>20</sup> First, USTR investigated Korean patent laws, especially regarding chemicals and pharmaceuticals, which protected only the specific process for making the product, not the product itself. Second, USTR investigated Korean trademark protection, which allegedly offered foreign firms little hope of redress with regard to trademark infringements, because Korean courts employed a “famous in Korea” test for trademarks. The courts had held that a trademark merited protection only if it were well-known to Korean consumers. Hence, products new to the Korean market, even if already well-known in other parts of the world, were denied trademark protection. Third, USTR investigated allegations by the American

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17. Korea's Restriction on Insurance Services, 50 Fed. Reg. 37609 (1985) (initiation of investigation under section 301).

18. Comments Regarding the Investigation into Korean Restrictions on Insurance Services, R. Rivers, C. Fontheim, & S. Frank of the law firm of Akin, Gump, Strauss, Hauer & Feld (October 1985).

19. *Id.* at 8.

20. Adequacy of Korean Law for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45883 (1985) (initiation of investigation under section 302).

publishing, music, motion picture, and software industries that Korean piracy of their books, records and cassettes, films and video cassettes, and computer software was widespread and that Korean copyright law offered little protection for foreign copyright-holders.

*Korea beef:* The American Meat Institute in February 1988 charged in a section 301 petition that since May 1985 the Korean Ministry of Agriculture, Forestry, and Fisheries had banned the importation of American beef.<sup>21</sup>

*Taiwan rice:* The (American) Rice Millers Association filed with USTR in July 1983 a section 301 complaint against the Republic of China (Taiwan), that charged the Taiwanese government with purchasing rice from its farmers at prices significantly higher than world market price, and then dumping the rice to selected countries at below world market price.<sup>22</sup> The Rice Millers alleged that the Taiwanese government's price support system encouraged over-production in Taiwan which depressed American rice exports.

Case study evidence was marshaled through (1) interviews with many of the participants in the disputes, (2) U.S. government documents from the Departments of Commerce and State, USTR, the International Trade Commission, and Congress, (3) GATT documents, (4) legal briefs and documents filed with the U.S. government by trade lawyers for the disputants, (4) correspondence among U.S. government officials, East Asian government officials, and private trade lawyers available in public files of the U.S. Department of Commerce and USTR, and (5) press accounts in *The International Trade Reporter*, *The Journal of Commerce*, *The New York Times*, *The Wall Street Journal*, *The Far Eastern Economic Review*, and other Pacific Basin region periodicals.

The nine cases of trade disputes between the United States and Japan, Korea, and Taiwan studied here were settled by agreement. (See Table 2.)

The nine settlement agreements codify trade-offs among the possession and milieu goals of the trade negotiators. Among the possession goals sought by the trade negotiators were commercial competitiveness, domestic interest group support, improvement of the U.S. balance of payments, and maintenance of domestic employment. Since in all these cases the United States aimed to either open markets

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21. Petition for Relief under Section 301 of the Trade Act of 1974, as Amended, on Behalf of the American Meat Institute, P. Rosenthal, L. Lasoff, & R. Beeckman of the law firm of Collier, Shannon, Rill & Scott (February 1988).

22. Section 301 Petition of the Rice Millers' Association, B. Fisher & S. Schneebaum of the law firm of Patton, Boggs, & Blow (July 1983).

*Table 2*  
CASE SETTLEMENT AGREEMENTS

case	unfair activity	settlement agreement
Japan footwear	quota	eliminate quota
Japan tobacco	tariff	eliminate tariff
Japan semiconductor	access	20% foreign market share
Korea insurance	access	open market to foreign companies; make licensing transparent
Korea intell. prop.	protect	draft domestic IPR* laws; sign int'l IPR treaties; enforce strictly
Korea footwear	customs	change admin. procedures
Korea beef	quota	eliminate quota
Taiwan footwear	tariff	lower tariffs
Taiwan rice	subsidy	only sell in small country markets

\* Intellectual Property Rights.

or to expand intellectual property protection in East Asia, the U.S. trade negotiators put a high priority on the possession goal of enhancing the commercial competitiveness of U.S. industry.<sup>23</sup> By doing so, the negotiators also sought, in all cases, domestic interest group support for the President.<sup>24</sup> The pressure of U.S. trade deficits during the 1980s propelled the trade negotiators to improve the U.S. balance of payments with these export-promoting settlement agreements.<sup>25</sup> At least nominally (though interviewees rarely mentioned these goals), negotiators also had the goal of increasing, or at least maintaining, domestic employment levels.

U.S. trade negotiators also aimed to achieve several milieu goals. In eight of the nine cases, U.S. negotiators' purpose was to move East Asian State practice closer to compliance with GATT (Japan footwear, Japan tobacco, Korea footwear, Korea beef, Taiwan footwear, Taiwan rice) or in the direction of emerging GATT norms (Korea insurance, Korea intellectual property). Only in the Japan semiconductor agreement (with the twenty percent market-share commitment from the Japanese government)<sup>26</sup> did U.S. negotiators aim to produce a GATT non-compliant settlement.

23. Interviews by author (Dec. 1989-Apr. 1990).

24. Interviews by author (Dec. 1989-Apr. 1990).

25. Interviews by author (Dec. 1989-Apr. 1990).

26. See Letter from Ambassador Matsunaga, *infra* note 79.

However, achievement of these goals through dispute settlement agreements probably came at the expense of friendly diplomatic relations, since trade dispute settlement of this type creates diplomatic friction under even the best of circumstances. The United States is, in disputes such as these, demanding changes in a government's trade policies. Trade policy changes typically have economic, social, and political costs for which the East Asian governments must bear responsibility. Indeed, some interviewees representing the East Asian governments complained bitterly about some of the dispute outcomes.<sup>27</sup>

To summarize then, evidence from the case studies indicates that, most of the time, U.S. trade negotiators were able to make achievement of possession goals—such as enhancing commercial competitiveness, assuring domestic interest group support, increasing domestic employment, and improving the U.S. balance of international payments—complement the milieu goal of strengthening the GATT. Only in the Japan semiconductor case did achievement of possession goals contradict the milieu goal of strengthening the GATT.

Yet all these U.S. national goals will not be achieved unless the East Asian States comply with the settlement agreements. The compliance record of the nine cases is presented in Table 3.

Substantial compliance with the settlement agreements by the East Asian States was achieved in seven of the nine cases: Japan footwear, Japan tobacco, Korea footwear, Korea beef, Korea insurance, Taiwan footwear, and Taiwan rice. Substantial compliance means that the East Asian States completely or nearly completely implemented the terms of the agreement. Hence, in a large percentage of cases, U.S. trade negotiators were able to achieve the important negotiation goal of drafting an agreement that receives substantial compliance.

Nevertheless, two of the agreements (Japan semiconductor and Korea intellectual property) did not result in substantial compliance. Why? What factors explain compliance and noncompliance with bilateral trade dispute settlement agreements? These questions are addressed in the next three sections of this paper.

### III. NEGOTIATION STRATEGY AND BUREAUCRATIC POLITICS

Though firm trade policy behavior is under-researched,<sup>28</sup> Ameri-

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27. Interviews by author, #9009 (Apr. 26, 1990), #9018 (Apr. 27, 1990), #9036 (Sept. 8, 1990).

28. For literature on firm trade policy behavior, see R. BAUER, I. DE SOLA POOL, & A. DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY* 105-243 (1972); *AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION* (J. Zysman & L. Tyson eds. 1983); H. MILNER, *RESISTING*

*Table 3*  
CASE COMPLIANCE RECORD

case	compliance record	compliance yes/no
Japan footwear	quota eliminated	yes
Japan tobacco	tariff eliminated	yes
Japan semiconductor	20% share not met	no
Korea insurance	licenses granted	yes
Korea intell. prop.	weak enforcement	no
Korea footwear	tariff lowered; licensing transparent	yes
Korea beef	quota eliminated	yes
Taiwan footwear	tariff lowered	yes
Taiwan rice	exports to small markets	yes

can businesses apparently seek bilateral trade dispute settlement because their competitiveness is threatened by a foreign competitor. The threat may be from fair competition (as in an escape clause case) or from (allegedly) unfair competition (as in an antidumping, countervailing duty, section 337, or section 301 case). American businesses in the Pacific Basin trade disputes studied here sought to enhance their competitiveness in East Asian markets. They went to USTR under the section 301 trade-remedy process with their complaints and petitioned for help.

Pursuant to section 301 of the 1974 Trade Act, as amended in 1979, 1984, and 1988, USTR has the authority to:

- (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions . . . ;
- (B) impose duties or other import restrictions on the goods of . . . such foreign country; or
- (C) enter into binding agreements with such foreign country that commit such foreign country to
  - (i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken [by USTR].<sup>29</sup>

USTR is also authorized to take "all other appropriate and feasible

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PROTECTIONISM (1988); Milner & Yoffie, *Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Trade Demands*, 43 INT'L ORG. 239 (1989).

29. 19 U.S.C. § 2411(c) (1988). A useful reference to trade law is HOUSE COMM. ON WAYS & MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, H.R. DOC. NO. 14, 101st Cong., 1st Sess. 379 (1989) [hereinafter Overview].

action within the power of the President,"<sup>30</sup> *i.e.*, even retaliate, against a foreign government to aid a U.S. firm or industry that has been victimized by unfair foreign trade practices. If USTR determines 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, then

USTR *must* take action.<sup>31</sup> If USTR determines that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce," USTR *may* take action.<sup>32</sup> Section 301 was amended in 1984 so that "commerce" includes service trade and foreign investment in addition to merchandise trade.<sup>33</sup>

According to statutory dictate, the formal process of taking action under section 301 begins with a petition to or a self-initiation by USTR.<sup>34</sup> The actual process, however, typically begins before a formal petition is filed at USTR, with an informal meeting between representatives of the industry and their trade lawyer (usually), and representatives of USTR.<sup>35</sup> USTR representation typically consists of members of the general counsel's office, the area office, and the sector office. At this informal meeting or meetings, the American firm or industry informs USTR staff that it believes it is the victim of unfair trade practices.

For example, the trade lawyer for the Rice Millers Association might arrange a meeting with the USTR associate general counsel, a representative from the Asia and Pacific office, and a representative from the agriculture office to complain about Taiwanese rice policies. The trade lawyer would explain the problem and convey to USTR the importance of the issue to the Rice Millers Association. USTR, for its

30. 19 U.S.C. § 2411(a) (1988).

31. *Id.*

32. *Id.*, § 2411(b).

33. Overview, *supra* note 29, at 382.

34. 19 U.S.C. § 2412(a), (b) (1988).

35. Interviews by author, #9006 (Apr. 26, 1990), #9011 (Apr. 24, 1990), #9027 (Dec. 12, 1989). A useful outline of the procedures under section 301 is contained in Bello & Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 Nw. J. INT'L. L. & BUS. 633, 645-653 (1986).

part, explains whether the problem has been discussed with the Taiwanese in the past, the Taiwanese position, the bilateral foreign policy milieu, and USTR's preferred course of action.

Unless USTR determines that U.S. rights under a trade agreement have been denied or that the foreign country has acted unjustifiably and burdened U.S. commerce, thus requiring mandatory action by USTR, staff at USTR may decide that the complaint is without foundation and therefore merits no action. USTR may try to resolve a trade problem through informal bilateral negotiations with the other government. However, if the informal bilateral talks do not bear fruit, then USTR staff may discuss with industry representatives and trade lawyers the possibility of a formal section 301 petition-filing.

By rule of custom at USTR, trade lawyers for a firm or industry contemplating a section 301 petition-filing send a draft petition around USTR for comments.<sup>36</sup> It is the rare section 301 petition which arrives at USTR unannounced. For example, USTR staff were not surprised by any of the petitions filed in the cases studied here. In fact, three of the section 301 cases studied here were initiated by USTR (Japan tobacco, Korea insurance, and Korea intellectual property), while in two other cases, USTR invited petitions (Semiconductor Industry Association against Japan and American Meat Institute against Korea).<sup>37</sup> USTR is statutorily required to review petitions and determine within forty-five days whether to initiate an investigation.<sup>38</sup>

The theory of organizations as applied to foreign policy-making by Morton Halperin shows that an organization's behavior reflects its institutional mission.<sup>39</sup> The mission of USTR includes (1) representing the United States in multilateral trade negotiations, (2) acting as an international agent for American business in section 301 actions, and (3) advising the President on foreign trade policy.<sup>40</sup> The second aspect of the mission means that the needs of American business influence U.S. trade negotiators. The first and third aspects of the USTR mission, however, require the needs of American business to be balanced against milieu goals and the President's domestic and foreign policy goals.

Several factors apparently influence USTR decisionmakers when determining whether to initiate a case. First, is the case "winnable" and at what cost? Second, can this case serve a bilateral or multilat-

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36. Bello & Holmer, *supra* note 35, at 645.

37. Interviews by author, #9008 (Apr. 27, 1990), #9030 (Apr. 24, 1990).

38. 19 U.S.C. § 2412(a) (1988).

39. M. HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 26 (1974).

40. *See, e.g.*, I. DESTLER, *AMERICAN TRADE POLITICS* (1986).

eral strategic purpose? Third, how strong is political support for the industry within the Executive branch and Congress? Fourth, will other U.S. government agencies and the Departments of State, Treasury, Defense, and the National Security Counsel object for foreign policy reasons to the trade dispute initiation? Fifth, does the alleged unfair trade activity violate GATT or some other bilateral or multilateral treaty?

At USTR, winning is highly valued. Advised one staff member: "Think of us as like a prosecutor's office. Prosecutors love to win and hate to lose; we look for cases that we can *win*. You don't get ahead around here by losing."<sup>41</sup> A case involving a GATT violation may be the easiest type of case to win. A case without a GATT violation tends to be more difficult, though not impossible, to win. Hence, the opinion of the USTR general counsel's office on the international legality of the allegedly unfair trade activity weighs heavily in the decision to initiate or not to initiate the section 301 process.

The USTR negotiator plans a bargaining strategy which is most likely to move the East Asian government toward an optimal settlement agreement. If the East Asian government's trade practice clearly or probably violates GATT, then usually the best strategy is to push the legal argument. This is best because East Asian States find excellent "political cover" in being able to explain to their affected business communities and citizens that they conceded to the compunction of international norms, not to the compelling force of U.S. power.

The GATT strategy is also best because the East Asian negotiators realize that U.S. resolve to press its case is at its highest level when international law is on its side. As an American trade negotiator emphasized, "We had justice on our side; they knew we weren't going away on this one."<sup>42</sup> Indeed, one Japanese official opined, "GATT is key; it may determine win or lose for the U.S. If the U.S. has a strong GATT case, the case will go differently. The U.S. can use GATT as a very effective tool."<sup>43</sup>

Contracting Parties to the GATT may take their bilateral trade problems before a GATT panel or working party. The GATT dispute settlement mechanisms are often criticized by government policymakers and businesspeople for being slow, for issuing inconclusive final reports, and for unfairly ratifying the power relationship of the disputants.<sup>44</sup> Furthermore, not only is GATT unable to enforce a panel

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41. Interview by author, #9027 (Dec. 12, 1989).

42. Interview by author, #9033 (Apr. 26, 1990).

43. Interview by author, #9014 (Dec. 15, 1989).

44. Jackson, *Dispute Settlement Techniques Between Nations Concerning Economic Rela-*

determination, but according to John Jackson, "[i]t appears there is no legal obligation to carry out a panel finding. . . ."45 Because the present study is not devoted to an examination of GATT dispute settlement, the research has not been designed to systematically test the propositions of these critics.<sup>46</sup>

Nevertheless, the two cases in this study that were taken to GATT for formal dispute settlement—Japan leather/footwear<sup>47</sup> and Korea beef<sup>48</sup>—suggest that GATT dispute settlement can achieve more than its critics realize. These cases suggest that a GATT panel finding against a State can be critical to eventual settlement of particularly thorny disputes. Without GATT leverage over Japan for its leather and footwear policies and over Korea for its beef policies, U.S. negotiators would not have been able to reach settlements. Said one U.S. negotiator about the Japan case: "We said to the Japanese: 'You are wrong; you will lose.' A GATT loss would allow them to sell it at home."<sup>49</sup>

In some cases, USTR initiates a section 301 investigation, as it did against Japan for its leather and footwear policies and against Korea for its beef, insurance, and intellectual property policies, precisely because successful settlement serves a bilateral or multilateral strategic purpose. The bilateral strategic purpose in these cases was to further bilateral free trade: once Japan and Korea lost their justifications for quotas on leather, footwear, and beef, they lost justifications for all other quotas.

The multilateral strategic purpose in the Korea insurance and intellectual property cases was to get Korean support for newly emerging norms in the GATT. Once Korea opened its insurance market, its national interests moved significantly toward support for a GATT for service trade; once Korea strengthened its intellectual property laws,

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tions—*With Special Emphasis on GATT*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 39, 66 (T. Carbonneau ed. 1984); Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 *J. INT'L ARB.*, Dec. 1987, at 53, 92-93; H. HAZARD, *RESOLVING DISPUTES IN INTERNATIONAL TRADE* 167-181 (1990).

45. Jackson, *supra* note 44, at 50.

46. For work in this area, see Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51 (1987); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990).

47. GATT Panel Report on Japanese Leather Import Quotas, 20 *Int'l Trade Rep.* (BNA) 1082 (June 19, 1984). The United States requested application of the conclusions reached by the panel on Japanese leather import quotas to the leather footwear quota as well. See U.S. TRADE REPRESENTATIVE, SECTION 301 TABLE OF CASES, *supra* note 12, at 49:0846.

48. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 36, at 268 (1990) (Panel Decision on Korean Beef Imports) [hereinafter Korean Beef Panel].

49. Interview by author, #9033 (Apr. 26, 1990).

its national interests were served by stronger GATT laws regarding intellectual property. Since a key U.S. goal in the Uruguay Round of GATT multilateral trade negotiations was to write new GATT law regarding service trade and intellectual property, and the attainment of this goal depended, in large part, on the United States getting the support of the big developing countries, USTR believed that pressing the Korean government bilaterally would help multilateral efforts at GATT rule formulation. In this way, the U.S. pursuit of possession goals promoted milieu goals as well.

To summarize, USTR considers the bilateral and multilateral strategic value of a petition before initiating formal trade dispute settlement procedures. A Deputy U.S. Trade Representative made explicit the initiation policy pursued at USTR during the 1980s: "Our [third] strategy has been to concentrate, to the extent possible, on sectors that will have 'ripple' effects. . . ." <sup>50</sup>

Studies of the foreign policymaking of Executive branch bureaucracies in the United States show that domestic political issues influence decision-making.<sup>51</sup> In the American political system, the President seeks to possess influence sufficient to achieve his policy objectives. Yet, the President's political influence grows and diminishes with events. The political appointees who head Executive Branch agencies owe an allegiance to the President and thus make policy with an eye toward its effects on domestic interest groups and constituencies important to the President.

All U.S. administration interviewees (and many outside the U.S. government) in this study noted domestic politics as a factor in the USTR trade dispute initiation decision-making process. Yet, as this study shows, in a finding that may surprise some observers, possession goals such as interest group support typically are secondary to the factors discussed above (winning, strategic purpose, and GATT milieu goals). Only in the semiconductor dispute with Japan did domestic political and economic possession goals and pressures override these other factors.

USTR considers the foreign policy implications of a trade dispute initiation with a Pacific Basin government as well. One interviewee remarked, "At one time the State Department put so much pressure on us during Japanese elections that we didn't even talk to [Japanese

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50. United States-Japan Trade Issues with Emphasis on Structural Impediments Initiative: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs, 101st Cong., 2nd Sess. (1990) (statement of S. Linn Williams, Deputy U.S. Trade Representative).

51. See M. HALPERIN, *supra* note 39, at 26-62.

government representatives] about trade problems."<sup>52</sup> However, the cases studied here show that, by the mid-1980s, a consensus had been reached within the foreign policy bureaucracies in the Executive Branch, that trade policy *is* foreign policy. Thus, bilateral foreign policy concerns during this time period only weakly influence USTR's section 301 initiation decisions.

However, the preservation of friendly bilateral trade and diplomatic relations is apparently important to USTR negotiators. As noted above, trade policy change is made only with political, economic, and social cost. In several of the cases, U.S. negotiators sought to offer "political cover" to the East Asian governments involved through the use of GATT compliance legitimacy strategy or some other mechanism. Note for example, the GATT panel decision in the Japan leather/footwear dispute that allows the Japanese government to "sell it at home,"<sup>53</sup> and the preservation of the Taiwanese right to sell subsidized rice in small country markets.

Nevertheless, section 301 requires that USTR take action against a foreign government if the investigation ends with the conclusion that unfair activity exists.<sup>54</sup> Section 301 also authorizes USTR to retaliate by suspending or withdrawing trade benefits to that foreign country, or imposing quotas on the imported goods of the foreign country.<sup>55</sup> Because the statute requires mandatory action in certain circumstances and authorizes the use of U.S. economic power, section 301 can be an effective tool of U.S. trade policy. However, for the same reasons, section 301 can disrupt bilateral relations between the United States and the foreign government. East Asian States loathe being accused of unfair trade activity by USTR and fear the threat of economic sanctions. For these reasons, the section 301 process is a foreign policy tool to be used judiciously. As one interviewee stated, "It must be used with finesse."<sup>56</sup>

#### IV. CASE EVIDENCE

The cases illustrate the dynamics of the USTR decision-making process regarding trade dispute initiation—"winning," strategic purpose, domestic politics, foreign policy, and GATT. Selected aspects of the trade disputes studied in this research are reviewed here.

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52. Interview by author, #9002 (Dec. 12, 1990).

53. GATT Panel Report on Japanese Leather Import Quotas, *supra* note 47.

54. 19 U.S.C. § 2411(a) (1988).

55. 19 U.S.C. § 2411(c) (1988).

56. Interview by author, #9006 (Apr. 26, 1990).

Footwear Industries complained of unfair trade policies toward non-rubber footwear by the governments of Japan, Korea, Taiwan, Brazil, France, Italy, Spain, and the United Kingdom, as well as the European Community as a whole.<sup>57</sup> The heart of the petition was the claim that restrictions by Europe and Japan diverted shoe exports by the other named States to the "open" U.S. footwear market.<sup>58</sup> Footwear Industries confronted USTR with a morass of issues and problems.

World footwear markets are huge.<sup>59</sup> Shoe-making is labor intensive while start-up capital costs are relatively low. Hence, developing countries, typically labor-rich and cash-poor, have found good investment opportunities in shoe-making.<sup>60</sup> The large U.S. consumer market invites developing country footwear exports. As a result, since the late 1960s, U.S. shoe producers have faced ever-growing foreign competition for U.S. footwear retailers. Between 1965 and 1977, imports increased from twelve percent of the U.S. market to forty-nine percent.<sup>61</sup> Imports reached fifty-one percent of the market in 1976.<sup>62</sup> Between 1968 and 1983 over 350 shoe factories in the United States closed.<sup>63</sup> Still, the industry failed to get much U.S. government help.

The U.S. footwear industry petitioned the International Trade Commission (ITC) for escape clause protection and trade adjustment assistance at least 355 times between 1973 and 1978.<sup>64</sup> Though the footwear industry found some sympathetic supporters in Congress, it failed to generate much support from the Executive Branch. However, in 1977, on the heels of another escape clause finding by the ITC that footwear imports had, in fact, caused injury to domestic producers and thus the industry was entitled to relief, the industry succeeded in getting the Carter Administration to negotiate an Orderly Marketing Arrangement (OMA) with Korea and Taiwan, the two largest importers.<sup>65</sup>

The OMA, which expired in June 1981, resulted in more competition for U.S. producers (from Brazil, Spain, Italy, and Hong Kong, whose firms exploited the market opportunities created when quotas

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57. Footwear petition, *supra* note 13.

58. *Id.*

59. The information in this paragraph is taken from Yoffie, *Adjustment in the Footwear Industry*, in *AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION*, *supra* note 28, at 313-49.

60. *Id.* at 325.

61. *Id.* at 324.

62. H. MILNER, *supra* note 28, at 104.

63. Yoffie, *supra* note 59, at 323.

64. H. MILNER, *supra* note 28, at 106.

65. *Id.* at 108.

were placed on Korean and Taiwanese imports), better competition (from Korea and Taiwan, whose firms were prompted to become more efficient and move up-market), even lower U.S. market share than before, and even lower U.S. employment levels.<sup>66</sup> The industry needed a new strategy, one which promised to provide comprehensive protection. The section 301 trade remedy provided that range of opportunity.

Footwear Industries filed the section 301 petition with USTR only days before the November 1982 Congressional elections. The petition was ushered in by identical letters to USTR signed by fifty Senators and 111 Representatives urging acceptance of the petition.<sup>67</sup> Nevertheless, USTR rejected the petition's European trade-diversion argument. However, USTR did agree that there was evidence that the Japanese footwear market was closed to exports from the United States and other countries and that Japanese footwear policies merited investigation. With respect to Taiwan and Korea, USTR found evidence of several relatively minor GATT violations and high, though technically GATT-compliant, tariffs. USTR agreed to take up these issues with each country.

In rejecting the trade diversion argument, USTR kept its policy consistent with GATT practice: GATT has never accepted the trade diversion argument. Despite intense Congressional and footwear-industry pressure, the Executive resisted employing the section 301 leverage under a trade diversion argument to protect the U.S. footwear industry. Instead, it pursued only those issues where it believed a GATT violation existed.

The GATT panel decision in the leather/footwear dispute between the United States and Japan illustrates the utility of GATT as a negotiating tool and the bureaucratic prominence of the USTR general counsel's office in such cases. The USTR negotiators needed a bargaining strategy to challenge the Japanese negotiating strategy on leather and footwear market-opening, a strategy which the Japanese had used in the tobacco and semiconductor disputes as well. One trade negotiator described Japan's strategy during the leather and footwear cases as a "dribble out" strategy;<sup>68</sup> another trade negotiator was thinking of the tobacco case when opining that the Japanese "open markets we can't make any money in and open slowly markets that we can make money in. By letting the American industry make

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66. Yoffie, *supra* note 59, at 344-45; H. MILNER, *supra* note 28, at 104.

67. Letter to Ambassador Brock from members of Congress (Sept. 29, 1982) (available in U.S. TRADE REPRESENTATIVE, Public file #301-36).

68. Interview by author, #9033 (Apr. 26, 1990).

more money, they think they can appease it.”<sup>69</sup>

For example, the Japanese government took the following tack in bilateral trade dispute negotiations over leather, footwear, tobacco, and semiconductors. First, they denied for many months that there was a trade problem at all. Second, they admitted that the U.S. government perceived a bilateral trade problem, though it was illusory. Third, a bilateral “study group” was formed to investigate the “problem.” After many more months, the study group drew ambiguous conclusions and recommended small policy changes. Fourth, they bargained for many months over these minor Japanese policy changes. Fifth, they finally made minor concessions. The result was incremental policy changes which minimized the impact of the negotiations on the Japanese economy, business, and society.

In the leather and footwear disputes with Japan, USTR determined that the best strategy was to press the Japanese government hard that its policies violated GATT. USTR determined that a GATT panel finding against Japan, over its leather and footwear quotas, would bring international normative pressure to bear on Japan to end the quotas. In addition, a GATT panel finding against Japanese quotas on leather goods could be used as precedent in negotiations over tobacco as well as other products.

This negotiation strategy, however, was opposed by many in the Executive Branch, especially in the Treasury and State Departments, but in USTR as well. These policymakers opposed “legalizing” bilateral trade dispute settlement. They placed a higher value on the goal of friendly diplomatic relations with the Japanese government and rejected a policy that would cause the Japanese government to “lose face” internationally. The Deputy U.S. Trade Representative, however, argued within the Administration that only by legalizing the process could the United States get Japan to open its markets. The “legalize it” argument prevailed and the general counsel’s office was asked to prepare an “airtight” GATT case against the government of Japan over its leather and footwear policies.

The USTR lawyers argued before the GATT panel successfully and the panel held against Japan.<sup>70</sup> Indeed, one participant remarked, “The Japanese knew they were beaten; they didn’t even put up a defense in GATT.”<sup>71</sup> The Japanese quotas were held up as an unfair trade practice before the world by a legitimate international institu-

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69. Interview by author, #9007 (Apr. 24, 1990).

70. GATT Panel Report on Japanese Leather Import Quotas, *supra* note 47.

71. Interview by author, #9027 (Dec. 12, 1989).

tion. The GATT victory legitimized the U.S. position in the eyes of the world trading community and enhanced with the Japanese the credibility of the U.S. threat to use economic sanctions in pursuit of its goals. After the GATT panel victory against Japan for its leather and footwear quotas, USTR pressed Japan to eliminate quotas in one market after another. The GATT victory in leather/footwear ultimately doomed all Japanese quotas.

The leather/footwear case, then, served a strategic purpose greater than its immediate trade value (which was small). USTR's GATT case against Japanese leather and footwear import policies was the first attempt to make the Japanese political economy conform with the rules and principles of the GATT and of liberal market political economic ideology. USTR pressed the GATT case against Japan in a relatively inconsequential market because a victory would offer the United States additional leverage in future negotiations over other products. A U.S. trade policymaker said, "Leather and footwear was [a] medium to attack the Japanese system."<sup>72</sup> Another U.S. policymaker mused, "Nobody would have believed then that it would result in 1990 with the Structural Impediments Initiative. Now we are demanding the complete restructuring of the Japanese economy."<sup>73</sup>

The precedential value of a GATT panel finding is also illustrated by the Korea beef case. The Korean government employed every diplomatic effort to prevent the formation of a GATT panel to investigate the beef case. Their justification for quotas on beef was the same as their justification for quotas on many other products, the so-called balance of payments exception.<sup>74</sup>

GATT permits the maintenance of import quotas in order to protect a country against balance of payments deficits. The U.S. position was that, by the end of the 1980s, the Korean balance of payments was in surplus and the surplus was growing each year, and thus Korea should no longer be permitted to use the GATT balance of payments exception to legitimize its quotas. However, USTR determined that it needed authoritative multilateral, not unilateral, action in order to convince the Korean government to change its policy. For Korea, on the other hand, if beef were lost, and it was, since a GATT panel ruled against Korea,<sup>75</sup> the justification for the other quotas would be lost as well. Thus, the normative pressure of GATT mattered to both Japan and Korea.

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72. Interview by author, #9033 (Apr. 26, 1990).

73. Interview by author, #9007 (Apr. 24, 1990).

74. GATT, *supra* note 2, art. XII.

75. See Korean Beef Panel, *supra* note 48.

The significance of the normative pressure of GATT is not diminished because, in both the Japan and Korea cases, the United States ultimately found it necessary to threaten economic sanctions to get settlements. Rather, the need for the show of U.S. power underscores the importance to the Japanese and Korean governments of the trade practices at issue. Indeed, it points out that GATT tends to get the really tough cases, the ones in which the stakes are truly high.

The charge that GATT dispute settlement is slow—it typically takes about a year—winters when compared to the alternatives. The leather/footwear dispute between the United States and Japan had dragged on for years before it was taken to GATT. Trade diplomacy is not for the impatient. Indeed, the business firm or industry which depends upon quick government action for survival is doomed. GATT dispute settlement should be seen as a tool of negotiation which, if used judiciously, can be influential leverage against unfair trade practices.

From the perspective of USTR, the disputes with Japan over leather, footwear, and tobacco were about changing the Japanese political economy so that it conformed with the GATT. The semiconductor dispute illustrates the incompatibility of the Japanese political economy with that of the United States. However, the dispute exposes the limits of GATT law, which was written between the 1940s and 1970s by Americans and Europeans schooled in traditional market economics. The traditional economic model, on which GATT is based, envisions a market of simple manufactured goods, but must be applied in the 1980s and 1990s to high technology trade and to political economies that do not conform to traditional liberal models.

One participant remarked about the dispute: “We could never find the smoking gun; we could never find the GATT violation, but we knew we should have had a bigger share of [the Japanese] market.”<sup>76</sup> In the beginning, U.S. negotiators sought to open Japanese markets for American (and all foreign) semiconductor makers, in addition to pursuing dumping issues, which are not studied here. Without clear evidence of GATT-noncompliant market barriers, USTR was forced to give up. They opted for results: “Give us twenty percent of your market.”<sup>77</sup>

The Semiconductor Arrangement<sup>78</sup> signed in September 1986, which “settled” the dispute, made only cautious commitments to “an-

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76. Interview by author, #9033 (Apr. 26, 1990).

77. Interviews by author, #9008 (Apr. 27, 1990), #9027 (Dec. 12, 1989), #9033 (Apr. 26, 1990).

78. Arrangement between the Government of Japan and the Government of the United

ticipate," to "impress," to "improve gradually and steadily" foreign firm market access. However, a once confidential letter from Ambassador Matsunaga to Ambassador Yeutter was attached to the public treaty.<sup>79</sup> The existence of the letter and its contents leaked out to both the Japanese and American press. The letter explicitly recognizes a twenty percent target for foreign semiconductor market share.

The letter states,

The Government of Japan recognizes the U.S. semiconductor industry's expectation that semiconductor sales in Japan of foreign capital-affiliated companies will grow to at least slightly above 20 percent of the Japanese market in five years. The Government of Japan considers that this can be realized and welcomes its realization.<sup>80</sup>

A "recognition" of an "expectation" may not be a commitment, however. Also, the letter continues, "The attainment of such an expectation depends on competitive factors, the sales efforts of the foreign capital-affiliated companies, the purchasing efforts of the semiconductor users in Japan and the efforts of both Governments."<sup>81</sup> This clause leaves much room to maneuver if the target market share is not met.

It is easy to criticize the Semiconductor Arrangement for its inadequacies. However, many of the negotiators for the semiconductor dispute also negotiated the well-drafted and successfully implemented settlements to the leather/footwear and tobacco disputes. Why the different outcomes? In the leather/footwear case, USTR demonstrated that Japanese policy violated GATT and, certain of its normative position, pushed the Japanese government hard. In the tobacco case, USTR, having pressed the Japanese government for years to change their GATT-violating policies and having finally achieved most of these objectives, demanded the elimination of a GATT-compliant tariff. But, whether it is GATT-compliant or not, a tariff is a readily apparent trade barrier. With a tariff, USTR can point to a "smoking gun." In the semiconductor case, USTR could point to no smoking gun. Hence, USTR could do no better than to fashion an agreement that *might* enhance the commercial competitiveness of a vital U.S. industry, even if it violated the spirit of the GATT.

Nevertheless, rarely did USTR disregard milieu goals in favor of

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States of America Concerning Trade in Semiconductor Products, Sept. 2, 1986, United States-Japan.

79. Letter from Ambassador Matsunaga to Ambassador Yeutter, *quoted in* Identification of Japan's Failure to Abide by the Semiconductor Agreement, Submission before the United States Trade Representative, A. Wolff, R. Gadbow, & J. Ragosta of the law firm of Dewey Ballantine (March 1989).

80. *Id.*

81. *Id.*

possession goals during its application of section 301 in the Pacific Basin in the 1980s (with the Japan semiconductor case as the only example among the nine case studies). Indeed, USTR typically promoted milieu goals in support of possession goals.

## V. COMPLIANCE AND UNILATERAL SURVEILLANCE

This study shows that substantial compliance with bilateral trade dispute settlement agreements will likely be achieved under the following conditions: (1) expected trade behavior is clearly specified, (2) expected trade behavior is implementable, (3) effective monitoring procedures are provided in order to detect noncompliance, and (4) positive and/or negative incentives for compliance are offered. As Table 3 shows, seven of the nine settlement agreements received substantial compliance by the East Asian governments. Two settlements, however, did not: Japan semiconductor and Korea intellectual property.

The first condition—clear specification of expected trade behavior—was met by eight of the nine settlement agreements. (See Table 2.) For example, the Japanese government committed itself in the settlement agreement regarding tobacco to eliminate a tariff. The Korean government agreed to license foreign firms to sell certain types of insurance in Korea in settling the insurance dispute. The Taiwanese government committed itself to ensuring that Taiwanese rice would be exported only to small countries. Even the agreement that settled the dispute with Japan over semiconductor market access clearly specified the expected behavior. Only in the Korea intellectual property settlement was expected behavior inadequately specified.

A trade negotiator explained "clear specification": "Clarity demands that you say 'two years,' not 'over a reasonable period of time.'"<sup>82</sup> The agreement between the United States and Korea on intellectual property, however, fails to meet that standard in some of its important provisions. Regarding protection for sound recordings, the agreement states, "[p]rotection of sound recordings . . . against unauthorized reproduction, importation and distribution will be *strengthened* through *stricter enforcement* of Korea's Phonogram Law. . . . The ROKG will *strengthen* penalties against copyright infringement. . . . Through *administrative guidance*, printed materials copyrighted in the United States. . . will be prevented from unauthorized reproduction, publication, and distribution. . . ."<sup>83</sup> The agreement's

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82. Interview by author, #9021 (Dec. 14, 1989).

83. U.S. TRADE REPRESENTATIVE, RECORD OF UNDERSTANDING ON INTELLECTUAL

treatment of patent and trademark issues is similarly ambiguous. Noncompliance resulted.

According to the International Intellectual Property Alliance, extensive copyright violations continued in Korea after the agreement was reached in the summer of 1986.<sup>84</sup> Korean attorneys hired by the Alliance discovered that Korean pirate publishers had dumped \$2 million worth of textbooks on the Korean college market in February 1988. Pirating also persisted in videocassettes, records, and computer software. Korean enforcement efforts appeared to the Alliance to be minimal and they urged USTR to pressure the Korean government to enforce their intellectual property laws.

American pharmaceutical companies remained dissatisfied with treaty compliance as well. Squibb and Bristol-Myers filed new section 301 complaints with USTR.<sup>85</sup> They charged that Korean companies were pirating their products, often with the help of a Korean government-funded research center. As a result of these compliance problems, in May 1989 USTR placed Korea, along with Brazil, India, Mexico, China, and Thailand, on its priority watch list of violators on intellectual property rights under the Special 301 provision of the 1988 Trade Act.<sup>86</sup>

The second condition—expected trade behavior that can be implemented, *i.e.*, the government possesses the political capacity to do what it has committed itself to doing—was also met in eight of the nine agreements. In the footwear case, the Japanese government committed itself to eliminating a quota, and in the tobacco case, to eliminating a tariff. The expected trade behavior was implementable by the Japanese government. The agreement commitments in the other cases were also implementable by the East Asian governments. However, in the semiconductor dispute, the Japanese government (ambiguously and in response to U.S. pressure) committed itself to helping U.S. semiconductor-makers garner twenty percent of the Japanese market. The Japanese government lacked the authority to implement its commitment. Noncompliance resulted.

The same USTR negotiators who had drafted clearly specified and implementable trade behaviors in all of the other cases did not draft

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PROPERTY RIGHTS (available in U.S. TRADE REPRESENTATIVE, Public File #301-52) (emphasis added).

84. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, TRADE LOSSES DUE TO PIRACY AND OTHER MARKET ACCESS BARRIERS AFFECTING THE US COPYRIGHT INDUSTRIES 36-37 (1989).

85. Interview by author, #9031 (Apr. 25, 1990).

86. U.S. TRADE REPRESENTATIVE, 1990 TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 19, 40, 90, 133, 144, 193 (1990).

such agreements in the Japanese semiconductor and Korean intellectual property cases. What can account for this? The likely explanation is USTR's possession goal of interest group support. Political pressure may lead negotiators to "paper over" a dispute with a weak agreement.

The third condition—effective monitoring procedures for detecting noncompliance—was met in all nine cases. Even in the Japan semiconductor and Korea intellectual property settlements, effective monitoring was provided. Indeed, monitoring in commercial treaties, unlike in arms control, is apparently relatively simple, but still very expensive.

In arms control, the U.S. government itself takes primary responsibility for monitoring Soviet compliance with bilateral treaties through national technical means. The U.S. government does so because no credibly competent international institutions exist which are able to effectively monitor compliance. In much the same way, the U.S. government must undertake responsibility for monitoring compliance with trade agreements. The GATT, in theory charged by its members with providing surveillance of national trade policies and compliance with GATT rules, in reality possesses weak surveillance and enforcement capability. Hence, in both arms control and trade policy, the United States must provide unilateral surveillance to insure treaty compliance.

USTR, unlike the Department of Commerce, has no staff officers whose mission is to insure implementation of and compliance with trade agreements. In fact, the Department of Commerce has one person who does nothing but monitor Japanese semiconductor dumping and price compliance with the Semiconductor Arrangement. Nevertheless, even the relatively large Commerce Department relies heavily on U.S. industry for monitoring help. For example, the Semiconductor Arrangement requires industry monitoring to insure compliance; the Department of Commerce lacks access to information to guarantee compliance on its own. Thus, American business must actively monitor compliance with agreements that affect it. USTR has relied on the Semiconductor Industry Association, the Pharmaceutical Manufacturers Association, and the International Intellectual Property Alliance to detect noncompliance with the applicable settlement agreements.

The fourth condition—positive and/or negative incentives for compliance—was met to some degree in all nine cases. Due to the political and diplomatic asymmetry in the relationships between the East Asian governments and the United States, the East Asian govern-

ments in bilateral trade disputes always have a positive incentive to improve overall bilateral relations with the United States by signing and complying with a settlement agreement. They also have a negative incentive to sign and comply with an agreement: the threat of losing U.S. markets. The East Asian States need unfettered access to large U.S. consumer markets and thus loss of these markets is a credible economic sanction.

Furthermore, the East Asian States share with the United States the milieu goal of a strong, GATT-based liberal international trading system, because export-led economies depend upon open international markets. Thus, the East Asian States strengthen the GATT system when they settle and comply with the terms of agreements that put their trade behavior into compliance with GATT.

However, because trade dispute settlement typically demands a policy change that creates domestic losers, governments may have strong incentives for non-compliance, as well. The trade negotiator must not be misled into a casual agreement by the seeming willingness of the leadership of the opposing government to comply. Non-compliance can occur, despite the best intentions of senior political leaders, at lower levels of the government, a phenomenon that one political scientist has called "involuntary non-compliance,"<sup>87</sup> but that may also be called "bureaucratic non-compliance."

Although the bureaucracies in Japan, Korea, and Taiwan are large and hierarchically ordered, the lower levels of the bureaucracy have ample discretion when implementing orders from the top.<sup>88</sup> Cases such as the Korea intellectual property case illustrate that even when political leaders intend compliance, a large bureaucracy must still be moved in support of the new policy. It would appear that settlement agreements which call for bureaucratic action of this type must be settled and monitored carefully to ensure compliance. On the other hand, tariff and quota changes can apparently be implemented by a government with little difficulty.

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87. R. Keohane, *Reciprocity, Reputation and Compliance with International Commitments* 11, 33 (Sept. 4, 1988) (unpublished paper prepared for delivery at the 1988 Annual Meeting of the American Political Science Association).

88. See, e.g., C. JOHNSON, *MITI AND THE JAPANESE MIRACLE* 20-24, 44, 55-81 (1982) (MITI is the primary Japanese government bureaucracy involved with trade policy); Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 136, 151-56 (F. Deyo ed. 1987) (noting expertise, influence, and independence from political leadership of Japanese, Taiwanese, and South Korean bureaucracy); H. TIEN, *THE GREAT TRANSITION: POLITICAL AND SOCIAL CHANGE IN THE REPUBLIC OF CHINA* 121-25 (1989) (describing Taiwan's administrative bureaucracy).

### CONCLUSION

Grounded in theories of interstate conflict, foreign policy, arms control, and bureaucratic politics, this paper has used the evidence of the section 301 experience in the Pacific Basin to explain the U.S. strategy of bilateral trade dispute settlement. The U.S. strategy aims to achieve important national goals which may be described as either milieu or possession goals.

The U.S. government typically attempts to promote the GATT-based multilateral trading system as an important national milieu goal. USTR, this study shows, typically carries out bilateral trade dispute settlement with high regard for the GATT system. The Pacific Basin experience with section 301 shows that the USTR strategy is to select cases with "ripple effect," *i.e.*, cases which will open more markets or promote more GATT rule formulation. As an important possession goal, staff at USTR also aim to enhance interest group support for themselves and for the President.

The U.S. strategy also typically aims to achieve compliance with the settlement agreements. This paper has specified the conditions under which compliance is likely to occur. In doing so, this paper shows that "covenants without the sword" need not be mere words.