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SECTION 301 AND THE APPEARANCE OF UNILATERALISM

*Warren Maruyama**

I. INTRODUCTION

I realize that it is getting late. I promised Professor Stoltenberg that since I would be the second-to-last speaker in the afternoon session, I would try to keep things interesting.

I have a friend who is a customs lawyer. He had a client who was engaged in importing a pharmaceutical from South America into the United States. The pharmaceutical consisted of a white powder. The powder was imported in metal drums, so that it could be made into pills after importation.

Unfortunately, the white powder came from a South American country that is in close geographical proximity to Colombia. So — quite understandably — Customs agents frequently opened the drums to poke around inside. Unfortunately, this meant the pharmaceutical had to be sent back for reprocessing, which cost several thousand dollars.

The lawyer tried to work out a solution with the regional Customs office. He knew that Customs would continue to open the drums — that is part of its job. But he wanted to develop a procedure so that his client could be present to ensure that drums were opened properly. He was not successful: he visited the U.S. Customs Service headquarters in Washington, D.C., but to no avail.

Finally, in desperation, the company came up with an unorthodox solution. It stuck a label on the drums that said:

WARNING. CONTAINS AN ACTIVE BIOLOGICAL INGREDIENT. EXCESSIVE EXPOSURE MAY LEAD TO ALTERATION OF SEXUAL IDENTITY, PSYCHOTIC DELUSIONS, AND BALDNESS.

(Please call before opening.)

I do not necessarily recommend this approach, but my friend claims that it worked.

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I am going to draw three lessons from this story and apply them to section 301.

First, I will try to address the "what's inside the barrel" question. Judging from this morning's session, there are some misconceptions about section 301. Perhaps a brief description of the law and its origins will help clear up the confusion.

Second, I will argue that with section 301, as with many other things, appearances can be deceiving. Despite any appearance of unilateralism, the United States has sought to use section 301 in a constructive way, with the aim of strengthening the General Agreement on Tariffs and Trade ("GATT") and multilateral dispute settlement mechanisms over the long term.

Third, we all know that it is important to read and understand warning labels. Congress and the Executive Branch have recognized that there are limits to section 301 and have worked within these constraints.

II. SECTION 301

Despite extensive criticism, section 301 is a modest statute.¹ It directs the United States Trade Representative (USTR), subject to the direction of the President, to take action if (1) the rights of the United States under a trade agreement are being denied, or (2) an act, policy, or practice of a foreign government is "unjustifiable" and burdens or restricts U.S. commerce. It also authorizes the USTR, again subject to the direction of the President, to act if (3) an act, policy, or practice of a foreign government is "unreasonable" and burdens or restricts U.S. commerce.

"Action" generally consists of retaliation in the form of higher tariffs on products of the foreign country engaging in unfair trade practices. These sanctions are imposed infrequently. Most section 301 cases are resolved through negotiation.

Section 301 began as section 252 of the Trade Expansion Act of 1962.² To my knowledge, section 252 was never used. The statute became "section 301" in the Trade Act of 1974.³ In addition, it was amended to authorize private parties to file petitions. In the Trade Agreements Act of 1979, Congress added time limits and tightened section 301 procedure.⁴ This reflected concern that the Executive

1. 19 U.S.C. § 2411 (1988).

2. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872, 879-80 (1962).

3. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2364 (1975).

4. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. IX, 93 Stat. 144, 295-300 (1979).

Branch sometimes sat on section 301 investigations in order to avoid unpleasant decisions.⁵

Throughout this period, section 301 was a peripheral part of U.S. trade law. The 1974 Act focused on amendments to the "escape clause,"⁶ section 337,⁷ and the antidumping law.⁸ The 1979 Act focused on tightening antidumping and countervailing duty remedies and procedures.⁹ In both, section 301 was an afterthought.

Those days are over. Section 301 was the centerpiece of the Omnibus Trade and Competitiveness Act of 1988 (hereinafter "1988 Trade Act" or "Act"):

1. The Act created a new procedure known as "Super 301".¹⁰ For two years — 1989 and 1990 — the USTR is required to identify foreign trade barriers *and*, based on the "number and pervasiveness" of these barriers, to identify "priority foreign countries." The USTR must initiate section 301 cases against "priority" unfair trade practices in these countries.

2. The Act added another procedure known as "Special 301."¹¹ Each year, the USTR must identify countries that fail to provide adequate and effective protection for intellectual property rights and initiate section 301 cases.

3. The Act delegated the authority for imposing section 301 sanctions to the USTR. Formerly, this authority was the President's. The Act changed the decision-maker to the USTR, although it specified that he or she acts "subject to the direction of the President."

4. The Act required that the USTR retaliate in certain cases involving violations of trade agreement rights and "unjustifiable" practices.¹² The Act, however, is not quite as mandatory as it might appear, since it contains several narrow, carefully crafted exceptions.¹³

5. The Act generally tightened section 301 procedures and imposed strict deadlines for decisions and actions.

5. S. REP. NO. 249, 96th Cong., 1st Sess. 239-42 (1979).

6. 19 U.S.C. § 2251 (1988).

7. 19 U.S.C. § 1337 (1988).

8. The 1974 Act added the "constructed value" provisions of the antidumping law. 19 U.S.C. § 1677b (1988).

9. 19 U.S.C. §§ 1671, 1673 (1988).

10. 19 U.S.C. § 2420 (1988).

11. 19 U.S.C. § 2242 (1988).

12. 19 U.S.C. § 2411(a) (1988). An "unjustifiable" practice is defined at 19 U.S.C. § 2411(d)(4)(A) as an "act, policy, or practice . . . in violation of, or inconsistent with, the international legal rights of the United States."

13. See 19 U.S.C. § 2411(a)(2) (1988). In a frequently quoted (and accurate) observation, ex-special Trade Representative Robert Strauss said in Congressional testimony that section 301 should be "mandatory, but not compulsory."

III. U.S. TRADE POLICY

What happened to turn this “wimp” into the Arnold Schwarzenegger of U.S. trade law?

Those of you who have studied with Professor Jackson¹⁴ know that U.S. trade law has both a legal and a political element. The changes in section 301 are closely related to the shifting politics of trade in the United States.

In 1980, when I first emerged from law school and got a job with the U.S. International Trade Commission (USITC), international trade was a backwater. Congress passed trade bills every once in a while and GATT rounds occurred about once every ten years, but no one paid much attention to either one.

The situation changed in the mid-1980's when the United States started to run massive trade deficits. These deficits reshaped trade politics to such an extent that the 1988 Trade Act was regarded as one of the major achievements of the 100th Congress.

These tensions were mirrored in section 301. Through the mid-1980's, section 301 was primarily of interest to trade specialists. It was administered by a small, inter-agency “Section 301 Committee” and relied almost entirely on the filing of petitions by private parties. The U.S. Government's policy was to bring cases to GATT and to minimize potential inconsistencies with GATT. While the Section 301 Committee was quite successful in resolving cases through negotiations and GATT dispute settlement procedures, certain major section 301 cases that were taken to GATT were never resolved. As a result, in some circles, section 301 acquired an unfair reputation for being all talk and no action.

In this respect, 1985 was a watershed. The trade deficit was ballooning. Some critics claimed that the Administration did not have a trade policy and was not doing enough to address the trade deficit. The Administration had recently centralized international economic decision-making in the Economic Policy Council (EPC) chaired by then-Secretary of the Treasury, James A. Baker III. During August and September, USTR and the EPC fashioned a section 301 initiative that was announced on September 13. The Administration self-initiated section 301 investigations of Japanese barriers to imported tobacco products, Korean restrictions on foreign insurance firms, and Brazilian barriers to trade and foreign investment in the informatics

14. John H. Jackson, Professor of Law, University of Michigan. Professor Jackson is the author of *World Trade and the Law of GATT* (1969) and a noted expert on GATT and U.S. trade law.

(computer and computer software) sector.¹⁵ In addition, President Reagan directed United States Trade Representative, Clayton Yeutter, to expedite action in two existing section 301 cases, where GATT panels had ruled in favor of the United States, but the foreign governments had failed to comply: Japanese leather quotas and European Community (EC) canned fruit and raisins.

Congress followed up on these ideas in the 1988 Trade Act by directing the USTR to continue to self-initiate section 301 cases and by creating a formal process in Super 301 for identifying "priority" foreign countries and unfair trade practices.

IV. UNILATERALISM

As you may have gathered from the morning session, U.S. section 301 policy has generated intense foreign criticism. This criticism centers on its alleged "unilateralism."¹⁶ The argument goes something like this: In the General Agreement on Tariffs and Trade (GATT), the United States and its trading partners have agreed on a common set of rules to govern international trade and on a multilateral dispute settlement mechanism for resolving disputes over the application and interpretation of these rules. Yet, the United States now wishes to go off on its own, taking on the role of "judge and jury" by attacking foreign practices without reference to GATT rules or multilateral procedures. Indeed, there are no GATT rules governing many of the practices about which the United States complains,¹⁷ and in any case, an increase in a GATT-bound tariff as a trade sanction is a violation of GATT.

While everyone is entitled to an opinion, the foreign critique should not be regarded as the end of the debate.

I will argue that the United States has used section 301 as a short-term tool for pursuing long-term multilateral objectives. The long-term goal of U.S. policy is the strengthening and expansion of the GATT rules, backed up by strengthened international dispute settlement and enforcement mechanisms.

In this sense, the 1988 Trade Act was not the loosing of a monster, but a constructive development. The Act reflected a new consensus

15. 50 Fed. Reg. 37,608-09 (1985).

16. While section 301 has been called many things (some unfit for publication), it cannot be termed "protectionist." If anything, section 301 is "too free trade" in its perspective, since it seeks to force foreign governments to open their markets when they would prefer not to open them.

17. A number of section 301 investigations have involved services, investment, and intellectual property rights issues. These issues are not covered by the current GATT rules, except in a peripheral sense.

between Congress and the Executive Branch about the direction of U.S. trade policy. Despite intense frustration over the trade deficit, Congress rejected protectionism as a policy option. Instead, the trade bill centered on (1) aggressive efforts to open foreign markets under section 301, and (2) intensified Uruguay Round negotiations to strengthen and expand GATT. This point was brought home most clearly when the Senate dropped the so-called Gephardt amendment, which relied on across-the-board import surcharges to reduce bilateral trade imbalances, and substituted Super 301, which centers on opening foreign markets to U.S. exports.

There can be no question that the ideal international trading environment is one in which there are strong, clear, and comprehensive multilateral disciplines, coupled with effective enforcement mechanisms. By limiting government interference in economic activity, strong GATT rules allow private traders to seek out new markets and new economic efficiencies. Effective dispute settlement and enforcement mechanisms are necessary to protect against interference by governments, who are always under political pressure to tilt the proverbial playing field. Such a system would promote the free flow of goods, services, and investment between nations and increase global standards of living.

There also can be no question that such a system does not exist today. While GATT was an incredible achievement in 1947, its weaknesses have become apparent:

—GATT is limited to traditional trade in goods and does not cover important areas of world economic activity, such as investment, services, and intellectual property rights (“IPR”).

—Certain GATT rules, which were originally created as pragmatic political compromises, are now meaningless. While it is unusual for a government to disregard a clear and unambiguous international obligation, it is an invitation to trouble when the rules are vague or shot full of exceptions. Such ambiguities invite government meddling, particularly when political gains are to be had. The agricultural subsidy rules, which have encouraged massive government interventions in the agricultural sector, are one example.

—The GATT has permitted self-centered “beggar-thy-neighbor” policies by less-developed countries (LDCs) that would be intolerable in a developed country. While it is arguably possible to accept such deviations when a country is truly less developed, these policies have become difficult to ignore as more and more “newly industrialized countries” (NICs) cross the threshold of in-

dustrialization to become significant players in the international trading system.

—Finally, the GATT dispute settlement mechanism cannot guarantee compliance with the rules.¹⁸ In particular, because GATT requires a consensus of all contracting parties before a panel report is adopted, it is possible for the losing party to block a report indefinitely.

The logical solution would be to reform the international trading system in the Uruguay Round.

The challenge, however, is how to get from A to Z. While the system clearly could use updating, some foreign participants, particularly those with extensive trade barriers, are perfectly comfortable with the *status quo*. A government that does not protect intellectual property rights, for example, has little incentive to change if it can pirate foreign goods and inventions for free. And a government that extensively subsidizes domestic agriculture and disposes of excess production by dumping it into world markets has every reason to continue doing so, particularly if any change in the system would be opposed by farmers who have profited from it. Such measures are equally a form of unilateralism: they involve the pursuit of selfish interests at the expense of the international trading system as a whole.

What is needed is an outside disruptive force to create pressures for change. Super, Special, and section 301 represent an effort to supply this incentive and concentrate attention on the need for GATT reform. In a sense, the United States has signalled that foreign barriers to U.S. trade, services, investment, and IPR are important. These barriers can be discussed in the Uruguay Round negotiations in GATT or they can be addressed under section 301 and its progeny. But they will be dealt with in some fashion.

V. A NEGOTIATING TOOL

While section 301 provides important leverage for the United States, it also has certain limits that ought to be appreciated.

First, section 301 will not fix the trade deficit. The trade deficit arises from broader macroeconomic factors that have a very limited relationship to U.S. trade policy or unfair trade practices.¹⁹

18. GATT Article XXIII permits a contracting party to challenge actions by another contracting party that are inconsistent with GATT or "nullify or impair" a tariff concession. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT 178-87* (1969). These issues are heard by panels of impartial experts. The panel issues a report containing its findings and recommendations. In the 1950s, this procedure was a legal innovation that permitted the interpretation, clarification and, on occasion, the creative expansion of GATT discipline.

19. In 1986, the General Accounting Office (GAO) commissioned a blue ribbon panel to

Second, it is difficult to build an effective global trade policy exclusively around section 301. Because section 301 typically relies on negotiations with a single foreign government to address a single unfair trade practice, it is a very labor-intensive way to seek change. While GATT negotiations are time-consuming and sometimes incremental, they can lead to broad-based multilateral reforms that are adopted by a large number of governments.

Third, section 301 requires leverage with a particular foreign government. If leverage exists, section 301 negotiations can be quite effective. If not, the goal of opening up foreign markets and increasing U.S. exports is exceedingly difficult to achieve.

Fourth, like any power-oriented system, section 301 can generate a high degree of unpredictability, particularly if the cases frequently lead to U.S. retaliation and foreign counter-retaliation. American businessmen, like businessmen everywhere, often seek a predictable international trading environment. When the United States imposes sanctions on foreign goods, foreign governments have not infrequently struck back by imposing reciprocal sanctions on American goods or investments. In such trade wars, the U.S. exporter, the U.S. consumer, and the foreign exporter are all worse off, at least in the short term.

Fifth, trade sanctions can have spillover effects on other U.S. objectives²⁰ and, if abused, a corrosive effect on the international trading system itself.

In sum, it is useful to appreciate that section 301 is a tool, not the magic fix for every trade problem. By challenging unfair trade barriers, section 301 protects the integrity of the international trading system, which is essential from a perceived equity standpoint. It is a wedge for opening foreign markets to U.S. exports and, if negotiations fail, for defending U.S. economic interests. But it is not cost-free, nor is it necessarily the ultimate solution to the underlying problems of the global trading system.

study the U.S. trade deficits. Its conclusions were reported in, *The U.S. Trade Deficit: Causes and Policy Options for Solutions*, GAO/NSIAD 87-135 (1987). The GAO's conclusions included the following:

"Although these two factors [foreign trade barriers and loss of U.S. competitiveness] clearly have an effect on trade, they do not account for the sharp rise in the trade deficit since 1980 because they have changed little in recent years." *Id.* at 2.

"The U.S. trade balance is fundamentally determined by U.S. fiscal and monetary policies and those of its trading partners." *Id.*

"Changing the current mix of U.S. macroeconomic policies is essential to lowering the U.S. trade deficit." *Id.* at 3.

20. While in the past trade has perhaps been unnecessarily subordinated to U.S. foreign policy and international financial or national security objectives, neither of these considerations can be entirely ignored. The issue is one of balance.

VI. IMPLEMENTATION OF THE 1988 TRADE ACT

The Administration and the Congress have worked together to implement the Super and section 301 provisions prudently in order to further the long-term market-opening goals of U.S. trade policy.

In identifying the Administration's "priority" unfair trade practices under Super 301, President Bush made clear that the U.S. preference is a stronger GATT system:

The Uruguay Round of the GATT continues to be the centerpiece of our trade strategy. While the lack of effective multilateral rules and enforcement mechanisms has forced us to resort to section 301, we look forward to the day when such actions will be unnecessary.²¹

In addition, where possible, the United States has pursued unfair trade issues in GATT. The successful resolution this year of U.S. complaints regarding Korean beef quotas, EC oilseeds subsidies, and EC export restrictions on copper scrap shows that, in some circumstances, the GATT can be a very effective instrument for challenging unfair trade practices.

VII. CONCLUSION

In short, there is a clearly understood creative tension between section 301 and the GATT. One hopes that this tension will lead to a stronger multilateral trading system. In any case, those who object to section 301 and the alleged unilateralism of U.S. trade policy know where the ultimate solutions to these issues lie.

21. Statement by the President, Office of the White House Press Secretary, Release Announcing Super 301 (May 26, 1989).