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Section 301 of the Trade Act of 1974, as Amended: Its Operation and Issues Involving its Use by the United States

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Abstract. Sections 301 through 309 of the Trade Act of 1974 (as amended), commonly referred to as Section 301, are one of the principal means by which the United States seeks to address unfair foreign barriers to U.S. exports and enforce U.S. rights under trade agreements. U.S. membership in the World Trade organization (WTO) has raised congressional concern over the ability of the United States to effectively use its trade laws to combat unfair foreign trade practices. This report describes the Section 301 process (including the related Special 301 and Super 301 processes) and examines questions that arise from its use.

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Section 301 of The Trade Act of 1974, As Amended: Its Operation and Issues Involving its Use by the United States

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Summary

Sections 301 through 309 of the Trade Act of 1974 (as amended), commonly referred to as *Section 301*, are one of the principal means by which the United States seeks to address "unfair" foreign barriers to U.S. exports and enforce U.S. rights under trade agreements. U.S. membership in the World Trade Organization (WTO) has raised congressional concern over the ability of the United States to effectively use its trade laws to combat unfair foreign trade practices. This report describes the Section 301 process (including the related Special 301 and Super 301 processes) and examines questions that arise from its use. This report will be updated periodically to reflect administrative action and congressional legislation on Section 301.

Section 301: Its Operation

Section 301 is one of the principal means by which the United States attempts to combat unfair trading practices and enforce U.S. rights under trade agreements.[1] Congress created this provision in part to give the President authority to respond to restrictive foreign trade barriers in the hope that the removal of such barriers would boost U.S. exports. The Section 301 provisions cover a wide variety of practices and set procedures and timetables based on the type of trade barrier(s) addressed. Broadly speaking, Section 301 divides such practices into two major categories: (1) violations of U.S. rights under a trade agreement,[2] and (2) unreasonable or discriminatory practices that burden or restrict U.S. commerce.

[1] The United States maintains other trade laws similar to Section 301 that deal with specific issues, including "Title VII," requiring USTR action against countries maintaining discriminatory government procurement practices, and "Section 1377," requiring USTR action against countries that violate telecommunications agreements with the United States.

[2] A trade agreement violation either (a) denies U.S. rights under a trade agreement or (b) denies benefits to the United States under a trade agreement, or is unjustifiable (i.e., it violates or is inconsistent with U.S. international legal rights) and burdens or restricts U.S. commerce.

Section 301 cases can be initiated as a result of a petition filed by an interested party (such as a U.S. firm or industry group) with the United States Trade Representative (USTR), or can be self-initiated by the USTR. If the USTR decides to start a Section 301 investigation, it must seek to negotiate a settlement with the foreign country concerned, either in the form of compensation or an elimination of that barrier or practice. For cases involving an area covered under a trade agreement (such as the WTO trade agreements), the USTR is required to use the formal dispute proceedings provided by that agreement.

If a settlement cannot be reached within a specified period, 12 to 18 months for most cases, except for intellectual property rights (see below), the USTR is required to determine whether or not to retaliate. Such retaliation usually takes the form of 100% tariffs on selected imported products from the offending country; the level of which is generally intended to equal U.S. trade losses resulting from the trade barrier. There have been 119 cases initiated under Section 301 since its enactment in 1974. Most cases have been resolved through trade agreements; 15 cases have resulted in trade sanctions.

Special 301

Section 182 of the 1974 Trade Act (as amended), commonly referred to as *Special 301*, is the primary U.S. trade law used to protect U.S. intellectual property rights (IPR) in foreign markets.[3] It directs the USTR to identify countries that deny adequate protection of IPR, or restrict IPR-related products, and to initiate Section 301 procedures against countries whose practices are considered to be the most serious or harmful – "priority foreign countries." If an agreement is not reached (between six months and nine months), the USTR must determine if trade sanctions should be imposed.[4]

Since the start of the Special 301 provision in 1989, the USTR has annually issued a three-tier list of countries which are judged to have inadequate regimes for IPR protection or to deny market access: (1) *priority foreign countries*, which are considered to be the worst violators of U.S. IPR and are subject to Section 301 investigations and possible U.S. trade sanctions; (2) *priority watch list countries*, which are considered to have serious deficiencies in their IPR regime, but do not currently warrant a Section 301 investigation; and (3) *watch list countries*, which have been identified because they maintain IPR practices or market barriers that are of particular concern, but do not yet warrant higher level designations. In addition, the USTR has made "out-of-cycle" decisions throughout the year concerning the IPR regimes of

[3] Special 301 was added by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418). IPR provisions (such as patents, copyrights, and trademarks) give legal protection to various intangible assets resulting from research, innovation, creativity, and commercial reputation. Such assets cannot be copied, used, changed, or sold without the authorization of its owner.

[4] The Uruguay Round agreements established new guidelines for the protection of IPR. As a result, the Special 301 statute was amended in the Uruguay Round implementing legislation (P.L. 103-465) to exempt IPR issues covered under the WTO from the timetables under Special 301 to allow the USTR to proceed under the WTO dispute resolution process and timetables.

particular countries, including the designation of countries as *priority foreign countries* and the imposition of trade sanctions for IPR violations.[5]

In its latest Special 301 Annual Review (issued on May 1, 2000), the USTR identified 59 trading partners whose IPR protection practices raised U.S. concern. No countries were designated as a *priority foreign country*, but the USTR warned that the Ukraine risked such a designation by August 2000.[6] Additionally, the USTR announced it would initiate IPR-related WTO dispute resolution consultations with Argentina and Brazil, and warned it would proceed to a WTO dispute resolution case against Denmark.

Super 301

Section 310 of the 1974 Trade Act (as amended) is commonly referred to as *Super 301*.[7] As enacted, Super 301 required the USTR for 1989 and 1990 to issue a report on its trade priorities and to identify *priority foreign countries* that practiced unfair trade and *priority practices* that had the greatest effect on restricting U.S. exports. The USTR would then initiate a Section 301 investigation against the priority countries to obtain elimination of the practices which impeded U.S. exports, in the expectation that doing so would substantially expand U.S. exports.[8]

Japan was the main target of Super 301 during its initial two-year operation (although Brazil and India were designated as Super 301 priority countries in 1989, and India again in 1990).[9] The United States reached separate trade agreements with Japan in 1990 on trade barriers to satellites, supercomputers, and wood products.

The original Super 301 provision expired in 1990. However, following a breakdown in talks between the United States and Japan in February 1994 over a new framework for addressing Japanese trade barriers, President Clinton issued an executive order (EO No. 12901) reactivating the Super 301 mechanism. The EO reinstated the Super 301 process for two years (1994 and 1995), but made certain changes.[10] The Super 301 process was

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[5] China in particular has been the subject of several Special 301 actions in recent years. It was designated as a special 301 *priority foreign country* in 1991, 1994, and 1996. Under the threat of U.S. sanctions, China agreed to improve its IPR laws and enforcement efforts.

[6] In June 2000, the USTR stated that Ukraine had made progress in improving its IPR regime and indicated that a decision on Ukraine's status under Special 301 would be put off until November.

[7] Originally enacted under Section 1302 of the 1988 Trade Act (P.L. 100-418).

[8] Congress added the Super 301 provision mainly because many Members felt that the regular Section 301 mechanism was sparingly used by the executive branch and generally constituted a piecemeal approach to addressing foreign trade barriers. Congress wanted the President to take action against countries that maintained the most pervasive and restrictive trade barriers and to address all at once a wide array of trade barriers that impeded certain U.S. exports.

[9] Brazil was cited for quantitative import restrictions; it subsequently lowered certain import license barriers, resolving the case. India was cited in 1989 and 1990 for restrictions on insurance and investment; it refused to lower its barriers, but the USTR chose not to retaliate.

[10] Super 301 designations were to be made *six months* (by September 30) after the USTR issued

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extended again through 1997 by EO No. 12973 (issued in September 1995), but was not in operation during 1998.

From 1994-1997, the USTR, through its annual Trade Expansion Priorities (or Super 301) reports, took the following actions. In both 1994 and 1995, no *priority foreign country practices* were identified. In 1996, no priority foreign country practices were identified. However, four new Section 301 cases were initiated against Indonesia's national auto policy, Brazil's auto program, Australia's leather export subsidies, and Argentina's import duties on textiles and apparel; all four cases were brought to the WTO for dispute settlement. In 1997, the USTR designated South Korea's barriers to auto imports as a *priority foreign country practice* under Super 301.[11] In addition, the USTR announced that it would pursue WTO dispute settlement procedures (in the context of Section 301 investigations) against Japanese trade barriers to fruit, Canadian export subsidies and import quotas on dairy products, and the EU's circumvention of export subsidy commitments on dairy products. The USTR also said it would invoke WTO dispute settlement procedures against Australia's export subsidies on automotive leather.

On March 31, 1999, Super 301 was re-instated and revised by EO 13116. It requires the USTR by April 30 to issue its Super 301 report on *priority foreign trade practices* and to initiate a Section 301 case against such practices if an agreement is not reached after 90 days. The USTR's April 1999 Super 301 report did not identify any trade practices under Super 301; however, the USTR announced it would initiate WTO dispute resolution proceedings against the EU aviation equipment subsidies, India's auto policy, and South Korea import barriers on beef. In addition, the USTR announced that it would initiate a Section 301 case against Canada's restrictions on tourism. The USTR's May 2000 Super 301 report again did not make any designations under Super 301; however, the USTR announced that it would pursue WTO dispute settlement cases against India, the Philippines, Brazil, and Romania.

Section 301 and WTO Trade Dispute Resolution

A central goal of U.S. officials during the Uruguay Round (UR) negotiations (1986-1994) was to strengthen multilateral trade dispute mechanisms.[12] The UR agreements included several provisions to strengthen dispute resolution procedures by providing stricter timetables for trade dispute panel decisions, establishing mechanisms to prevent blocking of panel decisions by affected countries, and broadening the ability of nations to retaliate against countries that fail to abide by WTO dispute settlement decisions.

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[10] (...continued)
its report on foreign trade barriers (usually by March 30), rather than after 30 days following the issuance of the report (as under the previous law). The EO also directed the USTR to identify *priority foreign country practices* under Super 301, as opposed to *priority practices* in *priority foreign countries* under prior law; this was done to avoid labeling countries as "unfair traders."

[11] In October 1998, the United States and South Korea reached an agreement on autos.

[12] Under the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), dispute settlement panels and reports could be delayed or blocked by any one country, and the GATT had no authority to enforce its decisions. The United States often claimed that it had to rely on Section 301 until the GATT developed a more effective trade dispute mechanism.

The UR agreements expanded the level and types of trade in goods and services which are now covered under multilateral rules and included new rules for trade-related investment and intellectual property rights. U.S. trade law requires that Section 301 investigations involving trade agreements be brought to formal dispute proceedings provided for by the trade agreements. Thus, many cases initiated under Section 301 have been brought before the WTO for dispute resolution (if initial consultations failed to resolve the issue). In some cases, the USTR has brought disputes directly to the WTO without initiating a formal Section 301 case.

The United States has been one of the heaviest users of the WTO dispute resolution process (established in January 1995), which it has used to successfully resolve several trade disputes. An August 2000 General Accounting Office (GAO) report stated: "Overall, the results of the WTO's dispute settlement process have been positive for the United States.[13] On the other hand, the United States has been one of the largest targets of WTO dispute resolution cases brought by other WTO members.

Some U.S. policymakers have expressed concern that the WTO diminishes the ability of the United States to utilize Section 301 to eliminate trade barriers and hence undermines U.S. sovereignty. Several points regarding the use of Section 301 and the WTO are worth examining.

- Section 301 provisions require the United States to bring Section 301 cases involving trade agreements to the dispute settlement procedures established under those agreements. Thus, U.S. membership in the WTO does not diminish or restrict the ability of the United States to *initiate* Section 301 cases, but technically requires it to submit cases involving WTO trade agreements to the WTO for dispute settlement. If a WTO dispute resolution panel rules in favor of the United States, the offending country could be directed to remove the trade barrier in question or provide compensation to the United States. If that country refuses to abide by the WTO ruling, the United States could seek to obtain authorization from the WTO to impose sanctions under Section 301.
- Cases initiated under Section 301 are brought to the WTO for dispute resolution if the country in question is a member of the WTO and if the trade practice is covered under multilateral rules (or the practice nullifies or impairs a benefit accruing under a WTO agreement). Section 301 sanctions can be applied to non-WTO members without having to go through WTO dispute resolution proceedings.
- Technically, the United States could impose trade sanctions under Section 301, even if it lost a case brought before the WTO dispute resolution process. However, if the United States imposed such sanctions against a WTO member, that country could bring a complaint before the WTO, which might rule against the United States and authorize that country to impose sanctions against the United States.
- The WTO has no real authority to force any nation (including the United States) to abide by WTO dispute resolution rulings and/or to change its laws.

[13] GAO, *World Trade Organization, Issues in Dispute Settlement*, August 2000.

> However, in joining the WTO, the United States (like other WTO members) has agreed to abide by the obligations in the various trade agreements and follow the WTO dispute resolution procedures. If the United States chooses to ignore rulings under the WTO, it could run the risk that other countries would refuse to abide by WTO rulings that are favorable to U.S. trade interests.[14]

While many U.S. policymakers have praised the overall operations of the WTO's dispute settlement mechanism, arguing that it has been effective in resolving several trade disputes with U.S. trading partners, some have criticized certain aspects of the process. For example, one analyst estimates that WTO dispute resolution cases on average take nearly 3 years to complete and that over half of all cases filed since 1995 are still pending.[15] In addition, U.S. officials have expressed concern over the implementation of WTO dispute settlement rulings on two cases brought by the United States against the EU concerning its banana import regime and ban on hormone-treated meat imports. In both instances, a WTO dispute panel ruled in favor of the United States and those decisions were basically affirmed by the WTO Appellate Body.[16] However, the United States has charged that the EU has failed to fully abide by the WTO dispute panel rulings on meat hormones and bananas.[17] Congressional concern over the EU's non-compliance with WTO dispute resolution rulings led it to add a provision (Sec. 407) to the Trade and Development Act of 2000 (P.L. 106-200) authorizing the USTR to periodically revise the list of products subject to retaliation in cases where the United States has won a trade dispute case in the WTO and has been authorized to impose sanctions against another WTO member that refuses to remove the barrier. The EU has threatened to pursue a WTO dispute resolution case against the United States if it employs this provision.[18]

It is likely that U.S. trade officials will press for reforms in the WTO that quicken the dispute resolution process and ensure prompt and effective compliance with WTO dispute settlement rulings.

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[14] Some analysts argue that if WTO members fail to abide by WTO dispute panel decisions or begin to take unauthorized action to resolve trade disputes, the ability of the WTO to resolve trade disputes could be diminished, which could lead to greater conflict among WTO members over trade and undermine international support for multilateral trade rules.

[15] See *International Trade Reporter*, November 4, 1998, p. 1840.

[16] A similar case arose in 1998 when the Canadian government proposed to pass a new law restricting the sale of advertising in Canada by foreign magazine publishers, a provision the United States argued violated two previous WTO dispute rulings on similar restrictions (which had found such policies violated WTO trade rules). Subsequently, Canada and the United States reached an agreement on the issue in May 1999.

[17] On April 6, 1999, the WTO authorized the United States to impose $191million in trade sanctions (100% ad valorem duties) on EU products, due to its restrictive banana import regime; on April 9,1999, the USTR issued a list of products that would be subject to U.S. sanctions. On July 12, 1999, the WTO determined that EU's beef hormone restrictions cost U.S. exporters $117 million annually and authorized the United States to impose trade sanctions. As a result, the USTR issued a list of EU products subject to beginning on July 29, 1999. For further information on these disputes, see CRS reports RS20130 (bananas) and RS20142 (meat hormones), both by Charles E. Hanrahan.

[18] Previously, the EU the challenged the U.S. use of Section 301 procedures as being inconsistent with WTO rules. However, a WTO dispute resolution panel ruled in favor of the United States.