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Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How

by Shirley A. Coffield*

Section 301 of the Trade Act of 1974 is the primary U.S. statute providing authority for the President to take action against unfair trade practices of other governments which adversely affect U.S. commerce, either in goods or services. For the most part, the implementation of the statute has focused on attempts to eliminate the acts, practices, or policies of foreign governments that adversely affect U.S. exports. The statute is also used to combat violations of international agreements by foreign governments which may affect imports into the United States as well as exports, and it contains special provisions for the treatment of violations of the MTN agreement on subsidies and countervailing duties.2

Section 301 is not a substitute for, nor an alternative to, other U.S. statutes that address specific unfair trade practices, such as the antidumping laws,3 the 337 statute,4 or, except under specifically provided procedures, the countervailing duty statute.5 Unlike these statutes, a section 301 proceeding is not an APA proceeding, and the flexibility provided the President and the United States Trade Representative (USTR) makes it a more political statute. Section 301 was shaped quite deliberately to give the Executive the tools to use diplomatic and economic pressure to achieve a more "equitable" world trading system, to the benefit of U.S. commerce.

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4 Id. § 1337.

5 Id. § 1303.
In its amended form, section 301 takes on an expanded and more critical role as the primary statute to enforce U.S. rights under newly negotiated trade agreements as well as under general GATT provisions. For this reason, the future use of section 301 will be an important indicator of both the United States' commitment to the multilateral trade rules and its ability to resolve trade disputes on a bilateral basis before resorting to the more fragile multilateral mechanisms.

This article will examine the provisions of sections 301-306 of the Trade Act of 1974, as amended by the Trade Agreements Act of 1979. The development of this trade action will be reviewed, and the mechanics for a private petition will be outlined. Then, the article will describe the petitioner's interface with the Office of the USTR as well as the federal government's roles and objectives. Throughout, practical advice on sensitive areas of the process will be provided to enable the petitioner to prepare a well-conceived strategy to achieve the desired results.

I. Background

While the roots of present section 301 may be found in much prior federal legislation, the major provisions now present in the statute were first incorporated into legislation in the Trade Act of 1974. That legislation gave the President broad authority to retaliate against unreasonable and unjustifiable import restrictions of other countries that affect U.S. commerce.

As enacted in 1975, section 301 allows the President to deny or modify the benefits of trade agreement concessions or to impose duties or other import restrictions on the products and services of any country that is found to be unjustifiably or unreasonably burdening or restricting U.S. commerce. Congress gave administration of the procedures to the Office of the Special Representative for Trade Negotiations (STR).

The purpose of section 301 is quite clear: the United States is to use this retaliatory authority vigorously as leverage to get other countries to

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6 General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. Parts (5) and (6), T.I.A.S. No. 1700 [hereinafter cited as GATT].
11 "Unreasonable" refers to restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or which otherwise discriminate against or burden U.S. commerce. Id.
eliminate unfair trade practices that affect U.S. commerce, including both product exports and services. The practices noted in the legislative history as unfair include discriminatory rules of origin, government procurement, licensing systems, quotas, exchange controls, restrictive business practices, discriminatory bilateral agreements, variable levies, border tax adjustments, discriminatory road taxes, horsepower taxes, other taxes which discriminate against imports, certain product standards, and many other practices that were documented by the U.S. International Trade Commission (USITC), and subsidies identified in their principal forms by the Senate Finance Committee.

The Congress felt in the early 1970's that the General Agreement on Tariffs and Trade (GATT) provisions for dispute settlement and retaliation rights had not been effective in preventing or eliminating barriers to U.S. exports. In fact, many Congressmen believed that the decisionmaking process in the GATT worked to the detriment of the United States. Thus, in the Trade Act of 1974, Congress instructed the trade negotiators in the Multilateral Trade Negotiations (MTN) to seek changes in those rules. Because of this low opinion of the GATT process, the 1974 legislation made it clear that the President could take retaliatory action even in the absence of a GATT finding of a violation, and that the U.S. action itself need not conform to the GATT provisions.

Eighteen cases were filed by petitioners and initiated by the STR under section 301 of the Trade Act of 1974 from January 1975 until the passage of the Trade Agreements Act of 1979 in July 1979. Of these, six cases were referred by the United States to GATT working parties or GATT panels for dispute settlement. Four were subject to consulta-

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14 The term "U.S. commerce" includes U.S. services associated with international trade. For example, the U.S. insurance industry, the air transport industry, banking industry, or merchant shipping industry. Id. at 165, [1974] U.S. Code Cong. & Ad. News at 7303. See discussion in text accompanying notes 122-129 infra.
20 The Report noted that "[t]he Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by the Congress." Id.
21 Cites to these cases throughout this article are to the complaints and termination notices published in the Federal Register. More complete information can be obtained by consulting the case files, which are open to public inspection at the Office of the USTR.
22 Exports of eggs to Canada, Office of the USTR Docket No. 301-2, 40 Fed. Reg. 33,749 (1975); Exports of certain fruits and vegetables to the European Community (EC), Docket No. 301-4, 40 Fed. Reg. 44,635 (1975); Exports of soybeans, soybean meal and soybean oil to the EC,
tions under Article XXII or XXIII of the GATT, and eight cases were never involved in the GATT process. During that four and a half year period, the United States took no retaliatory actions under section 301 and terminated only six cases through satisfactory bilateral resolution. Throughout this period, however, the Multilateral Trade Negotiations had a great impact on the actions taken under section 301 as well as on the discussions and negotiations with other countries regarding the practices complained of by U.S. petitioners. For this reason, one should not treat this period as indicative of the success or failure of section 301 as a method for dealing with restrictive actions of other nations.

The Trade Agreements Act of 1979 amended section 301 to encourage the effective use of the new dispute settlement processes agreed to in the MTN. The purposes of the amendments were to place time constraints on the USTR and the President for making certain decisions under section 301, to encourage responsible actions under 301, and to terminate cases more expeditiously.


Many cases were discussed indirectly or directly in the context of the MTN and therefore no formal action was taken on these cases during that period. Very little was accomplished in the MTN to solve the problems raised in many of the cases that were put on "hold," generally because most of those problems concerned the Common Agricultural Policy of the EC, a sacrosanct, albeit costly, system in the EC which the United States was not willing to challenge directly. Two of the pending active cases now being pursued through the GATT, however, are old cases which involve elements of that system. See Docket No. 301-6, note 23 supra; Docket No. 301-11, note 23 supra.


assure that the petitioner would be fully informed throughout this process.29 The new statute clearly reflects Congress' dissatisfaction with the pace and degree of enthusiasm with which section 301 cases had been pursued by the Office of the STR under the 1974 legislation.30

II. Provisions of the Statute

Section 301 of the Trade Act of 1974 was substantially rewritten and new sections 302 through 306 were added in the Trade Agreements Act of 1979.31 Congress expanded the provisions of the 1974 Act creating new and more detailed procedural requirements and providing new responsibilities for the USTR.32 The new Act reflects a change in the Congressional attitude toward the GATT dispute settlement procedures, with the caveat that the U.S. Government has a major responsibility to see that the new provisions work to the benefit of the United States. The Senate Report on the bill's provisions notes:

The changes made in the MTN with respect to dispute settlement procedures offer possibilities of significantly improving the process and the results of international dispute settlement with respect to international trade issues. However, the results merely offer the possibility of improvement. The U.S. Government must take responsible and forceful action in the use of these procedures, and other countries must adhere to their spirit as well as their letter, if in fact they are to be of benefit to the United States and international trade.33

Section 301 sets forth the conditions which would require the President to take action. Subsection (a) authorizes the President to take action if he determines that action by the United States is appropriate (1) to enforce the rights of the United States under any trade agreement, or (2) to respond to any act, policy or practice of a foreign country or instrumentality that (A) is inconsistent with the provisions of or otherwise denies benefits to the United States under any trade agreement, or (B) is unjustifiable, unreasonable or discriminatory and burdens or restricts U.S. commerce.34

The provision authorizes the President to take all appropriate and feasible action within his power to enforce these rights or to obtain the elimination of the foreign practice, act or policy on either a non-

29 Id.
discriminatory or discriminatory basis. Subsection (b) gives specific authorization for the President to deny or modify the benefits of trade agreement concessions or to impose duties or other import restrictions on the products of, or fees on the services of, the foreign government.

Once a determination has been made to take action, subsection (c) defines the Presidential procedures. The President may take action on his own or in response to a petition filed by any interested party. If the President is taking action under his own motion, he must publish his determination and reasons in the Federal Register, and provide the opportunity for presentation of views before actually taking the action "unless he determines that expeditious action is required." If the determination results from a petition filed by an interested party, he must make his decision on what action to take, if any, within twenty-one days of receiving a recommendation on the petition from the USTR. The President must also publish this determination in the Federal Register.

Any interested party may file a petition with the USTR, requesting the President to take action under section 301 and "setting forth the allegations in support of the request." Section 302 sets forth the procedures for the filing of the petition with the USTR and the determinations by the USTR of whether to initiate an investigation. This section provides time limits and notice requirements for these determination procedures, and will be discussed in Part IV.

When the petitioner's allegations involve an international trade agreement, section 303 requires consultation between the USTR and the foreign country. If the parties reach no satisfactory resolution in the consultation period, the USTR must request proceedings under the formal dispute settlement procedures of the agreement.

Section 304 sets forth the time limits for the USTR recommendations to the President. The time limits vary depending on the type of complaint and are presented in detail in Part IV of this article.

Another new provision of section 304 requires the USTR to submit a report to the Congress within fifteen days after the end of the minimum dispute settlement period in the affected agreement if the dispute were
not resolved before the close of that minimum period. The report would have to give the status of the dispute proceedings, the prospects for resolution and any actions contemplated with respect to the dispute by the Executive.\textsuperscript{46}

Section 304(b)\textsuperscript{47} continues the requirements in the old law that there be a presentation of public views except in cases where expeditious action is necessary. This provision also requires the USTR to obtain advice from appropriate private sector advisory representatives before making recommendations to the President.

Section 305\textsuperscript{48} sets up a procedure whereby any person may request from the USTR information on acts or practices of foreign governments or instrumentalities with respect to particular merchandise, U.S. rights under any trade agreement and remedies which might be available, and past and present domestic and international proceedings or actions which have been instituted or completed with respect to that practice or policy.\textsuperscript{49} The USTR must provide any nonconfidential information; or, if information is not available to the USTR or other federal agencies through the USTR, he must request the information from foreign governments; or, if the USTR declines to request that information, he must inform the person requesting the information of the reasons that information has not been requested or provided.\textsuperscript{50}

Section 306\textsuperscript{51} provides for the administration of section 301. It incorporates procedures present in the old act, including a requirement for regulations to be issued by USTR, the submitting of a report to the House and Senate semi-annually on the pending petitions and their current status, and a new obligation to keep the petitioner regularly informed of all determinations and developments in his petition.\textsuperscript{52}

Under the amended section 301, the President may take action on a nondiscriminatory basis or solely against the products and services of the foreign country which is found to be burdening or restricting U.S. commerce.\textsuperscript{53} Congress repealed the override provision\textsuperscript{54} on actions that are specified in the agreement, but computed without regard to any extension authorized under the agreement of any stage." \textit{Id.} § 2414(a)(3).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.} § 2414(b).

\textsuperscript{48} \textit{Id.} § 2415.

\textsuperscript{49} \textit{Id.} § 2415(a)(1)-(a)(3).

\textsuperscript{50} \textit{Id.} § 2415(b). The USTR must inform the petitioner or person requesting the information of its reasons for refusing to request the information from the foreign government in writing and within thirty days of the request. \textit{See also} 15 C.F.R. § 2006.14 (1981). While not explicit in the statute, the thirty day time limit logically would also apply to positive responses from the USTR to the information seeker.


\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.} § 2411(a).

\textsuperscript{54} Found in the Trade Act of 1974, Pub. L. No. 93-618, § 302, 88 Stat. 1978 (repealed 1979), this section provided for a Congressional override by vote of a simple majority of both Houses if the President took action on a nondiscriminatory basis.
taken on a nondiscriminatory basis because it felt that under the new broadened and more detailed provisions of the amended act the provision was no longer necessary.\(^5\) It is expected that actions will be on a discriminatory basis since the action is taken in retaliation for an act of a specific country.\(^6\)

### III. When to Bring a Complaint

#### A. When a Section 301 Action Would Be Appropriate

Any time a potential petitioner feels he has a problem exporting a product to a foreign country, he should look at the provisions of section 301 through section 306 to see whether his concerns might be answered through recourse to these statutory provisions. Frequently, a petitioner will not know exactly what the practice is that is keeping his exports out of a given country. In that case, he can take advantage of new section 305 of the Trade Agreements Act of 1979 and require the USTR to respond to requests for information about acts or practices of foreign governments or instrumentalities with respect to particular merchandise or services.\(^5\) Petitioners have not used this provision of the law to its fullest extent to this point. Yet, it could be a more effective way for potential petitioners to not only obtain information about the practices of the foreign government but also get an indication of the possible chances of success of a formal section 301 complaint, should one be filed. Finally, use of section 305 can serve both to warn the foreign government of a potential 301 action and to alert the USTR of a problem that needs to be examined and perhaps solved before the complaining party feels a need to bring a formal 301 action.

Actions brought under section 301 in the past provide a good cross-section of the types of foreign practices that might lead a U.S. complainant to bring a formal action under section 301, or at least to make informal inquiries about the use of section 301 to solve a problem he might have with the particular foreign practice, act or policy.

Some of these cases involve the services sector, such as discriminatory cargo preference legislation and discriminatory insurance requirements of foreign governments, both in the shipping and nonshipping areas.\(^5\) Common complaints in product trade include practices such as those of the European Economic Community affecting U.S. agricultural

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\(^6\) See generally id. at 235, [1979] U.S. CODE CONG. & AD. NEWS at 621. Also, the GATT would only authorize country-specific retaliation in GATT cases of this type, a violation of an agreement by a specific country.


\(^5\) See, e.g., Docket No. 301-1, note 24 supra; Docket No. 301-14, note 22 supra; Docket No. 301-18, note 24 supra.
exports: internal use regulations, \textsuperscript{59} "minimum-import prices," \textsuperscript{60} third-country subsidization \textsuperscript{61} (which adversely affects U.S. exporters in third-country markets), excessively high tariffs, and import and customs regulations. Other common complaints by both manufacturing industries and agricultural producers include import formalities, advertising and marketing restrictions, and numerous other practices that violate, or appear to violate, national treatment provisions of international agreements. \textsuperscript{62}

\textbf{B. Informal Complaints versus Formal Filings}

In many cases, more can be accomplished through the threat of filing a 301 complaint than might be accomplished through the actual filing of a complaint. This depends on the foreign government involved and the particular act or practice in question. Some governments, faced with a formal, public section 301 complaint, will become difficult to deal with or completely intransigent to show that it is not being "bullied" around by the U.S. Government. In many cases, though, an informal private discussion by the USTR with the foreign government, with either the implicit or the explicit threat of a formal public complaint, might lead to a satisfactory resolution of the complaint. This approach may work, however, only in those cases where the foreign government feels it has some flexibility to change the act, practice or policy which is the subject of the complaint. Where a foreign government's trade policies may be difficult to change because they reflect domestic concerns in that country and pressures for protection of certain producers or industries, an informal and fairly substantial process between governments might drag on for some time. \textsuperscript{63} The petitioner may finally have to file a formal complaint to show the "seriousness" of his concerns and to make sure that the USTR in fact is doing everything necessary to resolve a legitimate concern of the complainant.

In other cases, the proper approach may be to immediately bring a formal complaint and to press it vigorously with the hope that the foreign government, to avoid retaliatory action, will in fact respond by changing the act, practice or policy. Setting forth criteria under which each of these tactics should be used is difficult, but a careful study of the

\textsuperscript{59} An "internal use" regulation is the requirement of the use of domestic products in, for example, grain mixtures.

\textsuperscript{60} "Minimum import prices" involve the assessment of an additional payment on imports that enter below a set minimum price.

\textsuperscript{61} For example, the European Community subsidizes wheat flour exports to markets in which nonsubsidized U.S. wheat is also competing. See, e.g., EC subsidization of wheat flour exports to third world markets, Docket No. 301-6, note 26 supra.

\textsuperscript{62} See, e.g., Docket No. 301-12, note 22 supra; and Docket No. 301-17, note 22 supra, which detail extensive Japanese nontariff barriers.

\textsuperscript{63} Cases involving Japan are good examples, such as Docket No. 301-10, note 24 supra; Docket No. 301-12, note 22 supra; Docket No. 301-17, note 22 supra.
particular complaint and the particular country involved will be important in determining how best to bring an effective 301 case.

C. Political Considerations

The political considerations in bringing a 301 action are both domestic and international. Frequently, the domestic producer or industry bringing a complaint against a foreign government will expect the wholehearted support of interested Congressmen and at least some U.S. agencies. However, international political considerations, which the USTR and other Executive Branch agencies must take into account, may convince a potential petitioner that a section 301 complaint will not produce the desired results. One obvious example would be bringing a 301 action against a country in a sensitive political situation when, for valid foreign policy considerations, the Administration is not willing to take action against that nation at that particular time.

While theoretically the economic considerations of section 301 should be separate from those foreign policy considerations, in reality they are not separate, and indeed cannot be made so. Petitioners should be aware of this when preparing to bring a case under section 301. In many of these situations, however, an informal approach to the USTR may prompt the U.S. Government to make informal approaches to the other government in hopes that a potentially difficult case can be resolved before it becomes public. Similarly, the U.S. Government may be able to use the "threat" of a 301 petition as leverage to get a foreign government to change a practice which the U.S. Government itself has not been successful in getting removed through purely diplomatic means.64

Another consideration in bringing a section 301 action is to consider the actual effect and impact of the foreign act, practice, or policy on domestic producers or manufacturers. Unfortunately, some cases brought in the past under section 301 have been geared to "principle" rather than to actual significant or even moderate damage to U.S. exporters.65 These particular cases are very difficult, if not impossible, to resolve successfully. In the international framework, getting the GATT to take action is difficult if the complaining country is not able to show anything more than negligible impact on its exporters.66 Those types of cases also weaken the credibility of the U.S. Government's threats to take retaliatory action.

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64 A difficult problem of hide export embargoes by Argentina, Brazil, and Uruguay was resolved by agreements negotiated before cases had to be filed.
65 For example, in Docket No. 301-16, note 23 supra, concerning wheat exports, the U.S. industry was thriving and exports had increased significantly. In Docket No. 301-3, note 24 supra, concerning the EC variable levy on egg albumen, no measurable damage was demonstrated. The U.S. Government eventually terminated both cases.
66 See, e.g., Docket No. 301-2, note 22 supra, involving exports of eggs to Canada. The United States was unable in the GATT working party to show anything other than minimal trade impact.
tory action against exports of the allegedly sinful foreign country. While many countries have policies on the books that in fact would be quite detrimental to U.S. exports, unless a petitioner can show a real connection with his own exports or real export potential, he should not bring the case:

IV. How to Bring a Section 301 Action

Whether filing a formal petition immediately or making an informal complaint, the first thing any potential petitioner should do is contact the USTR's office and speak to the Chairman of the Section 301 Committee about the case. This initial contact will be helpful not only to the potential petitioner but also to the USTR who may be able to get the foreign country to take some action alleviating the problem before a formal complaint is filed. The Chairman of the Section 301 Committee should be helpful, depending upon who holds that position. Also, the petitioner should send a draft of his petition to the Section 301 Chairman before making a formal filing to make sure it conforms to both the procedural regulations and the substantive criteria of the law.

A. Regulations and Procedures for Filing a Complaint

A petitioner may find the “Procedures for Complaints Received Pursuant to section 301 of the Trade Act,” as amended in Title 15 of the Code of Federal Regulations. Under these regulations, petitions may be submitted by any interested party, which is defined as a party who has a significant interest, for example, a producer or a commercial importer or exporter, of a product which is affected either by the failure to grant rights to the United States under a trade agreement or by the act, policy or practice complained of; a trade association, a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production or wholesale distribution in the United States of a product so affected; or any person representing a significant economic interest affected by the act, practice or policy complained of.

The petition must be submitted in twenty copies and should contain the following information: (1) identification of the petitioner whose interest is affected; (2) identification of the rights of the United States being affected by the foreign government, with particular reference to that part of 301 considered relevant; (3) copies of the laws or regulations of the foreign government which is the subject of the petition; if copies are not available, the laws and regulations should be identified with as much detail as possible; (4) the identity of the foreign country which is the subject of the complaint; (5) identification of the product or service affected by the complained of act, policy or practice; (6) information on

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68 Id. § 2006.0(b).
69 Id. § 2006.0(c).
the complained of act, policy or practice—that is, information showing how the restriction, act, policy, or practice violates or denies a U.S. right under a trade agreement or otherwise discriminates against, burdens, or restricts U.S. commerce, including specific information on volume of trade and the impact on the petitioner and on U.S. commerce; and (7) an indication of any other forms of relief sought by the complainant under any act.70

Petitioner must supply additional information if the assertion is that subsidy payments are having an adverse effect on sales of the U.S. product, either in U.S. or third-country markets. The required information includes the volume of trade in the goods or services involved, an estimate of the amount of the economic or other impact on petitioner and U.S. commerce, and a statement of the particular manner in which the subsidy is inconsistent with the trade agreement and burdens or restricts U.S. commerce.71

B. USTR Procedure for Handling a Complaint

Recognizing that some information may be difficult or impossible to obtain, the Chairman of the Section 301 Committee may accept petitions with less than complete information or may return the petition and offer assistance to make the petition conform to the above requirements.72 Once the USTR receives a petition, he notifies the foreign government or instrumentality of the petition and may request information from that foreign government on the complained of act, practice or policy. If the information is not provided by the foreign government, the USTR may proceed on the basis of the best information available.73

Once a petition has been filed, the USTR has forty-five days to determine whether to initiate an investigation.74 During this time the Section 301 Committee will look at the jurisdictional issues, determine whether the petition conforms with procedural requirements, and determine whether the petition demonstrates a basis for substantive complaint under section 301. If the USTR determines not to initiate, he must notify the petitioner and publish the notice of the negative determination and a summary of the reasons in the Federal Register.75 If the USTR decides to initiate the investigation, he must publish the text of the petition in the Federal Register and provide for a presentation of views, including the opportunity for a public hearing, on the issue.76

Once the USTR has decided to initiate an investigation, he will request consultations with the foreign government regarding the issues in

70 Id. § 2006.1.
71 Id. § 2006.1(f).
72 Id. § 2006.2.
73 Id. § 2006.4.
75 Id. § 2412(b)(1).
76 Id. § 2412(b)(2).
RESPONSE TO GOVERNMENT TRADE ACTIONS

If the particular complained of act, practice, or policy is the subject of a trade agreement between the two countries and the consultation does not lead to a satisfactory resolution, the USTR must institute formal international dispute settlement proceedings, if any exist under the agreement. At the same time, the USTR must seek information and advice from the petitioner and from other private sector advisors during the course of these consultations and dispute settlement proceedings. Congress felt this last provision was especially important to insure private sector involvement at all stages.

The requirement for seeking advice also applies to the domestic proceedings at the office of the USTR. Prior to making recommendations to the President for action under this statute, section 303 requires the USTR to obtain advice from appropriate private sector advisory representatives. In the case when expeditious action is required, that advice must be sought after the recommendation is made. The USTR may also, at his discretion, seek the advice of the USITC on the probable economic impact of the proposed action.

At the request of the petitioner, the Section 301 Committee will hold public hearings as soon as possible, generally within 30 days of the initiation of the investigation. Petitioner should include the request in the complaint but may submit it later if timely. The Committee must announce the public hearing in the Federal Register, and interested persons must submit a written brief before the closing date announced in that public notice. The brief may stand on its own or may be supplemented by oral testimony at the public hearing. After the public hearing, the Committee will allow a period of time, usually ten to fifteen days, for submitting rebuttal briefs. Petitioners should limit rebuttal briefs to demonstrating errors of fact or analysis not pointed out in the briefs or in the hearing testimony. For reasons of "equity and the public interests," the USTR or the Chairman of the Section 301 Committee may waive any of the requirements discussed thus far.

C. Time Requirements for Recommendations from the USTR

After receiving the advice of the 301 Committee through the trade

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77 Id. § 2413.
78 Id.
79 Id.
82 Id.
83 Id.
84 Id. § 2006.7(a).
85 Id. § 2006.7(a)(3).
86 Id. § 2006.7(d).
87 Id. § 2006.8(a).
88 Id.
89 Id. § 2006.8(b).
90 Id. § 2006.10.
policy structure and advice from appropriate private sector advisors, the USTR recommends to the President what action, if any, should be taken in a particular case under section 301. The time for the recommendation varies depending upon the issues raised in the complaint. For petitions alleging export subsidies covered by the International Agreement on Subsidies and Countervailing Duties, the recommendation must be made within seven months after the initiation of the investigation. If the petition alleges any matter other than an export subsidy under the above-named agreement, the time limit is eight months.

If the petition involves other trade agreements reached in the MTN and approved by the Congress, a recommendation must be made thirty days after the dispute settlement procedure of such agreement is concluded. Or, finally, if the case does not fall under one of the above categories, a recommendation must be made within twelve months of the date of the initiation of the investigation. The President then has twenty-one days to determine what, if any, action to take.

V. Alternative Actions Under Section 301

A. Retaliatory Actions

Hearings held under section 304 prior to the actual recommendation of what U.S. action to take against a country will probably involve a number of different interests. If the USTR is considering the recommendation of retaliatory action against the products or services of that other country, importers and users of those products in the United States and those with an interest in or affected by the service involved, in all probability, will complain, first, about the action being taken against this country in general, and second, more specifically about the product or service of interest to them being included on the list of possible retaliatory actions. When this point in the case is reached, therefore, the petitioner should have a succinct but potent list of products or services that is

\[\text{91} \text{Id. } \S 2006.12.\]
\[\text{92} \text{See Agreement on GATT, note 2 supra.}\]
\[\text{93} 19 \text{U.S.C. } \S 2414(a)(1)(A) \text{ (Supp. III } 1979).\]
\[\text{94} \text{Id. } \S 2414(a)(1)(B).\]
\[\text{95} \text{See id. } \S 2503(a).\]
\[\text{96} \text{Id. } \S 2414(a)(1)(C).\]
\[\text{97} \text{Id. } \S 2414(a)(1)(D).\]
\[\text{98} \text{Id. } \S 2411(c)(2).\]
\[\text{99} \text{Id. } \S 2414.\]
aimed at hurting the exports of the foreign country in question but which will cause the least amount of negative political or economic pressure in the United States.

To date, the United States has never taken any final retaliatory action under section 301 against any foreign government whose acts, practices, or policies have been the subject of a formal section 301 complaint. However, a number of sufficiently close calls give some guidance as to how the system would work. Three cases published in the Federal Register have made determinations of action and a list of possible items of exports from the foreign country that would be subject to retaliatory trade restricting actions by the U.S. Government should the act, practice, or policy not be significantly modified or eliminated.100

While the most logical type of retaliation would be on the products of the other country, section 301 authorizes other sanctions, such as the imposition of fees on the services of other countries or any actions which the President could take under any authority available to him to affect the errant country.101 Generally, the view among policymakers has been that the punishment should fit the crime where possible, and if the act, practice, or policy which has been determined to be unjustified or unreasonable is in the product area, the retaliation should also be in the product area. Likewise, if the act, practice, or policy is in the service area, the retaliation should be in the service area.102 Of course, taking action against the foreign country has always been the least preferred solution under section 301. The purpose of 301 is to lower the trade barrier of the other country, not to raise another trade barrier in the United States. Thus, the USTR has used section 301 and threats of action thereunder most effectively as leverage to get some movement from the other government on reducing its trade restricting actions.

B. Termination or Suspension

Another action the United States can take under section 301 is the termination or suspension of a section 301 investigation.103 A termination would follow a decision by the Section 301 Committee that the allegations in the petition were not substantiated by the investigation. On the other hand a suspension might well follow a tentative agreement with the foreign government that would lead to a partial or future reduc-

102 This is a generally held view among international trade policy makers both in the United States and abroad. It also has practical advantages since services are not covered by the GATT, and therefore retaliation in the service area would not involve GATT scrutiny. Likewise, to take an action against a product in retaliation for a service area practice would violate the GATT. See GATT, supra note 6, at art. VI § 5.
tion of the trade restricting actions of the other government. Technically, the suspension would keep section 301 in effect, as leverage to assure that the agreement is carried out. Terminations or suspensions must be communicated to the complainant and be published in the Federal Register with a statement of reasons. 104

VI. Petitioner and the Government

A. The Interagency Trade Policy Mechanism which Develops Recommendations to be Submitted to the USTR

As is the case in other trade policy decisions in the federal government, the USTR is the coordinator and major policy director with respect to decisions under section 301. 105 However, certain decisions and recommendations are formulated first by an interagency task force—in this case, the Section 301 Committee chaired by an official from USTR—and are approved by the statutorily created trade policy structure 106 before going to the USTR and through him to the President.

All parties should always keep in mind that in most cases the Committee will arrive at its decision by consensus among the various interested departments and agencies, with some having more influence and interest than others, depending upon the particular issue in the petitioner’s complaint. The major agencies and departments involved in this process by Executive Order 107 include the USTR, the Departments of State, Commerce, Agriculture, Labor, Justice, Treasury, Interior, Transportation, Defense, and Energy, the Council of Economic Advisers, the Office of Management and Budget, and the National Security Council. A representative of the International Trade Commission also sits as ex officio member of all staff level trade committees. In each department or agency, one or a few people are assigned to make departmental or agency recommendations on section 301 petitions; usually many of the same people will be members of the Section 301 Committee for several different cases. At the same time, experts from particular departments may be called upon to handle any technical matters for a particular case. 108 Depending on its structure and the sensitivity of the case, White House officials at any or all levels of the decision-making process may be involved.

The Section 301 Committee will have several meetings throughout the course of its investigation, and if a consensus is reached among the

104 Id.
108 For example, staff members from the Maritime Administration have provided technical help on marine cases. See Docket No. 301-1, note 24 supra; Docket No. 301-14, note 24 supra; Docket No. 301-18, note 24 supra.
agencies, the recommendation will go forward without too much further input from higher policy and political levels. However, if there is disagreement among the agencies, particularly if a major agency does not agree with recommendations that other agencies are putting forward, the matter will likely be elevated by the Chairman to a higher level in the trade policy structure, perhaps the Deputy Assistant Secretary level in the different agencies or departments. The case will get added attention from the senior levels in the Office of the Trade Representative and possibly from the USTR himself. In addition, cases involving the European Community and Japan usually generate senior level attention for both economic and political reasons. Cases involving large volumes of trade or particularly sensitive political or economic issues also will receive more and higher level attention.

The investigation itself should be thorough and extensive. While the unamended law did not clearly spell out the degree of investigation, the Congress was careful to make the point in the 1979 amendments that the investigation should cover all relevant issues, whether or not they all were contained in the petition. The Senate Report notes:

In Investigations instituted under new section 302, it is expected that the scope of the investigation will comprehend all issues fairly raised by the allegations in the petition, and not be narrowly focused only on the accuracy of the allegations. What is instituted is an investigation, so that the [USTR] is expected to actively seek information on the issues raised and not passively await the provision of information to it. In this respect, the [USTR] should be able to request assistance of other agencies in investigating or pursuing a petition, and such assistance should be forthcoming.

Before sending recommendations to the President or taking intermediate action, the higher policy levels in the Department and in the USTR must ratify any decisions to initiate dispute settlement mechanisms in the international forum or to make initial public determinations that may lead to retaliatory action. Intermediate action, short of a recommended retaliatory action, might include a decision to go forward in dispute settlement in the international forum, tactics for that process, initiation of consultations with foreign governments, or a major jurisdictional or substantive determination on the merits of the petition.

Given the time limits under the new Trade Agreements Act of 1979, this process has become far more regularized than it was in the past, and parties in any case should have a more accurate reading of the status of a particular complaint at any moment in the process.

111 See generally Exec. Order No. 11846, note 107 supra.
112 Internal USTR and agency practice is to handle all cases in this manner.
B. Contacts

A petitioner and other interested parties on both sides should know who is on the Section 301 Committee for his case. He should be sure that those persons are completely aware of his position and have adequate information on which to base recommendations for the agency or departmental position. The most help an interested party can give is to provide as much information as possible and to be as helpful as possible to the members of the Section 301 Committee. At the same time, active interest by the petitioner demonstrates to Committee members the seriousness with which the petitioner considers his particular complaint and makes it more difficult for the Committee to not vigorously investigate the particular complaint at issue. Likewise, active interest by those opposed to a petition is crucial.

Naturally, the most important individual is the Section 301 Chairman who will be on the staff of the USTR. He will have the most influence over the Committee with respect to policy direction, both substantively and procedurally, on any particular case. The Chairman of the Committee and representatives of all sides of the case should be in frequent and close contact with each other throughout the Section 301 process.

C. Other People with Whom Contact Should be Made

Even in the early stages of the investigation, interested parties should also be in contact with the sub-cabinet, political and substantive decision makers in the foreign trade and economics area who will have the final say with respect to action on the petition. They should also be in touch with appropriate congressional committee members, the Ways and Means and Finance Committees, and possibly other substantive committees, for example, Agriculture, if the issue is an agricultural one. The purpose of this contact will be to keep the congressional staff and members informed and interested in the petition. From the petitioner’s standpoint, such contacts should also assure that proper pressure is placed on the USTR to follow through vigorously on the complaint in the petition. Likewise, petitioner should be in touch with interest groups that would have an interest in the case or in similar cases. Frequently, the complained of act, practice, or policy may affect other products or services not necessarily the particular concern of the petitioner but which may be of great concern to a number of other people who have not petitioned under section 301.14

113 The present chairperson of the Section 301 Committee is Jeanne Archibald, Esq., Office of the General Counsel, Office of the USTR. All chairpersons are appointed by the general counsel at the office of the USTR.

114 For example, Japanese nontariff barriers such as licensing and other import formalities affect more imports than just tobacco, leather, and thrown silk, the subjects of Docket Nos. 301-17, 301-13, and 301-12, respectively, note 22 supra.
Depending upon the case, the country, and the issues involved, a private petitioner should be in contact with the foreign government itself. While in some cases this would be appropriate, in others it would not. The foreign government may seek out and welcome private contacts with a petitioner, or it might be offended by such an approach.

VII. What to Expect from Section 301

As noted previously, no 301 case to date has led to retaliation by the U.S. Government against the complained of act, practice, or policy of the foreign government. Nor have several of the cases been resolved successfully or even partially successfully from the point of view of the petitioner. Many cases ended with a partial action on the part of the foreign government, were terminated because of the de minimis nature of the harm suffered, or were rather unsatisfactorily resolved through the GATT dispute settlement mechanism.

Thus, a petitioner should not get his expectations too high and come to believe that the complained of action of the other government will be completely eliminated or eliminated in a hurry. At best, these negotiations are long and drawn out and require a great deal of compromise on all sides. Also, in many instances the act, practice, or policy of the foreign government is politically sensitive and, hence, very difficult to change publicly. If the U.S. position is also a politically sensitive one, the result might be a complete deadlock. In those cases, it is important to realize that the USTR considers retaliation a tool of very last resort. The U.S. Government, if following past practice, will go to great lengths to avoid taking action against the foreign country, instead preferring to exert the maximum pressure to get some movement towards a reduction in the complained of act, practice, or policy.

Even given that pessimistic assessment, however, the petitioner, if he is persistent, should be able to obtain some benefit from the 301 process. Of course, the level of the benefit will vary from case to case, but in some cases the resolution may be completely satisfactory if the petitioner is willing to accept less than he perhaps first requested. In this regard, the question "What do you want?" is one that petitioner should ask and answer, not only at the very beginning of the 301 process but also at several different critical stages throughout the process.

At the beginning of the 301 process, the petitioner should have clearly in mind what action on the part of the other government will be necessary to remove the obstacle to petitioner's trade in the product or service. Throughout the investigative process and throughout the negotiation and consultation process, the question should repeatedly be asked:

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115 See, e.g., Docket No. 301-12, note 25 supra.
117 See, e.g., Docket No. 301-4, note 25 supra.
How much can the petitioner compromise and still make the effort worthwhile? For example, in a product trade area, how much will the petitioner settle for in the way of export to the particular country? In many of these cases, the solution comes down to numbers and amounts of money involved in the trade that is the subject of the complaint.

A "final" solution may be presented to the petitioner for comment. Petitioner needs to examine realistically what he is getting as contrasted to what he started out requesting at the beginning of the process, and, in hard economic terms, what the action will accomplish. Section 301 cases are not, nor should they be, simply exercises in philosophical disagreement on different trade policies. The bottom line on any of these cases is the economic benefit gained or lost by the particular trade actions of the other country and, likewise, the action taken by the U.S. Government in support of the petitioner.

All through the process, the interested parties should keep the different interest groups and the congressional contacts that have been "lobbied" on this issue informed and in some cases even bring them into the process of decision-making about the "final" acceptable compromise or other resolution of the case. The extra leverage of congressional pressure and pressure from other interest groups will help greatly in stiffening the spine of U.S. Government officials who, in the final analysis, are going to be the ones to decide the resolution of any particular case. While many other considerations will come into play, including foreign policy, military, and international political considerations, clearly the largest factor in a decision should be, and in most instances can be, the merits of the case as demonstrated by petitioner and other interested persons. The more active and responsible the interjections by the petitioner and other interested persons, the more likely the resolution of the case will be favorable to the petitioner.

A. International Dispute Settlement

Most cases under 301 that involve product trade may end up in the GATT, either in bilateral GATT Articles XXII or XXIII consultations or in the formal dispute settlement panel mechanism of GATT Article XXIII.118 The formal dispute settlement panel mechanism varies slightly under the new MTN trade agreements, depending upon the particular issue in dispute, but the general outline of the mechanism is the same as it has been since the GATT was founded in 1947.119 At the request of the complaining country, the GATT will establish a panel of objective experts, generally drawn from government representatives in Geneva not acting on behalf of their governments, who will investigate the complaint and report its findings and recommendations to the Con-

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118 GATT, supra note 6, at arts. XXII and XXIII.
119 Id. art. XXIII.
The recommendations may include the authorization of sanctions against an errant country not following the recommendations of the Contracting Parties. In the past this process has had its ups and downs. In the early years, the process was perhaps more legalistically acceptable to the U.S. than it has become in later years. Under the expanded and clarified rules of the MTN, it is hoped that the orderliness and timeliness of these dispute settlement procedures will begin working more to the benefit of those countries bringing complaints to the GATT, including the United States. However, the GATT is an organization that runs on consensus and there will never be the kind of certainty of right and wrong or justice and injustice as one would expect in the U.S. court system. Likewise, the political and economic relationships and situations among countries weigh heavily, not only on GATT panel members but also on the Contracting Parties when making decisions about any particular complaint. For that reason, frivolous cases should be kept out of the GATT process to the extent possible. Neither an independent panel of experts nor the Contracting Parties like to make adverse statements about another Contracting Party when the complaint does not involve recognizable economic harm.

All through the GATT dispute settlement process, which is limited to representatives of governments, the petitioner should be kept informed by government representatives and should also be providing information and help to the U.S. officials presenting the case. Under the new law, the USTR has a greater obligation to take cases involving disputes under the GATT rules through the GATT dispute settlement mechanism if bilateral consultations are not successful. Therefore, the petitioner has an even greater responsibility, as does the U.S. Government, to insure that the cases are well prepared, involve significant issues of dispute that result in economic harm and, once they are begun, are followed through vigorously and responsibly, not only in the international forum but in the internal U.S. forum as well.

VIII. Defending a Section 301 Case

The defense of section 301 petitions varies with the country and the issue involved. Since the complaint is brought against a foreign government's actions, the foreign government may or may not acknowledge the legitimacy of section 301 for that purpose and, for example, may or may not hire counsel to make representations to the USTR and other agencies. More frequently, governments will make representations directly, through diplomatic channels. Some governments also reinforce these contacts with private representations to the USTR office or even, in some cases, the appearance of counsel at a public hearing.

The first objective of the foreign government is to demonstrate that
the act, practice, or policy is not in violation of any international or bilateral agreement or is not otherwise burdening or restricting U.S. commerce. Failing that, the government may try to negotiate the minimum change necessary to get the petition withdrawn or terminated. Much of these discussions will be formal and informal consultations and negotiations between governments. The foreign government always is more likely to get more private sector U.S. support for its position if a retaliation list is published. Then, the respondent can appeal to those who would be hurt by limits or duty increases on the foreign products or by fees added onto foreign services in the United States. If the USTR holds hearings on the proposed action, the majority of witnesses most likely will be those opposed to the action for economic reasons.

IX. Unsettled Issues

A. Jurisdiction: "U.S. Commerce"

Questions about what acts, practices, or policies of foreign governments are within the framework of section 301 have been raised since the 1974 Act and continue to be raised even though clarifications were made in the 1979 Act. The issues revolve around the definition of "U.S. commerce." Under section 301, the act, practice, or policy of the foreign government must be one that discriminates against or burdens U.S. commerce. The 1974 Act defined "U.S. commerce" as not only product trade but also U.S. services associated with international trade, such as actions affecting the U.S. insurance industry, air transport industry, banking industry, or merchant shipping industry. However, this definition created problems; for example, some interpretations were attempted that would narrow the definition to U.S. service industries associated with product trade. In the 1979 Act, Congress clarified the definition to include, but not be limited to, services associated with international trade whether or not such services are related to specific products.

Congress added this provision specifically to take care of a problem that had arisen in the Canadian Broadcasting case, when representatives of Canadian interests maintained that the complained of tax law was not within the framework of section 301. To clarify that problem and other potential problems, the Senate Finance Committee clearly

122 See note 14 supra.
123 For example, a narrow definition of "U.S. commerce" was attempted by some agencies in the U.S. Government and by those interests (Canadian) adverse to the petitioner in Docket No. 301-15 note 24 infra. This action involved Canadian tax treatment of cross border advertising by Canadians on U.S. television stations. The allegation was made that a television signal was not a service associated with a product in foreign commerce and therefore was not covered by section 301. Partly because of this allegation, the law was clarified in the 1979 Act to assure that "commerce" would not be so narrowly defined. See text accompanying note 124 infra.
125 Docket No. 301-15, note 24 supra.
noted that, "What is comprehended in the term commerce includes international trade and services as, for example, the provision of broadcasting, banking and insurance services across national boundaries."126

Even with these clarifications, significant problems in determining where to draw the line between a trade related and an investment related problem in a foreign country still persist. Even in those cases that might seem quite clear, such as the Korean insurance case,127 persons in the Administration who might not want to pursue a section 301 action have raised questions about the jurisdiction of section 301, claiming in that particular case, for example, that the insurance question in Korea was one of a “right of establishment” and therefore an investment issue rather than one of those trade issues intended to be covered by section 301. However, because the legislative history of the Act clearly uses insurance as an example of one of those issues covered, that particular argument is hard to maintain. In other cases, however, the line might be finer and certainly a number of investment and trade issues would be very close to the line. Depending on whether the USTR interprets the act narrowly or broadly in those borderline cases, a petitioner may or may not get the USTR to take jurisdiction over his particular issue under section 301.

B. Dispute Settlement

Because of some ambiguity in the law, a question remains as to when and to what degree international conciliation, consultation, and dispute settlement must be entered into by the United States when an investigation is initiated under section 301. When the allegations concern matters falling within trade agreements, there must be “consultations” with the foreign government involved.128 While the law does not state that these consultations must be under the auspices of the GATT dispute settlement mechanism, that is a valid interpretation. Depending upon the USTR interpretation of that statute, cases could either quite quickly or more slowly get into the international formal dispute settlement forum. Tactically, for a petitioner’s interests, each case will be dif-

126 1979 Senate Report, supra note 28, at 237, [1979] U.S. CODE CONG. & AD. NEWS at 622. At the suggestion of the then Chairman of the Senate Finance Committee, Senator Russell Long of Louisiana, the committee included another clarifying provision to assure that the provision of subsidies on the construction of vessels used in the commercial transportation of goods by water between the United States and foreign countries is within the purview of section 301. This provision was added to provide some leverage to deal with what many have considered to be a difficult problem of subsidization by foreign countries for the construction of merchant seagoing vessels and the decline in the U.S. shipbuilding industry. Id. at 236, [1979] U.S. CODE CONG. & AD. NEWS at 622.

127 See Docket No. 301-20, note 100 supra, which was ultimately withdrawn by petitioner after assurances were given by the Korean government that the problem would be solved. Early in that case, some interests who did not want to pursue the case argued that the type of insurance problem experienced by petitioner was not one involving international trade but was rather an investment problem.

ferent depending upon the country involved and the issue. In some cases, petitioner should push immediately for the formal dispute settlement mechanism; in others, informal bilateral consultations might be the best approach.

C. Presidential Determinations and Responses

While the statute requires the President to determine what action, if any, he will take under section 301 within twenty-one days of receiving a recommendation from the USTR, section 301 itself is quite broad as to what action that may be. While he may take a specific action earlier noted, he shall, under 301(a), take “all appropriate and feasible action within his power to enforce . . . .” Frankly, that could mean a number of things short of actual trade retaliation, including perhaps more consultation. The drafters of the amended 301 did not intend that the President be required to retaliate. At the same time, they did intend that the law require some response in meritorious cases. The degree of response actually required is uncertain, and Presidents are more likely to interpret the law liberally to allow more flexibility in responses. For that reason, petitioner should not believe, for example, that a recommendation for retaliatory action will actually result in a strong response by the President.

X. Conclusion

Under the amended section 301, three cases have been initiated and eight of the holdover cases from the old law have been terminated or suspended. Other cases have been filed under the new law but not initiated, either because the issues were resolved before the time to initiate elapsed (forty-five days) or the petitions did not contain sufficient information on which the USTR could base a determination to initiate. Three holdover cases from the unamended law are still pending and active in the GATT dispute settlement process.

It appears that much of the activity under the amended statute

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129 Id. § 2411(c)(2).
130 Id. § 2411(b).
131 Id. § 2411(a).
133 Id.
134 Cases terminated include Docket Nos. 301-3, note 24 supra; 301-5, note 23 supra; 301-7, note 24 supra; 301-15, note 24 supra; 301-16, note 23 supra; and 301-17, note 22 supra. The two marine insurance cases, Docket Nos. 301-14 and 301-18, note 24 supra, have been suspended, the Russian case pending an end to the trade embargo and the Argentine case pending agreed to multilateral negotiations to be participated in by the Argentine government.
135 A case brought by Diamond Sunsweet concerning export of dried prunes to Venezuela and a case brought by the Rice Millers Association concerning rice exports to Japan.
136 See Docket Nos. 301-6, note 23 supra; 301-11, note 23 supra; and 301-13, note 22 supra.
might be non-public or prior to actual filings. There is a danger, however, that the lack of activity in section 301 might be misinterpreted.

The success of section 301 might best be judged by how little it is used rather than by how much it is used, if in fact the U.S. Government uses the potential of section 301 along with other tools to settle issues adversely affecting U.S. exporters before they reach a confrontational stage. Formal section 301 cases should only be brought when the matter of concern to potential petitioners cannot be solved by less confrontational methods and in a timely manner.

The key, then, is for U.S. policy makers and for U.S. private interests adversely affected by the foreign trade practices covered by section 301 to know how best to utilize the statute. To some extent, use of 301 as a tool both to avoid a formal filing or, if filed, to achieve a satisfactory result, will vary greatly from case to case. The flexibility and “political” element in 301 is much greater than in other trade statutes and for that reason can be both more effective or less effective depending on how each case is handled and responded to by all parties involved in the dispute.

It is important, however, that section 301 not be avoided or ignored. It was quite clearly the intention of Congress that the United States more effectively and vigorously enforce U.S. rights under international agreements and to insure that U.S. exporters of both goods and services be given opportunities to compete in foreign commerce. Neglecting to pursue the use of section 301 to achieve those goals would send the wrong signal to foreign governments, to U.S. interests, and to the Congress.