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The Use of Section 301 to Open Japanese Markets to Foreign Firms

Jean Heilman Grier

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The Use of Section 301 to Open Japanese Markets to Foreign Firms

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The Use of Section 301 to Open Japanese Markets to Foreign Firms

Jean Heilman Grier*

Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>PART ONE: SECTION 301 OF THE TRADE ACT OF 1974</td>
<td>4</td>
</tr>
<tr>
<td>I. PURPOSE OF SECTION 301</td>
<td>4</td>
</tr>
<tr>
<td>II. LEGISLATIVE HISTORY OF SECTION 301</td>
<td>4</td>
</tr>
<tr>
<td>A. General Background</td>
<td>4</td>
</tr>
<tr>
<td>B. &quot;Super 301&quot; Provision</td>
<td>5</td>
</tr>
<tr>
<td>C. &quot;Telecommunications 301&quot; Provision</td>
<td>7</td>
</tr>
<tr>
<td>III. STANDARDS AND PROCESS FOR USE OF SECTION 301</td>
<td>8</td>
</tr>
<tr>
<td>PART TWO: JAPANESE TRADE AGREEMENTS</td>
<td>10</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>10</td>
</tr>
<tr>
<td>II. JAPANESE &quot;SUPER 301&quot; AGREEMENTS</td>
<td>11</td>
</tr>
<tr>
<td>A. Implementation of &quot;Super 301&quot; Provision</td>
<td>11</td>
</tr>
<tr>
<td>B. Supercomputer &quot;Super 301&quot; Investigation and Agreement</td>
<td>12</td>
</tr>
<tr>
<td>C. Satellites &quot;Super 301&quot; Investigation and Agreement</td>
<td>15</td>
</tr>
<tr>
<td>D. Wood Products &quot;Super 301&quot; Investigation and Agreement</td>
<td>16</td>
</tr>
<tr>
<td>E. Monitoring of &quot;Super 301&quot; Agreements</td>
<td>19</td>
</tr>
<tr>
<td>III. &quot;TELECOMMUNICATIONS 301&quot; AGREEMENTS</td>
<td>20</td>
</tr>
<tr>
<td>A. Implementation of &quot;Telecommunications 301&quot; Provision</td>
<td>20</td>
</tr>
</tbody>
</table>

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The views expressed in this Article are solely those of the author, and do not necessarily reflect those of any department or agency of the U.S. Government. The author would like to thank Allyson L. Senie for her assistance with this Article.
Introduction

Section 301 of the Trade Act of 1974, as amended, has been the force behind virtually all of the successful trade agreements negotiated with Japan in recent years. It is the silent, if unwelcome, presence at every negotiating session with Japan, rarely mentioned, but never forgotten. By providing leverage in the form of a credible threat of retaliation, Section 301 has enhanced the ability of the United States to negotiate and enforce agreements to eliminate unfair trade practices and to gain access to Japanese markets for U.S. exports. It has become one of the most effective weapons that the United States has in its negotiating arsenal to overcome the great reluctance of the Japanese to enter into trade agreements.

Section 301 authorizes, and in some cases requires, the United States to impose trade sanctions against foreign countries that violate trade agreements or engage in unfair trade practices. Its primary objective is to provide the United States with the necessary leverage to negotiate satisfactory agreements with foreign countries, in order to resolve trade disputes and to open foreign markets to U.S. firms. Although the United States has seldom exercised its re-

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taliatory authority, and even then reluctantly, the mere threat of its use has provided the leverage needed to settle a variety of trade disputes.

The Administration's negotiating leverage vis-a-vis Japan was strengthened significantly in 1988 with the adoption by the Congress of Section 301 variants, under which Section 301 sanctions could be imposed. Since 1988, these provisions have provided the primary impetus for the negotiation of important trade agreements with Japan, covering a variety of sectors ranging from supercomputers and satellites to construction projects and wood products. The U.S. government anticipates that these agreements will lead to the removal of offending trade barriers and enable U.S. firms to gain access to the Japanese markets in these sectors.

Not only has the Section 301 specter served as the catalyst for Japan to agree to satisfactory settlements of a variety of trade disputes, it has also substantively improved the agreements that were negotiated. It has enabled the United States to put into practice a lesson that it has had to relearn repeatedly in working out resolutions of disputes with Japan: that it is not sufficient to rely on Japan to implement an agreement with general commitments. Rather, if the United States is to have a reasonable expectation that a trade agreement with Japan will fulfill its overall purpose and remedy the underlying trade dispute, the agreement must contain specific commitments that do not leave room for ambiguity and interpretation.

While vague, ambiguous provisions are easier to negotiate, they do not serve the interest of either country or their respective industries, and only lay the basis for future disputes. Without clear commitments, an agreement cannot be effectively enforced, even when the United States acts, in effect, as both judge and jury. In order for the United States to enforce an agreement under domestic law (Section 301), it must be able to specify the commitments that Japan has failed to fulfill or implement. By the same token, Japan needs to know exactly what actions the United States is expecting it to take and by what standards its compliance will be judged.

This Article consists of three parts. Part I will examine Section 301 — its purpose, its operation, and the manner in which it was strengthened by the Congress in 1988. In Part II, trade agreements negotiated with Japan as a result of the new provisions added in 1988 will be surveyed. This section will examine the specific barriers behind the trade disputes that led the two governments to the negotiating table, the role of Section 301 in prodding Japan to agreement and the resulting commitments that Japan made to avoid Section 301 sanctions. Three of these agreements were negotiated under the umbrella of the 1988 "Super 301" provision. Three other agreements resulted directly or indirectly from the implementation of the
“Telecommunications 301” provision. The final agreement to be considered in this section, which substantially revised an existing public works agreement, had its genesis in a Section 301 investigation mandated by Congress in 1988. Part III of this Article will explore the potential future use of Section 301 to open up Japanese markets, in particular its use to enforce existing bilateral agreements with Japan.

Part One: Section 301 of the Trade Act of 1974

I. Purpose of Section 301

Section 301 of the Trade Act of 1974, as amended, is the primary statutory authority for the U.S. government to take action to eliminate acts, policies, and practices of foreign governments that violate (or deny U.S. rights and benefits under) trade agreements, or constitute unjustifiable, unreasonable, or discriminatory restrictions on U.S. commerce. The basic objective of Section 301 is to provide the United States with the leverage necessary to negotiate agreements with foreign countries to resolve trade disputes thus opening foreign markets to U.S. firms. It is also the law relied upon by the U.S. government to enforce commitments made by foreign governments under international trade agreements (bilateral and multilateral). The leverage of Section 301 derives from the potential imposition of sanctions, which are usually in the form of additional duties.

II. Legislative History of Section 301

A. General Background

The major provisions of the current Section 301 were incorporated into the Trade Act of 1974 ("1974 Act"), although the provision originated in prior legislative enactments. Section 301 substantially revised the ability of the President to respond to unfair foreign trade practices by authorizing him to retaliate against foreign countries which impose unjustifiable or unreasonable restrictions or

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6 Section 301 is also designed to produce equitable conditions for U.S. investment abroad and to improve protection of intellectual property rights by foreign governments. 19 U.S.C. §§ 2411(d)(4)(B), 2411(d)(5).
burdens on U.S. commerce.\textsuperscript{9} The Congress enacted Section 301 as "negotiating leverage"\textsuperscript{10} to ensure compliance by foreign countries with trade agreements and to eliminate restrictions and other distortions of trade.\textsuperscript{11}

The Congress amended Section 301 in 1979,\textsuperscript{12} and 1984,\textsuperscript{13} and in the Omnibus Trade and Competitiveness Act of 1988 ("1988 Trade Act").\textsuperscript{14} The 1988 amendments: (1) transferred Section 301 authority from the President to the United States Trade Representative ("USTR"),\textsuperscript{15} (2) mandated retaliation where a foreign country violated a trade agreement or engaged in unjustifiable acts,\textsuperscript{16} (3) expanded the list of unreasonable practices actionable under Section 301,\textsuperscript{17} and (4) created variations of Section 301 ("Super 301,"\textsuperscript{18} "Telecommunications 301,"\textsuperscript{19} and "Special 301")\textsuperscript{20}, all of which rely upon the authority of Section 301 to impose sanctions.

\textbf{B. \textit{"Super 301" Provision}}

The 1988 provision, commonly referred to as "Super 301," required that for two years (1989 and 1990) the USTR identify and

\begin{itemize}
\item \textsuperscript{10} \textit{Id. at 164, 1974 U.S.C.C.A.N. at 7302.}
\item \textsuperscript{11} The executive branch was given discretion as to when to exercise this authority. \textit{Id. at 167-68, 1974 U.S.C.C.A.N. at 7306.}
\item \textsuperscript{12} Trade Agreements Act of 1979, Pub. L. No. 96-39, \S\ 901, 93 Stat. 144 (1979); see Coffield, \textit{supra} note 8, at 185, 386; see also Thatcher, \textit{supra} note 8, at 496.
\item \textsuperscript{15} Omnibus Trade and Competitiveness Act of 1988, \textit{supra} note 14, \S\ 1301; see also Bello & Holmer, \textit{supra} note 14, at 2-10.
\item \textsuperscript{16} Omnibus Trade and Competitiveness Act of 1988, \textit{supra} note 14, \S\ 1301; see also Bello & Holmer, \textit{supra} note 14, at 10-18.
\item \textsuperscript{18} 19 U.S.C. \S\ 2420 (1988).
\item \textsuperscript{19} \textit{Id.} \S\ 3106.
\item \textsuperscript{20} The "Special 301" provision is designed to enhance the Administration's ability to negotiate improvements in foreign intellectual property regimes. It requires the annual identification of foreign countries which "deny adequate and effective protection of intellectual property rights" or "deny fair and equitable market access to United States persons that rely on [such] protection." \textit{Id.} \S\ 2422(a)(1). The USTR must initiate Section 301 investigations of each priority country within 90 days of identification. \textit{Id.} \S\ 2412(b)(2)(A) (1988).}
\end{itemize}
initiate Section 301 investigations of priority trade practices.\textsuperscript{21} Behind the enactment of "Super 301" lay Congressional concern "that certain foreign countries, most notably Japan, engage in broad and consistent patterns of unfair practices that serve to keep their home markets free of significant competition from U.S. and other foreign firms."\textsuperscript{22} The Congress mandated these Section 301 investigations because: "Merely initiating such an investigation can give the President enormous leverage in negotiating an end to a foreign unfair trade practice."\textsuperscript{23}

With the inventory of foreign practices in the National Trade Estimates Report ("NTE Report")\textsuperscript{24} as a base, the "Super 301" process began with the identification\textsuperscript{25} of:

1. Priority practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent;\textsuperscript{26}

2. Priority foreign countries taking into account the number and pervasiveness of priority activities affecting that country, as identified in the NTE Report, and the level of U.S. exports of goods and services "that would be reasonably expected from full implementation of existing trade agreements to which that foreign country is a party, based on the international competitive position and export potential of such products and services;"\textsuperscript{27} and

3. An estimate of the total value of additional U.S. goods and services which would have been exported to the priority countries absent their trade distorting practices ("but-for" exports).\textsuperscript{28}

Within twenty-one days after the "Super 301" report was sent to the Congress, the USTR was required to initiate Section 301 investigations of each practice.\textsuperscript{29} It was also required to seek consultations with the priority countries with the objective of negotiating an agreement that would provide for either: (1) the elimination or phase-out

\textsuperscript{21} Id. § 2420 (1988).
\textsuperscript{23} 1987 Senate Finance Committee Report, supra note 22, at 13.
\textsuperscript{25} This identification was required to be made in 1989, within 30 days after the NTE Report was submitted to the Congress, and in 1990, on the date the NTE Report was due. 19 U.S.C. § 2420(a)(1)(1988).
\textsuperscript{26} Id. § 2420(a)(1)(A). Factors to be considered were: "(A) the international competitive position and export potential of United States products and services, (B) circumstances in which the sale of a small quantity of a product or service may be more significant than its value, and (C) the measurable medium-term and long-term implications of government procurement commitments to United States exporters." Id. § 2420(a)(3).
\textsuperscript{27} Id. §§ 2420(a)(1)(B), 2420(a)(2).
\textsuperscript{28} Id. § 2420(a)(1)(C).
\textsuperscript{29} Id. § 2420(b).
of the barriers within three years, with the expectation that U.S. exports would increase incrementally each year of the three-year period; or (2) compensation for the trade-distorting effects on U.S. commerce. Section 301 sanctions could be imposed if satisfactory agreements were not negotiated.

C. "Telecommunications 301" Provision

In 1988, the trade "imbalance" resulting from "the open nature" of the U.S. telecommunications market and the relatively closed nature of foreign telecommunications markets led the Congress to take the unusual step of targeting the telecommunications sector, with the enactment of the Telecommunications Trade Act of 1988, as part of the 1988 Trade Act. A primary objective of this measure was "to ensure that countries which have made commitments to open telecommunications trade fully abide by those commitments." The Congress believed that "the aggressive enforcement" of telecommunications trade agreements "is absolutely necessary if the negotiation of further trade agreements [was] to have any real benefit for the United States." Singled out for specific concern because of their "marginal benefits to date to United States firms" were two agreements with Japan, the MOSS (Market-Oriented Sector-Selective) Agreements on Telecommunications and the 1981 NTT Agreement on Procurement.
Accordingly, the Congress enacted Section 1377 of the 1988 Trade Act ("Telecommunications 301"), which requires the USTR to review annually all trade agreements involving telecommunications products or services to determine whether a foreign country is: (1) not in compliance with the terms of the agreement, or (2) otherwise denies "within the context of the terms of such agreement," mutually advantageous market opportunities to U.S. products and services. A determination of non-compliance with a telecommunications trade agreement is treated as an affirmative "unfairness" determination under Section 301, which requires the imposition of sanctions within thirty days. However, unlike most Section 301 cases where the USTR has broad discretion as to the products or services targeted by the retaliation, under "Telecommunications 301," the USTR must first take retaliatory actions "which most directly affect trade in telecommunications products and services" with the country affected, unless "actions against other economic sectors would be more effective in achieving compliance by the foreign country with the trade agreement."

III. Standards and Process for Use of Section 301

The Section 301 process commences with an investigation, which may be initiated by a petition filed with the USTR by "any
interested person” or upon self-initiation by the USTR.46 A Section 301 investigation includes fact-finding and consultations with the U.S. trading partner.48 Where the investigation involves a trade agreement and an acceptable resolution is not reached during consultations, the USTR must request proceedings under the dispute settlement procedures in the agreement.50

If the investigation, consultations, and any dispute settlement proceedings do not result in an agreement, the USTR must determine: (1) whether the foreign practice is “unfair” and actionable under Section 301; and (2) if so, what action (if any) the United States should take to counterbalance the effect of the unfair practice on U.S. commerce.51 Retaliation is mandatory when the USTR determines that there has been a violation or denial of U.S. rights under a trade agreement52 or that the foreign practice is unjustifiable and burdens or restricts U.S. commerce.53 However, retaliatory action is discretionary when a practice is found to be unreasonable or discriminatory and is a burden or restriction on

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47 Investigations are initiated under Section 302 of the 1974 Act. 19 U.S.C. § 2412 (1988). However, for ease of reference, such investigations will be referred to as “301 Investigations.”
48 Upon the initiation of an investigation, the USTR must request consultations with the affected foreign government to try to negotiate an agreement to resolve the issues. Id. § 2413.
49 Section 301 applies to all trade agreements except the agreement on subsidies and countervailing measures, as described in section 2(c)(5) of the Trade Agreements Act of 1979. Id. § 2414(a)(2)(A).
50 Id. § 2413(a)(2).
51 Id. § 2414(a)(1). The “unfairness” determination must be made within 18 months where a trade agreement is involved and 12 months in other cases. Id. §§ 2414(a)(2)(A), 2414(a)(2)(B). Additional time is allowed where a trade agreement is involved to accommodate the consultation and dispute settlement procedures in the agreement. Id. § 2414(a)(3)(B)(i).
53 Unjustifiable acts, policies, and practices are those which violate, or are inconsistent with, the international legal rights of the United States, including those which deny national treatment or most-favored-nation treatment to U.S. exports, the right of establishment of U.S. enterprises, or protection of intellectual property rights. 19 U.S.C. §§ 2411(d)(4)(A), 2411(d)(4)(B) (1988).
54 Id. § 2411(a)(1)(B)(ii). Retaliation is not required where inter alia the foreign country is taking satisfactory measures to grant U.S. rights under a trade agreement, has agreed to eliminate or phase out the act, policy, or practice, or to provide the United States with compensatory trade benefits. Id. § 2411(a)(2).
55 "Unreasonable practices" include: (1) the denial of "fair and equitable opportunities for the establishment of an enterprise;" (2) the denial of fair and equitable "market opportunities," including a foreign government's toleration of "systematic anticompetitive activities" by or among its private firms; (3) the denial of "adequate and effective protection of intellectual property rights;" (4) export targeting; and (5) the denial of worker rights. 19 U.S.C § 2411(d)(3)(B) (1988). In determining whether a foreign practice is
U.S. commerce. 57

The USTR has broad authority as to the type of retaliatory action that it may take "subject to the specific direction, if any, of the President." 58 For example, it may suspend or withdraw trade concessions, impose duties or other import restrictions on goods or fees, impose restrictions on services of the foreign country, or enter a binding agreement in which the foreign country agrees to eliminate or phase out the objectionable practice, eliminate the burden or restriction on U.S. commerce, or compensate the United States for the trade distortion. 59

The U.S. Government is required to monitor the implementation of all trade agreements, bilateral and multilateral, under Section 301. If it finds that a country "is not satisfactorily implementing a measure or agreement," it must determine what further action to take under Section 301. 60

Part Two: Japanese Trade Agreements

I. Introduction

The 1988 Trade Act provided the basis for the negotiation of a number of significant trade agreements with Japan in recent years (1989-91). Six agreements were negotiated under the umbrella of Section 301 variants included in that Act. Three agreements were negotiated after Japanese practices were designated under the "Super 301" provision. Three others resulted from the implementation of the "Telecommunications 301" provision. One agreement followed a Section 301 investigation of the Japanese construction market. This section will examine each of these agreements, including the trade barriers that led to negotiations, and the commitments made by the Government of Japan to remove the barriers and avoid Section 301 sanctions.

unreasonable, "reciprocal opportunities in the United States for foreign nationals and firms" must be considered. Id. § 2411(d)(3)(D). Practices will not be considered unreasonable in certain cases. Id.
56 "Discriminatory" practices include those foreign acts, policies or practices "which den[y] national or most-favored nation treatment to United States goods, services, or investment." Id. § 2411(d)(5).
57 Id. §§ 2411(b)(1), 2411(b)(2).
58 Id. § 2415(a)(1).
59 Id. § 2411(c)(1). Retaliation may be taken against any goods or economic sector on a nondiscriminatory basis or solely against the foreign country involved and without regard to whether such goods or economic sector were involved in the foreign practice that is the basis for the determination. Id. § 2411(c)(3). The retaliatory action must be devised to "affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce." Id. § 2411(a)(3).
60 Id. § 2416. Action imposed under Section 301 may be modified or terminated under certain conditions. Id. § 2417(a). Retaliatory measures expire after four years, if not renewed. Id. § 2417(c)(1).
II. Japanese "Super 301" Agreements

A. Implementation of "Super 301" Provision

Implementation of the "Super 301" provision began with the USTR's identification, on May 26, 1989, of six priority practices in three priority countries. Three of the identified practices were Japanese: exclusionary government procurement practices in the supercomputer sector which barred foreign suppliers, a ban on procurement by the government of foreign-made satellites, and technical barriers affecting the import of forest products into Japan.\(^{61}\) A Section 301 investigation of each priority practice was initiated on June 16, 1989, to determine whether the practices were actionable under Section 301.\(^{62}\)

Although the USTR requested consultations upon initiation of the investigations, the Government of Japan stated repeatedly that it would not negotiate on any of the market access claims under the threat of retaliation. As a consequence, the two governments did not begin in-depth discussions until September 1989 and then only in the context of the annual meeting of the U.S.-Japan Trade Committee, with Japan labelling the talks as “discussions or consultations,” not negotiations. Irrespective of the label applied to the ensuing dialogue, the two governments, over the following nine months, engaged in intensive efforts to reach agreements by June 16, 1990 (twelve months after the initiation of the investigations). In accordance with the statute [19 U.S.C. § 2414(a)(2)(b)], “unfairness” determinations were required to be made twelve months after the initiation of the investigations, if agreements had not been reached.

The negotiations were concluded on June 15, 1990, when the two governments signed bilateral trade agreements, resolving each of the designated practices. On the same day, the Section 301 investigations were suspended.\(^{63}\) Under the "Super 301" umbrella (and the threat of Section 301 sanctions), Japan agreed to take steps to open its public sector market to foreign supercomputer manufacturers, to procure commercial satellites competitively, and to remove restrictions on the use and imports of wood products. Each of these agreements will be examined in turn below.

\(^{61}\) Notice, 54 Fed. Reg. 24,438 (1989). The other priority practices and countries were quantitative import restrictions, including import bans and restrictive licensing, imposed in Brazil; trade-related investment measures that prohibit or burden foreign investment in India; and barriers to trade in services in India, in particular, the closure of its insurance market to foreign insurance companies. \textit{Id}.


B. Supercomputer “Super 301” Investigation and Agreement

1. Priority Practice: Exclusionary Procurement of Supercomputers

One of the three “priority practices” consisted of an array of practices which effectively denied the U.S. supercomputer industry access to Japan’s public sector market for supercomputers. This denial resulted despite a 1987 Supercomputer Agreement aimed at opening up that sector to foreign-made supercomputers. The USTR found that the Government of Japan had engaged in a variety of practices having the effect of thwarting the open procurement process, in order to ensure the purchase by governmental entities of supercomputers made by Japanese producers. For example, U.S. supercomputer suppliers were excluded from serious consideration in government purchases of supercomputers when technical specifications favored the supercomputers offered by incumbent Japanese suppliers. U.S. firms were further disadvantaged by extraordinarily low government supercomputer budgets which required massive discounts, of up to eighty percent, off list prices. Only domestic firms were able to participate under such conditions.

As a consequence of this policy, U.S. firms had not been able to penetrate the Japanese public sector supercomputer market even though they held eighty percent of the world supercomputer market. While sales of U.S. supercomputers to the private sector in Japan increased, reflecting their “worldwide competitiveness,” Japanese government entities purchased only two U.S. supercomputers “on a noncompetitive basis under a special 1987 import promotion budget.”

2. 1990 Supercomputer Agreement

On March 22, 1990, a preliminary agreement was reached in the supercomputer negotiations. It was the first “Super 301” agreement to be concluded. The final agreement, signed on June 15, 1990,

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65 Notice, 54 Fed. Reg. 24,438, 24,440 (1989); Notice of Initiation of Investigation, 54 Fed. Reg. 26,137 (1989). The Japanese firms participating in supercomputer procurements were much larger than the U.S. supercomputer industry and, therefore, were able to discount substantially the price of their supercomputers. For relative size of the U.S. and Japanese supercomputer companies, see Kelley, World IT Sales Grow 8.9 % to $278.5 B, DATAMATION 11 (June 13, 1991).

66 1990 NTE Report, supra note 64, at 114.

67 The U.S.-Japan 1990 Supercomputer Agreement is comprised of an exchange of
includes detailed procurement procedures that the Government of Japan agreed all governmental and quasi-governmental entities will follow in purchasing supercomputers to ensure that the procurements are competitive, transparent, and non-discriminatory.

The procedures specified in the new agreement detail the requirements for every stage of the procurement process, beginning with a determination of a procuring entity’s needs for a supercomputer and including, inter alia, announcement of the procurement, benchmark testing, tendering and bidding, award criteria, evaluation of bids, and award of contracts. For example, entities must establish specifications for new supercomputers based on their “actual minimum needs” and, in evaluating competing supercomputer models, they must rely primarily on benchmark tests of representative workloads (as opposed to “theoretical peak performance,” which is a calculation of the maximum potential capability of a supercomputer, but which does not represent its actual ability to solve computational problems). In addition, governmental entities are obligated to evaluate bids on the basis of the “overall greatest value to the entity which is determined by considering technical and functional performance factors as well as price.”

A significant element of the 1990 Supercomputer Agreement is the introduction of a comprehensive complaint mechanism, which


A “competitive procedure” is defined as one in which “there is no tendency, whether intentional or unintentional, for any company domestic or foreign to be favored, hindered, or blocked in its ability to supply a [supercomputer] which meets the information processing needs of prospective users.” 1990 Supercomputer Agreement, supra note 67, Attachment at 1.

68 A “competitive procedure” is defined as one in which “there is no tendency, whether intentional or unintentional, for any company domestic or foreign to be favored, hindered, or blocked in its ability to supply a [supercomputer] which meets the information processing needs of prospective users.” 1990 Supercomputer Agreement, supra note 67, Attachment at 1-2, §§ II(1.1)(1), II(1.1)(2).

69 Id., Attachment at 2, §§ II(1.1)(4)-(6).

70 Id., Attachment at 3-4, § II(1.5).

71 Id., Attachment at 5-8, § II(3).

72 Id., Attachment at 7, § II(3.7). Japanese entities must give extra credit in a transparent manner to bidders who offer superior products or services. Id., Attachment at 7, § II(3.7)(3).

73 Id., Attachment at 7, § II(3.7)(1).

74 Id., Attachment at 7, § II(3.7)(1).

75 Id., Attachment at 7, § II(3.7)(5).

76 Id., Attachment at 2, § II(1.1)(1). The parameters of the minimum needs of the procuring entity must be stated in terms of operational performance requirements (as opposed to theoretical levels). Id.

77 Id., Attachment at 6, § II(3.6)(1). Benchmark testing is “[t]he measurement of achieved performance of a supercomputer on a representative forecasted workload (set of codes), designated by the customer, and as measured by the elapsed time on the wall clock, as utilized in the United States.” Id. at 3-4, § II(1.5)(1). Benchmarking must be conducted on an “existing system” (rather than on a model not available for delivery during the bidding process, unless specified conditions are met). Id. at 6, § II(3.6)(2).

78 Id., Attachment at 6, § II(3.4)(1), 7, § II(3.7)(1).
the Government of Japan has agreed to establish to ensure that the
appropriate procedures are followed.79 Under this mechanism, Ja-
pan must create an independent Procurement Review Board to hear
complaints by potential suppliers of any aspect of a procurement, in
accordance with procedures specified in the Agreement. This system
is patterned after the bid protest system which is integral to the pro-
curement system in the United States,80 but without precedent in Ja-
pan. It is intended as a means for resolving complaints by U.S. firms
with Japanese supercomputer procurements that do not require the
claim to be subject to government-to-government consultations.
Prior trade agreements have included only general assurances by the
Government of Japan to consider complaints by U.S. companies aris-
ing under bilateral agreements.81 These agreements have rarely
been used as they lack “teeth.”

Another set of Japanese Government obligations under the
1990 Supercomputer Agreement is intended to remove one of the
major barriers faced by foreign manufacturers in prior procure-
ments. As noted above, because Japan had failed to provide ade-
quate funding for procurements, entities required bidders to reduce
or discount substantially their bids, by as much as eighty percent, to
meet the funding level.82 To eliminate this practice, the Japanese
Government agreed to base its budgets for supercomputers on
prices prevailing in the private sector for systems in similar environ-
ments.83 The use of private sector prices is designed to break the
cycle under which new supercomputer budget requests were based
on the discounted prices paid by other governmental entities, thus
perpetuating the practice that effectively excluded foreign firms from
the market. In the negotiation of the 1990 Supercomputer Agree-
ment, the United States was able to improve substantially upon the
1987 Supercomputer Agreement and to address specific issues iden-
tified in the “Super 301” designation of Japanese supercomputer
procurement practices as a priority trade practice.

79 Id., Attachment at 8-11, § III.
80 In the United States there are two primary entities that review procurement com-
(1988), and the General Services Administration Board of Contract Appeals. 40 U.S.C.
§ 759(f) (1988).
81 See, e.g., 1987 Supercomputer Agreement, supra note 64, Attachment at 6, § 5.
82 This issue was unresolved when the 1987 Supercomputer Agreement was signed.
See 1987 Supercomputer Agreement, supra note 64, Letter to Ambassador Matsunaga.
83 The Japanese Government recognized “that adequate budgets for supercomputers
are necessary to ensure fair and competitive procurements” and promised to seek “suffi-
cient funds to enable public procurement of supercomputers based on prices for similar
supercomputer systems in similar working environments in the private sector.” 1990
Supercomputer Agreement, supra note 67, Letter to Carla Hills, Attachment at 2,
§ II(1.1)(2). Japan also agreed to eliminate bids incorporating such deep discounts. Id.,
Attachment at 7-8, § II(3.9).
C. Satellite "Super 301" Investigation and Agreement

1. Priority Practice: Ban on Foreign Satellite Procurement

A second "priority practice" identified under "Super 301" was Japan's ban on government procurement of foreign satellites. Japan had enunciated a policy of autonomously developing a satellite and launch service industry in its 1983 "Long Range Vision on Space Development." Under this policy, the purchase of foreign satellites by government entities was prohibited if such purchases would interfere with the development of Japan's indigenous production capability, that is, if it involved technology not yet developed in Japan. This policy applied to the entire range of satellites (broadcast, communications, earth resource, and weather) and to procurements of satellites by two major quasi-governmental entities, the Nippon Telegraph and Telephone Corporation (NTT), Japan's largest telecommunications services provider, and the Japan Broadcast Corporation (NHK), its public radio and television network.84

As a result of the Japanese policy, no U.S. or other foreign firm had been able to compete to be the prime contractor on any of the satellite purchases of governmental or quasi-governmental entities. The United States, which had long been the world leader in satellite production, was thus denied significant market opportunities in Japan.85

2. Provisions of Satellite Agreement

In an agreement in principle, reached on April 3, 1990, and finalized on June 15, 1990,86 the Government of Japan agreed to remove its explicit restriction on the procurement of foreign satellites. It promised to open the procurement of all satellites, excluding research and development (R&D) satellites87 and R&D payloads on

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87 R&D Satellites are defined as "satellites designed and used entirely, or almost entirely, for the purpose of in-space development and/or validation of technologies new to either country, and/or non-commercial scientific research." Satellite Agreement, supra note 86, Attachment I at 1, § 3(1). R&D satellites do not encompass satellites "designed or used for commercial purposes or for the provision of services on a regular basis." Id., Attachment at 2, § 3(3). Typical examples of U.S. and Japanese R&D satellites are included in the Agreement. Satellite Agreement, supra note 86, Attachments III and IV.
non-R&D satellites by the Government or any entity under its control, including NTT, to foreign competition.\textsuperscript{88} Central to this Agreement was the recognition that Japanese Government space R\&D "is a legitimate pursuit of a sovereign nation," but that procurement of operational satellites by governmental or quasi-governmental entities, like NTT, must be open to foreign suppliers.\textsuperscript{89}

To implement the reversal in Japanese policy, the Government of Japan agreed to adopt and follow new open, transparent, non-discriminatory, and competitive procedures for the procurement of satellites.\textsuperscript{90} The procedures, which are generally comparable to the system used in the United States, detail the requirements that Japanese entities must follow when procuring satellites. They cover procurement planning,\textsuperscript{91} specifications,\textsuperscript{92} tendering procedures,\textsuperscript{93} award criteria,\textsuperscript{94} and notification of offerors.\textsuperscript{95} The Agreement also commits the Government of Japan to consult with the United States where the latter believes that Japan's classification of a planned satellite as an R\&D satellite is not consistent with the Agreement.\textsuperscript{96}

Finally, the Agreement requires Japan to establish a second Procurement Review Board and complaint mechanism, virtually identical to the one included in the 1990 Supercomputer Agreement. The Board will review complaints from private parties with respect to procurements of non-R&D satellites by the Government, and provide for the prompt and equitable resolution of such complaints.\textsuperscript{97}

The negotiation of the Satellite Agreement was a major accomplishment in that it reversed a Japanese policy designed to protect a targeted but undeveloped industry. The driving force behind the negotiations was the potential of Section 301 sanctions if the Government of Japan did not agree to open up its non-R&D satellite procurements to foreign companies.

D. Wood Products "Super 301" Investigation and Agreement

1. Priority Practice: Barriers Affecting Imports of Wood Products

In the third "Super 301" case, the USTR identified Japanese Government policies and practices that impeded imports of wood products as a "priority practice." It was the most complex of the

\textsuperscript{88} Satellite Agreement, supra note 86, Attachment I.
\textsuperscript{89} 1990 NTE Report, supra note 64, at 115.
\textsuperscript{90} Satellite Agreement, supra note 86, Attachment II. These procedures are similar to those required for procurements under the 1990 Supercomputer Agreement.
\textsuperscript{91} Id., Attachment II at 3-6, § III(2).
\textsuperscript{92} Id., Attachment II at 6-7, § III(3).
\textsuperscript{93} Id., Attachment II at 7-14, §§ III(6)-(8).
\textsuperscript{94} Id., Attachment II at 14-16, § III(10).
\textsuperscript{95} Id., Attachment II at 16-17, § III(11).
\textsuperscript{96} Id., Attachment II at 3, § III(1).
\textsuperscript{97} Id., Attachment II at 18-24, § IV.
three "Super 301" investigations because it involved a variety of tariff and non-tariff measures, including product standards, building standards that discouraged the use of wood in general, wood grading requirements, and technical standards that discriminated against U.S. wood products and favored Japanese producers. The United States sought changes in the Japanese system that would enable the U.S. wood products industry to ship more value-added products like plywood to Japan instead of logs and wood chips, which were about eighty percent of sales in 1989.

One of the most difficult and important elements of the negotiations centered on various Japanese building standards aimed at fire prevention. These standards served to limit the market for wooden buildings to relatively low density units by preventing the construction of three or four-story apartment buildings from wood. The United States challenged a number of these standards and certification requirements as not serving legitimate safety and structural concerns. The United States argued that these standards were outdated, prescriptive standards which failed to take into account current, widely-accepted fire tests and modern building techniques.

The United States also sought tariff reductions on processed products. Japan's tariffs on wood products ranged from zero to twenty percent with higher tariffs on higher value-added products. The United States also requested the reclassification of laminated lumber products that were subject to higher duties. Other issues subject to these negotiations included product standards that were not supported by technical data and Japan's reluctance to accept U.S. certification of American testing organizations. In addition, a number of Japanese standards for building materials and construction practices discriminated against U.S. products.

2. Provisions of Wood Products Agreement

In the agreement that emerged after numerous rounds of intensive negotiations, Japan agreed to take a number of measures over the next three years to expand the use of wood products and to improve access for such imported products. In the Wood Products Agreement, Japan undertook obligations in four primary areas:

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building standards, product standards, tariffs, and the classification of laminated wood products.

First, the provisions of the Agreement include important commitments to revise Japanese building standards in order to permit the increased use of wood products, in particular in the construction of three-story buildings. Japan recognized that “the use of wood products and wood building systems should be permitted where these products and systems provide levels of safety equivalent to or superior to those required of other building materials.” In accordance with this policy, Japan agreed to take specific measures to increase the use of wood products, with the recognition that “[g]iven the preference of the Japanese for wood housing and the cost competitiveness of such housing, wood construction in Japan is likely to increase significantly” as a result of the Agreement.

Second, with respect to product standards, Japan committed to take specific measures to simplify its system for certifying wood products for use in Japan, to revise and adopt new certification standards, to facilitate approval of foreign wood products as meeting Japanese standards, and to accept foreign grading organizations’ testing methodologies as equivalent to those in Japan. Japan also agreed to resolve product-specific standards issues involving oriented strand board, machine stress-rated lumber, nails, and fire-retardant materials.

The third area addressed in the new Agreement is tariffs. Japan agreed to make wood product tariff reductions in the Uruguay Round of trade talks, which were underway under the auspices of the General Agreement on Tariffs and Trade (GATT). As part of this

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100 Wood Product Agreement, supra note 99, Annex B at i, § I(2). Japan further recognized that “standards for safety are not fixed but vary in accordance with technological developments . . . [and] that progress has been, and continues to be, made in the development of wood building systems providing the structural and life safety equivalent to other building systems.” Id. In addition, Japan agreed that “building standards should be transparent, facilitate the introduction of new products and systems, protect safety and, to the maximum extent possible, be performance-based.” Id., Annex B at i, § I(3). Furthermore, it acknowledged that where wood products or wooden building systems meet performance standards, their use should be permitted. Id., Attachment at 2, § II(B)(1).

101 Id., Attachment, Annex B at i, § I(3)(d). See generally id., Attachment, Annex B for the specific measures that the Government of Japan agreed to take to increase the use of wood products. For example, Japan agreed to make specific changes in the structural restrictions that it imposes on wood frame construction by increasing the floor area and changing the nailing requirements. Id., Attachment, Annex B at ii, § II(1)(b); to “allow large sectional wood buildings as quasi-fireproof buildings and permit the construction and use of” wood buildings of specified dimensions. Id., Attachment, Annex B at ii, § II(2); and to “allow the construction of restaurants, shops, club houses as well as cottages of log construction by making [specified] changes in its building standards.” Id., Attachment, Annex B at iii, § II(5).

102 Id., Attachment at 4-7, § III.

103 Id., Attachment, Annex C.

104 Id., Attachment at 1, § I(1).
commitment, Japan is obligated to reduce overall tariff rates on certain wood products. It also agreed that initial staged reductions will be greater than subsequent staged reductions in order to achieve immediate substantial improvement in market access.\textsuperscript{105} Finally, with respect to tariff reclassification, Japan agreed to change the classification of certain laminated wood products to a tariff category with a lower rate of duty (3.9 percent rather than rates of up to twenty percent).\textsuperscript{106}

The Wood Products Agreement provides for a less formal mechanism for the resolution of disputes than the 1990 Supercomputer Agreement or Satellite Agreement. Japan promised to establish, with the United States, a Wood Products Subcommittee of the U.S.-Japan Trade Committee, composed of senior officials from both governments to resolve disputes and oversee the Agreement's implementation.\textsuperscript{107} It also agreed to establish a Japanese Agricultural Standards Technical Committee and a Building Experts Committee, in cooperation with the United States, to monitor the implementation of the Agreement in these areas.\textsuperscript{108}

Japan is the largest U.S. export market for wood and wood products, with U.S. exports totalling approximately $2.8 billion in 1990.\textsuperscript{109} Measured by the expected effect on U.S. exports to Japan, the Wood Products Agreement is one of the most significant agreements entered with Japan to date. It is expected to result in an increase of U.S. wood product exports to Japan of one billion dollars or more annually.

E. Monitoring of "Super 301" Agreements

On June 15, 1990, upon the signing of the agreements that concluded the three "Super 301" investigations, the USTR issued determinations stating that it would monitor Japan's implementation of the new agreements under Section 306 of the 1974 Trade Act.\textsuperscript{110} If in the future, the USTR determines that Japan "is not satisfactorily

\textsuperscript{105} Id., Attachment at 1, § I(2).
\textsuperscript{106} Japan agreed to switch most structural laminated wood products from the high-duty classifications, as of June 1, 1990. Id., Attachment at 7-9, § IV.
\textsuperscript{107} Id., Attachment at 10, § V(B).
\textsuperscript{108} Id., Attachment at 7, § III(D); id. at Annex B at vii, § IV.
\textsuperscript{110} The USTR described the scope of the monitoring as follows: "Monitoring will include but not be limited to consideration of overall compliance with the procedures, provisions, and understandings in or relating to the agreement and the resolution of any complaints should any be filed. In monitoring and evaluating Japanese performance of the obligations undertaken in the agreement, consideration will be given to the intent and objectives of the provisions contained therein." Notice of Suspension of Investigation, 55 Fed. Reg. 25,763 (1990)(forest products); see also Notice of Suspension of Investigation, 55 Fed. Reg. 25,761, 25,762 (1990)(satellites); Notice of Suspension of Investigation, 55 Fed. Reg. 25,764 (1990)(supercomputers).
implementing . . . [the] agreement," it must "determine what further action" to take under Section 301(a), the provision that mandates retaliation upon a finding that a trade agreement has been violated, or that the United States has been denied benefits or rights under such agreement.\textsuperscript{111}

The Congress also required the USTR, beginning in 1990, to publish an annual report of the progress made under the "Super 301" cases, including: (1) revised estimates of "but for" exports for each priority country, that is, the amount by which exports to Japan would have increased in the absence of the priority practices; and, (2) evidence in the form of increased U.S. exports that Japan has made substantial progress toward the elimination of the priority trade-distorting practices.\textsuperscript{112}

In 1990 the Administration did not cite Japan under the "Super 301" provision due to the progress made in each of the three 1989 "Super 301" investigations and negotiations.\textsuperscript{113}

III. "Telecommunications 301" Agreements

A. Implementation of "Telecommunications 301" Provision

The effectiveness of the "Telecommunications 301" provision in prompting Japan to enter trade agreements to open further its telecommunications market can be seen after three annual reviews of telecommunications agreements under Section 1377.\textsuperscript{114} In the first annual review of telecommunications agreements, the USTR cited Japan for its failure to comply with the MOSS Agreements.\textsuperscript{115} As a result of this determination, a new agreement was reached with Japan, just before the USTR was set to impose retaliatory measures. In the second annual review, Japan avoided being named when it agreed to resolve two specific telecommunications issues within a specified period of time.\textsuperscript{116} Similarly, in the third review in 1991, while Japan was not cited under Section 1377, it agreed to remedy an issue that had arisen with its implementation of a 1990 telecommunications agreement.\textsuperscript{117} The discussion below will examine each of the

\textsuperscript{111} 19 U.S.C. § 2416(b) (1988).
\textsuperscript{112} Id. § 2420(d).
\textsuperscript{113} Office of the United States Trade Representative, Press Release(Apr. 27, 1990)(on file with the U.S. Department of Commerce, Office of General Counsel). The "Super 301" investigation involving Brazil was terminated on May 21, 1990, when Brazil liberalized its import regime. 1991 NTE Report, supra note 109, at 19. The "Super 301" investigation of India was terminated on June 14, 1990, when the USTR determined "that India's insurance practices are unreasonable and burden or restrict U.S. commerce, but that retaliation was inappropriate at that time given the ongoing negotiations on services and investment in the Uruguay Round negotiations." Id. at 105-06.
\textsuperscript{114} See supra notes 32-44 and accompanying text.
\textsuperscript{115} See infra notes 118-21 and accompanying text.
\textsuperscript{116} See infra notes 136-61 and accompanying text.
\textsuperscript{117} See infra notes 162-75 and accompanying text.
reviews and will illustrate the role of the "Telecommunications 301" provision in providing the United States with the necessary leverage to negotiate new telecommunications agreements with Japan.

B. Cellular Telephone and Third-Party Radio Agreement

1. Section 1377 Determination in 1989

In 1989, when the USTR conducted its first annual review of existing telecommunications agreements, it examined Japan's compliance with the MOSS Agreements and the NTT Agreement. Based on this review, the USTR determined on April 28, 1989, that Japan was not complying with several commitments made under the MOSS Agreements with respect to third-party radio\(^{118}\) and cellular phone products and services, thus limiting the access of U.S. products and services to the Japanese market for third-party radio communications and cellular phone services.\(^{119}\)

With respect to third-party radio, the USTR found that Japan's Ministry of Posts and Telecommunications ("MPT"), its telecommunications regulatory agency, operated Japan's third-party radio licensing and approval system in a manner that discriminated against U.S. companies. The specific practices cited by the USTR were: (1) MPT limited radio spectrum and applied more burdensome licensing requirements to U.S. firms than were applied to Japanese companies in licensing frequencies; (2) MPT imposed pre-loading requirements on U.S. firms, which meant that a U.S. firm had to demonstrate to MPT, by pre-signing or obtaining signed customer agreements, that it had a customer base before it could obtain approval to build and operate a new system, a requirement that did not apply to Japanese companies; and, (3) MPT did not allow full foreign ownership of third-party radio systems.\(^{120}\)

The MPT cellular phone practices cited by the USTR as inconsistent with the MOSS Agreements were MPT's use of inadequate transparency in its allocation of radio frequencies and MPT's refusal to allocate frequency spectrum to a cellular radio system using U.S. equipment to operate ("roam") in the populous Tokyo/Nagoya area, "despite the recent identification of spectrum which would make 'roaming' into that market feasible." The competing Japanese system was allowed to "roam" throughout Japan.\(^{121}\)

In accord with Section 301 requirements,\(^{122}\) a public hearing was held on May 24, 1989, to provide an opportunity for interested

\(^{118}\) Third-party radio systems are often used by taxi drivers, towing services, and dispatchers.

\(^{119}\) Notice, 54 Fed. Reg. 19,624 (1989); see also supra note 37.


\(^{121}\) Id.

parties to comment on the retaliatory measures that were being considered against specified products and services. The Japanese imports listed on the proposed sanctions list had a 1988 import value of approximately $1.5 billion (approximately $900 million for telecommunications equipment and about $650 million for other items, principally cosmetics and minivans). The proposed sanctions were "many times larger than any action that would finally be taken ... to ensure that there [would] be sufficient products for consideration following the public comment period;" this would enable the USTR to select those items that would be most likely "to gain Japanese compliance with its telecommunications agreements while minimizing the adverse effect of sanctions on U.S. companies and consumers." The imposition of sanctions was averted when on June 28, 1989, after ten days of intense negotiations, Japan agreed to make specific changes in its telecommunications policy and regulations regarding cellular telephones and third-party radio products, thus resolving the issues identified in the Section 1377 determination. The imminence of the imposition of Section 301 sanctions arguably provided the necessary impetus for Japan to reach an agreement with the United States.

2. Provisions of Agreement

Under the U.S.-Japan Cellular Telephone and Third-Party Radio Agreement, Japan agreed to modify its third-party radio licensing system and to allocate additional spectrum in Tokyo for a system compatible with a U.S. firm's cellular telephone products. Such a system was already being implemented in the rest of Japan. Specifically, the Agreement obligated the Japanese Government: (1) not to discriminate against foreign companies in the allocation of frequencies for third-party radio systems or in licensing requirements and procedures for third-party radio systems; (2) to remove the requirement that companies had to pre-sign customers before ob-

125 On May 26, 1989, the Acting USTR had determined that it was necessary to delay the implementation of sanctions. Notice, 54 Fed. Reg. 29,633, 29,634 (1989).
126 Id.
127 The U.S.-Japan Cellular Telephone and Third-Party Radio Agreement is comprised of an exchange of letters between Yusai Okuyama, Japanese Vice Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative, and the incorporated Attachment. Letters between Yusai Okuyama, Japanese Vice Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative (June 28, 1989)(on file with the U.S. Department of Commerce, Office of General Counsel) [hereinafter Cellular Telephone and Third-Party Radio Agreement].
128 Id., Attachment at 1, § 1(1)(a)(1).
taining MPT approval to build and operate a new system;\textsuperscript{129} (3) to improve transparency in, and streamline licensing procedures for, third-party radio services;\textsuperscript{130} (4) to allocate additional spectrum to U.S. service providers for third-party radio services;\textsuperscript{131} (5) to allocate additional spectrum for cellular telephone "primarily for roaming by the users of the North American analog cellular telephone system;"\textsuperscript{132} and (6) to adopt other procedures to improve market access for foreign firms.\textsuperscript{133}

The USTR noted that this Agreement had "precise terms and definite market-opening objectives."\textsuperscript{134} The Secretary of Commerce stated that the "specificity in this agreement is a healthy plus for our trade relationship with Japan and should be a model for future negotiations."\textsuperscript{135}

C. 1990 Telecommunications Agreements

1. Section 1377 Review in 1990

In its second annual review of telecommunications agreements under Section 1377, the USTR reviewed three Japanese agreements (the MOSS Agreements, NTT Agreement, and the Cellular Telephone and Third-Party Radio Agreement).\textsuperscript{136} On March 30, 1990, the day before the deadline for the Section 1377 determination, the United States and Japan reached an agreement in principle. Japan agreed "to liberalize its market for network channel terminating equipment and to resolve problems for foreign companies arising from Japan's continuing distinction between General and Special Type II businesses."\textsuperscript{137} The two countries agreed to resolve specific issues relating to the agreement in principle through "intensive negotiations" to be concluded within 120 days.\textsuperscript{138}

As a direct result of Japan's commitment to negotiate resolutions of these issues, the USTR "decided that it would be inappropriate to invoke Section 1377 of the 1988 Trade Act."\textsuperscript{139} Thus, Japan avoided being cited under Section 1377 for noncompliance with a

\begin{itemize}
  \item \textsuperscript{129} Id., Attachment at 4, §§ I(4)(c), I(4)(d).
  \item \textsuperscript{130} Id., Attachment at 3-5, § I(4).
  \item \textsuperscript{131} Id., Attachment at 1-2, § I(1)(a)(2).
  \item \textsuperscript{132} Id., Attachment at 7-8, § II(2).
  \item \textsuperscript{133} In May 1990, a Japanese carrier chose a U.S. firm to supply cellular telephone equipment. 
  \textit{Telecommunications Study, supra} note 37, at 137.
  \item \textsuperscript{134} Japan Agrees to Modify Telecommunications Restrictions to Improve U.S. Market Access, [Jul.-Dec.] Int'l Trade Rep. (BNA) No. 27, at 856 (July 5, 1989).
  \item \textsuperscript{135} U.S. Department of Commerce, Press Release (June 28, 1989)(on file with U.S. Department of Commerce, Office of General Counsel).
  \item \textsuperscript{136} See \textit{supra} notes 37, 38, 127.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id. at 1-2. The USTR stated that all options would be reviewed at the end of the negotiating period. Id. at 2.
\end{itemize}
trade agreement. The ensuing negotiations resulted in two agreements, signed on July 31, 1990, in which Japan undertook new obligations aimed at further opening its market for foreign network channel terminating equipment and international value-added telecommunications services.

2. Network Channel Terminating Equipment Agreement

The first set of the 1990 negotiations centered on the request of the U.S. Government that Japan fulfill its commitment under the MOSS Agreements to liberalize its market for terminal equipment, including network channel terminating equipment (NCTE), which is a class of digital telecommunications equipment. In particular, the United States sought the removal of the requirement that the Japanese telephone carrier own the digital NCTE connected to the public-switched network, while customers were allowed to own analog equipment which performed the same function. As a result of this requirement, manufacturers were able to sell NCTE only to the owners of the telecommunications networks, usually NTT, which bought almost exclusively from Japanese companies. This policy severely limited the sales opportunities of U.S. manufacturers of NCTE in Japan.

In the ensuing agreement, Japan agreed to allow customers in Japan to buy NCTE directly from the manufacturer or distributor, consistent with the principles of the MOSS Agreements, and to treat foreign manufacturers in Japan in a manner equivalent to the treatment accorded foreign manufacturers in the United States. In the NCTE Agreement, the Japanese Government agreed to take a number of specific steps to ensure that foreign firms are able to sell NCTE freely in Japan, subject to only minimal and non-discriminatory regulations.

In addition, foreign firms are assured of access to the Type I

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140 Office of the United States Trade Representative, Press Release No. 90-48 at 1 (Aug. 1, 1990)(on file with U.S. Department of Commerce, Office of General Counsel). "NCTE is a type of digital connecting device (such as a modem) that converts a signal from business equipment (such as a personal computer) on the customer's premises to make the signal compatible with that of a digital telephone network." Id.

141 TELECOMMUNICATIONS STUDY, supra note 37, at 139.

142 The U.S.-Japan Network Channel Terminating Equipment Agreement is comprised of an exchange of letters between Mitsuo Igarashi, Japanese Deputy Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative and J. Michael Farren, U.S. Department of Commerce Under Secretary and the incorporated Attachment, Policies and Procedures Regarding Network Channel Terminating Equipment. Letters between Mitsuo Igarashi, Japanese Deputy Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative and J. Michael Farren, U.S. Department of Commerce Under Secretary (July 31, 1990)(on file with the U.S. Department of Commerce, Office of General Counsel)[hereinafter NCTE Agreement].

143 Id., Attachment at 1.

144 Id., Attachment.
carrier's technical specifications on an equal footing with Japanese firms to enable them to manufacture and sell specific types of NCTE on a basis that is fully competitive with domestic firms. Finally, the NCTE Agreement provides greater opportunities for interested parties, including U.S. suppliers, to have input into the Japanese government's decision-making process affecting NCTE.

It is estimated that with Japan's commitment to liberalize its market for NCTE, the U.S. participation in Japan's NCTE market could reach at least $150 million annually, particularly as manufacturers begin to market directly to the consumer.

3. 1990 International Value-Added Network Services Agreement

The second set of negotiations in 1990 resolved concerns with respect to market access to Japan's International Value-Added Network Services (IVANS). An agreement was not reached until the end of the 120-day negotiation period agreed to by the two countries. In the resulting agreement, Japan agreed to take significant steps to liberalize its fast-growing market for advanced telecommunications services, such as voice mail, enhanced facsimile, and electronic banking.

Under the 1990 IVANS Agreement, Japan is obligated to provide a streamlined and more transparent approval process for U.S. firms entering the market. For example, it must shorten the approval process for foreign businesses interested in operating value-added networks in Japan from several months to a maximum of thirty days. In addition, Japan will allow foreign IVANS operators to provide these advanced telecommunications services not only from the United States to Japan but also to other points overseas. MPT also must significantly streamline the process whereby it reviews operating agreement contracts between U.S. IVANS and their

145 Id., Attachment at 2, § I(4); id. at 3-4, § II(3)(a).
146 Id., Attachment at 5, § II(11).
147 TELECOMMUNICATIONS STUDY, supra note 37, at 139.
148 In October 1988, the United States and Japan had negotiated an agreement that allowed U.S. companies to continue to use their own proprietary protocols in offering IVANS in Japan. The 1990 negotiations addressed "significant market access problems left unresolved by prior agreements." TELECOMMUNICATIONS STUDY, supra note 37, at 138.
150 Id., Attachment at 1, § I(1).
151 Id., Attachment at 2, § I(8)(i).
Japanese partners, and limit the criteria for review to five minor items.\textsuperscript{152}

The 1990 IVANS Agreement includes “ground-breaking provisions on intracorporate communications” which eliminate the requirement for such users to register with MPT as a Special Type II business\textsuperscript{153} and allow them to take service as “joint users.”\textsuperscript{154} In addition, it obligates MPT to permit intracorporate networks to connect to the public telephone network in Japan; whereas, previously such networks were able only to connect in the United States, which had exacerbated the U.S. balance of payments deficit with Japan in telecommunications services.\textsuperscript{155} As a result of the Agreement, U.S. firms in Japan will now be able to provide corporate communications — internal, among affiliates, and with regular customers and suppliers — essentially free from regulation. U.S. manufacturing firms, financial firms, and other firms doing business in Japan should be able to run those operations more easily and economically.\textsuperscript{156} Pursuant to the Agreement, MPT must remove the requirement that IVANS build separate networks to carry their intracorporate communications and IVANS traffic.\textsuperscript{157}

Japan has also committed to implement and enforce effective safeguards over a five-year period against anti-competitive conduct by its Type I carriers, including NTT and Japan’s major international carrier, Kokusai Denshin Denwa Co., Ltd. (“KDD”).\textsuperscript{158} Specifically, Japan must prevent those carriers from cross-subsidizing their IVANS operations.\textsuperscript{159} It also must ensure that its major telecommunications carriers eliminate the twenty percent surcharge imposed on U.S. companies for leased international telecommunications circuit facilities.\textsuperscript{160}

The Japanese market for IVANS services (domestic and international) is currently estimated at more than $700 million annually, and is expected to grow dramatically over the next five years as Japan’s importance as a global financial and manufacturing center

\textsuperscript{152} \textit{Id.}, Attachment at 6, § II(2). Previously, MPT had not disclosed what criteria it used, relying instead on administrative discretion, and often delaying approval by as much as 18 months. \textit{Telecommunications Study, supra} note 37, at 139.

\textsuperscript{153} A Special Type II company is one that leases lines from Type I carriers (providers of telecommunications facilities) in order to provide value-added and other service offerings “between Japan and foreign points or to ‘many and unspecific’ customers on a nationwide basis.” \textit{Telecommunications Study, supra} note 37, at 135-36.

\textsuperscript{154} 1990 IVANS Agreement, \textit{supra} note 149, Attachment at 2-5, § I(8).

\textsuperscript{155} Id.

\textsuperscript{156} \textit{Telecommunications Study, supra} note 37, at 138.

\textsuperscript{157} 1990 IVANS Agreement, \textit{supra} note 149, Attachment at 2, § I(8).

\textsuperscript{158} Id., Attachment at 13-14, § V(1).

\textsuperscript{159} Id., Attachment at 13-14, § V(1)(i).

\textsuperscript{160} Id., Attachment at 10, § III(3). The surcharge cost U.S. firms an estimated $15 million over a three year period. \textit{See Telecommunications Study, supra} note 37, at 158-39.
The NCTE and IVANS agreements represent important steps toward providing U.S. firms with access in Japan comparable to the access Japanese firms enjoy in the United States, where IVANS are not regulated. It is expected that with these new measures, U.S. and other foreign firms will have increased opportunities in Japan to use and provide such goods and services as NCTE, voice mail, and enhanced facsimile.

D. 1991 International Value-Added Network Services Agreement

1. Section 1377 Review of 1990 IVANS Agreement

In the 1991 review of telecommunications agreements with Japan, which then totaled five, concern was focused on Japan's implementation of the 1990 IVANS Agreement, in particular its treatment of companies seeking to lease international private circuits as "joint users." In that Agreement, Japan was obligated to allow a customer to request service from a Type I carrier after self-certifying that it qualifies as a joint user under one of three criteria specified in the Agreement, and that it has the technical capability to prevent simple resale.

The "joint user" issue arose when KDD, the major international carrier in Japan, "sought to impose certain requirements on the establishment of 'joint use' services which, if implemented, would have violated the 1990 IVANS Agreement." However, on March 29, 1991, the USTR "determined that it would be inappropriate at this time to find a violation of the IVANS Agreement" because based on discussions and assurances from MPT, it believed that the issue could be resolved through technical talks; but it stated that it would review the situation in thirty days.


On April 27, 1991, Japan and the United States reached an

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162 Office of the United States Trade Representative, Press Release No. 91-11 at 2 (Mar. 29, 1991)(on file with U.S. Department of Commerce, Office of General Counsel);
163 In general, joint users are groups of affiliated companies that seek to communicate over shared private telephone lines leased from the public network. Because they do not provide telecommunications services to the public on a for-profit basis, as do IVANS, they are unregulated. For the specific definition, see 1990 IVANS Agreement, supra note 149, Attachment at 4, § I(8)(ix).
164 Id., Attachment at 2, § I(8)(v).
166 Id.
agreement that clarified the requirements for a customer requesting private leased circuit service and/or intracorporate communications and that reaffirmed the criteria for joint users set forth in the 1990 IVANS Agreement. The Agreement further provides that in the event that “a Type I carrier presents evidence that [its] customers or their joint users in Japan are engaging in . . . simple resale between Japan and the United States,” MPT may conduct an investigation. In addition, the two governments agreed to consult over the following sixty days to establish “a mutually-acceptable investigation process.”

Accordingly, after extensive discussions, the United States and Japan reached agreement on June 25, 1991, on the investigation procedure that MPT would follow in such cases. The Agreement provides, inter alia, that when an international Type I carrier presents evidence to MPT that a customer is engaging in simple resale using its private leased circuit, MPT may request the customer to provide relevant information. If MPT determines that the customer is actually engaging in simple resale, MPT will inform the international Type I telecommunications carrier that it may suspend the service or terminate the contract. MPT is committed to granting the customer sufficient opportunities to make presentations throughout the investigation process.

The negotiation of the 1991 IVANS Agreement illustrates the

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168 Id., Attachment at 1-2, § I. The Agreement provides that self-certifications by a customer that its communications conform to the definition of joint use and/or intracorporate communications and that it has the technical capability to prevent simple resale, “shall be sufficient to satisfy the . . . certification requirements in all cases of joint use communications. . . .” Id., Attachment at 2, § I.

169 Id., Attachment at 3, § III.

170 Id.

171 The IVANS Investigation Procedure is comprised of an exchange of letters between Mitsuo Igarashi, Japanese Deputy Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative and J. Michael Farren, U.S. Department of Commerce Under Secretary and the incorporated Attachment. Letters between Mitsuo Igarashi, Japanese Deputy Minister of Posts and Telecommunications and S. Linn Williams, Deputy U.S. Trade Representative and J. Michael Farren, U.S. Department of Commerce Under Secretary (June 25, 1991)(on file with the U.S. Department of Commerce, Office of General Counsel).

172 Id., Attachment at 1, § I(1).

173 Id., Attachment at 3-4, § II.

174 Id., Attachment at 4-5, § IV.

175 Id., Attachment at 2-5, §§ I(6), II, IV(b). MPT must treat information provided by customers in a confidential manner. Id., Attachment at 6, § VII(1)(a).
important role of the "Telecommunications 301" provision (Section 1377 review) in ensuring compliance with telecommunications trade agreements. In this instance, even though Japan was not cited in the 1991 annual review, the mere existence of the "Telecommunications 301" provision gave credibility to the insistence of the United States that Japan had to take the necessary steps to fulfill its commitments under the 1990 IVANS Agreement. Without this annual review of telecommunications agreements, there might be a greater inclination on the part of Japan to delay or refuse to carry out obligations it has undertaken.

IV. Major Projects Arrangements

The final agreement with its genesis in the 1988 Trade Act, and one also negotiated under the threat of Section 301 sanctions, is aimed at improving access for foreign firms to Japan's public sector construction market.

A. Background

Since 1986, the United States had been "aggressively" pursuing access to the Japanese public sector construction market for U.S. goods and services because of the millions of dollars of potential business in airport design, consulting and engineering services, construction, and equipment sales in Japan. However, U.S. firms had made very little progress. In 1986 the U.S. Government sought access for U.S. firms to the construction of the new multi-billion Kansai International Airport ("KIA") in western Japan as a way to open up the entire Japanese public and quasi-public works markets to foreign firms. The KIA project, which involves the construction of an international airport three miles out in Osaka Bay on a man-made island, was "the first of $60 billion in major Japanese projects" to be constructed by the end of the century.

The United States wanted to force open Japan's whole construction market to U.S. firms through Japan's adoption of a public works bidding system similar to the U.S. system. However, Japan sought to preserve its system and to limit any concessions to the KIA project. In November 1987, after more than a year of intensive discussions, the Government of Japan informed the United States that it would take steps to "ensure fair and non-discriminatory" opportuni-

177 Id. at 188. In 1990, it was estimated that Japan would spend as much as $65 billion on major public works construction during the next decade. Ellis S. Krauss and Isobel Coles, Built-in Impediments: The Political Economy of the U.S.-Japan Construction Dispute, in Japan's Economic Structure: Should It Change? 333, 336 (K. Yamamura ed. 1990).
178 Krauss & Coles, supra note 177, at 336.
ties for foreign firms. In particular, it would “introduce elements of the GATT Government Procurement Code and other internationally accepted practices, into the procurement procedures of [the] KIA project to ensure transparency” in the procurement of goods, construction and consulting services.

In the following year, the United States successfully negotiated an agreement with Japan which set forth procurement procedures for fourteen major projects. The KIA procedures were to be used in the KIA and two other projects. For procurements in the other major projects, the Government of Japan agreed to follow special procurement procedures, which were designed to familiarize foreign firms with, and to increase their access to, Japan’s public sector construction market. For example, it eliminated the requirement of prior experience in Japan before a construction license could be obtained. In addition, special notice provisions and deadlines were to be followed that would enable foreign firms to participate in procurements in the covered projects.

B. Section 301 Investigation Mandated by 1988 Trade Act

Unlike the “Super 301” and “Telecommunications 301” provisions which were not, on their face at least, directed at Japan, Congress explicitly targeted Japan’s construction practices when it adopted Section 1305 of the 1988 Trade Act. That provision directed the USTR to initiate a Section 301 investigation of the acts, policies, and practices of the Japanese Government and the entities that it owned, financed, or otherwise controlled that are barriers to the offering or performance of U.S. architectural, engineering, construction, and consulting services in Japan. Behind this provision was congressional concern with the limited progress that U.S. firms had made in entering the Japanese construction market.

As required by the 1988 Trade Act, a Section 301 investigation

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179 Letter from Japanese Ambassador to the U.S. Nobuo Matsunaga to U.S. Secretary of Commerce William C. Verity (Nov. 4, 1987)(with Appendix I, Details of Procurement Procedure for Future Orders)[hereinafter Kansai or KIA Procedures]. In Ambassador Matsunaga’s Letter, the Japanese Government noted it was a model for other major projects undertaken by private commissioning entities, similar to the KIA Commission.

180 Id. at 1. The specific procurement procedures were set forth in Appendix I.


182 Id., Appendix I.

183 Id., Appendix II.

184 Id., Appendix II at 2-7, § IV.

was initiated on November 21, 1988, and consultations were held with the Government of Japan. In early November 1989, Japan agreed informally to take immediate measures to improve access for U.S. firms to its construction market. It also committed to "ongoing bilateral consultations on all unresolved matters regarding access to the construction market," including the two-year review of the MPA scheduled for the spring of 1990.

Based on the Section 301 investigation, the USTR determined, on November 21, 1989, "that certain acts, policies, and practices of the Government of Japan with respect to the procurement of architectural, engineering and construction services, and related consulting services by the Japanese Government are unreasonable and burden or restrict U.S. commerce." This determination was based upon the finding that Japan implements its procurement policies in the construction sector "in a way that limits competition and facilities collusive bidding practices." The USTR specifically cited the implementation of Japan's designated bidder system as restricting competition by limiting the number of firms allowed to bid on a project, and basing its designation decisions on vague and subjective criteria.

A further basis for the "unreasonableness" determination was the fact that Japan used open bidding procedures in only the fourteen projects covered by the 1988 MPA; and it excludes foreign firms from bidding on public projects outside the 1988 MPA, unless they have prior experience on other Japanese construction projects. The USTR noted the "catch 22" aspect: the necessary experience could

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186 The commitments, as amplified in discussions with the USTR and in a November 17, 1989, letter from the Japanese Minister of Construction Shozo Harada to the United States Trade Representative Carla A. Hills, included the following: (1) to undertake "new administrative measures to deter collusive activities;" (2) "to provide greater detail [on] specific projects being tendered [to] enable potential bidders to assess . . . whether there is a reasonable likelihood that the company has the required technical capabilities;" (3) to "refrain from determining the share of any company in a joint venture or the segment of the project that a company will undertake" in the project; (4) "to open the design of two additional elements" of the KIA project "to non-discriminatory competition;" and (5) to undertake steps to provide more information with regard to the sub-contracting of major goods and services on projects covered by the 1988 MPA. Notice of Determinations, 54 Fed. Reg. 49,150, 49,151-52 (1989).

187 Japan and the United States had agreed to a two-year review of the 1988 MPA, i.e., the spring of 1990, to examine whether it is "serving the expected purpose of facilitating sufficient access of foreign firms into the Japanese construction market." 1988 MPA, supra note 181, Ambassador Matsunaga's Letter, at 2-3, and Secretary Verity's Letter at 1.


189 Id. at 49,151. The USTR specifically found that Japan's administrative measures restricting collusive bidding ("dango") were "ineffective to deter collusive activities." Id. It noted that Japanese "[m]inistries have consistently imposed the minimum penalties prescribed by their regulations to suspend from bidding firms found to have engaged in collusive activities. In two recent cases, the funding ministries suspended the guilty firms from bidding for only one month and only in the region where the collusion occurred." Id.

190 Id.
only be gained from projects subject to the 1988 MPA or from private sector projects, where the success of foreign firms had been limited. It also found that Japan discriminated against foreign firms by not providing them with information on pending procurements as promptly and fully as it did for Japanese firms on projects outside of the MPA.\textsuperscript{191}

Despite the unreasonableness finding, the USTR determined that retaliatory action under Section 301 was not appropriate given Japan's commitments to improve access for U.S. firms to its construction market\textsuperscript{192} and to ongoing bilateral consultations on all unresolved matters. However, the USTR gave notice that if Japan's implementation of its "market-opening" undertakings or the progress in the ongoing bilateral negotiations, including the scheduled review of the 1988 MPA, were not satisfactory, the USTR would consider "what further action may be appropriate under section 301."\textsuperscript{193}

C. 1991 Major Projects Arrangement

The subsequent negotiations to resolve remaining concerns affecting Japan's construction sector were carried out under the umbrella of the 1988 MPA two-year review which began in May 1990, two years after the 1988 MPA became effective. In the course of this review, the United States sought to expand the coverage of the 1988 MPA to all public sector construction projects, as well as to make improvements in the 1988 MPA procurement procedures and resolve issues identified in the Section 301 determination of November 1989. It also sought remedies to address specific problems which had arisen.\textsuperscript{194}

When, after eight rounds of negotiations, the two governments had not reached a satisfactory resolution of outstanding U.S. concerns, the USTR on May 1, 1991,\textsuperscript{195} proposed the imposition of Sec-

\textsuperscript{191} See supra note 186.
\textsuperscript{193} For example, during the course of the negotiations, a controversy arose between the two governments over whether appropriate procedures under the 1988 MPA had been followed in certain procurements under the KIA project.
\textsuperscript{194} Another consideration behind the timing of the proposed Section 301 action (and further evidence of continuing Congressional concern) were requirements for similar determinations by April 30 and May 1. Section 115 of the Airport and Airway Safety and Capacity Expansion Act of 1987, which amended the Airport and Airway Improvement Act of 1982 ("Airport Act"), Pub. L. No. 101-514, 104 Stat. 2074, 2098-2100 (codified at 42 U.S.C. App. §§ 2201-2227 (1988)), required the USTR to determine by April 30 whether foreign countries deny fair and equitable market opportunities for U.S. products, suppliers or bidders for construction projects that cost more than $500,000 and are funded by such countries. In 1990, the USTR did not list any country; however, it noted that it would "take into account Japan's implementation of its undertakings and our progress in negotiations" in making its 1991 determination. Notice, 55 Fed. Reg. 18,794 (1990).
\textsuperscript{195} Section 511 of the Energy and Water Development Act of 1991, Pub. L. No. 101-514,
tion 301 sanctions on the basis that Japan was "not satisfactorily implementing measures to address the practices determined on November 21, 1989, to be unreasonable and to burden or restrict U.S. commerce." It proposed to restrict the provision of Japanese architectural, engineering, and construction-related services by determining that Japanese contractors and subcontractors would be ineligible to enter into such contracts for the construction, alteration, or repair of any public buildings or public works in the United States undertaken by the U.S. Departments of Energy, Transportation, or Defense, including the U.S. Army Corps of Engineers and the Bureau of Reclamation of the Department of Interior. In accordance with the statute, interested persons were invited to submit comments on the proposed action by May 31, 1991.

The potential for imposition of Section 301 sanctions was averted when the United States and Japan reached an agreement on June 1, 1991, which substantially improves the procedures in the 1988 MPA, expands its coverage, and commits Japan to take further measures to open its construction market to foreign firms. In the 1991 MPA, Japan declared that its policy is to maintain open, transparent, competitive, and non-discriminatory procedures in public works procurements and to treat foreign firms no less favorably than domestic firms.

One of the most important elements of the 1991 MPA is its expanded coverage. Although the United States sought the application of the 1991 MPA to all public sector projects, Japan resisted on the ground that the purpose of the 1988 (and the 1991) MPA was to familiarize foreign firms with Japan's procurement process; when they became familiar with the Japanese system, they would be able to compete in Japan's construction market without the need for such

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197 Id.
198 1991 MPA, supra note 199, Appendix II at I, Part I, § I.
special measures. However, in the interim, Japan agreed to apply the 1991 MPA to twenty-three more projects, bringing the total number of projects covered by the MPA to forty.\footnote{Seventeen projects are subject to the 1991 MPA as of July 31, 1991; six others will be added if and when the project is initiated. 1991 MPA, supra note 199, at Second Letter from Japanese Ambassador Murata to U.S. Secretary of Commerce Mosbacher.} It also agreed to government-to-government reviews after one year to examine whether the MPA is serving its intended purpose and to consider adding additional projects.\footnote{The need for increased transparency was noted in the Section 301 Determination as a key concern. Notice of Determinations, 54 Fed. Reg. 49,150 (1989).}

A number of the new MPA provisions have essentially a two-fold purpose: (1) to provide for greater transparency in the Japanese procurement process; and, (2) to ensure that foreign firms are treated fairly and in the same manner as Japanese firms.\footnote{Japanese procuring entities use a ranking process to determine the size/type of contract for which a potential bidder may be eligible to bid. Under the designated bidder system, the procuring entity designates the firms that will be allowed to participate in the bidding on a particular contract. If a firm is not designated, it is prohibited from bidding on a contract.} These provisions are particularly important with respect to two aspects of the Japanese procurement system with which U.S. firms are largely unfamiliar because of the limited opportunities that have been available to them in Japan: ranking\footnote{Id., Appendix II at 17, Part II, § VI(5)(b)(2). Entities are required to use the procedures in one of four “Tracks” depending upon the type of procurement. Track I is used for purchases of goods, Track II for construction services, Track III for consulting and design services, and Track IV for procurements of a combination of goods and services, \textit{i.e.}, combinations of design and consulting services and goods when the award cannot be made solely on the basis of price and use of another “Track” would be inappropriate. \textit{Id.}, Appendix II at 6-17, Part II, §§ VI(1)-(4). The latter provision was added to address a controversy that had arisen over the procedures used for certain KIA project procurements.} and the designated bidder system.\footnote{Id., Appendix II at 17, Part II, § VI(5)(b)(4).} The United States had sought the elimination of both, but Japan steadfastly refused to make such fundamental changes in its system. As a compromise, Japan agreed for the first time to disclose in writing all of the factors to be used to rank and designate firms.\footnote{See supra notes 67 and 86.} Japan also committed commissioning entities to disclose at the commencement of a procurement, the precise MPA “Track”\footnote{Id., Appendix II at 17, Part II, § VI(5)(b)(3).} and the evaluation factors it would use, including the weight assigned to each technical evaluation factor and the relative importance of price and technical factors.\footnote{See supra notes 67 and 86.}

Consistent with undertakings it had made in the 1990 Supercomputer Agreement and the Satellite Agreement,\footnote{See supra notes 67 and 86.} Japan agreed to establish a comprehensive complaints mechanism to en-
sure that MPA procedures are followed in procurements covered by the MPA and that complaints of potential suppliers are equitably and expeditiously resolved. As in the earlier agreements, at the center is an independent Procurement Review Board, which will investigate complaints and make recommendations to commissioning entities on any aspect of a procurement. Japan also agreed to allow foreign firms to challenge their rankings under the new complaints mechanism.210

As a further measure to prevent discrimination against foreign firms, the United States obtained a commitment from Japan that in evaluating foreign firms, commissioning entities will treat the experience and technical competence acquired by a firm in a foreign country as equivalent to experience and competence acquired in Japan.211 Japan also committed not to apply the ranking or designation criteria in a manner that would disadvantage foreign firms.212 In addition, to simplify the ranking process, Japan agreed to require each government entity and its sub-units to follow a single ranking procedure, including the use of a single application, except in certain cases.213

Another common practice in Japanese public sector procurements is the requirement by the commissioning entities that potential bidders form joint ventures. In the new 1991 MPA, Japan finally acknowledged that this requirement was not based upon any provision of Japanese law, but rather was only a practice used by entities and that it would be used only in bidding on certain large-scale contracts.214 Japan also reaffirmed a 1989 commitment215 that commissioning entities will not determine the share of any company in a joint venture nor the segment of the project that any company will undertake.216 Additionally, the 1991 MPA includes anti-bidrigging measures that the Japanese Government is taking in large measure as a result of the consultations preceding the 1989 section 301 determination.217

D. Monitoring of Japan's Commitments

Following the execution of the 1991 MPA, the USTR determined that no Section 301 action was necessary "[s]ince the agreement resolves many U.S. concerns, and provides for periodic review of the implementation of the agreement."218 The USTR also an-

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210 1991 MPA, supra note 199, Appendix II at 6, Part II, § V(7).
211 Id., Appendix II at 27, Part II, § XI.
212 See, e.g., id., Appendix II at 7, Part II, § VI(1)(d)(1).
213 Id., Appendix II at 6, Part II, § V(5).
214 Id., Appendix II at 27, Part II, § XII(1).
216 1991 MPA, supra note 199, Appendix II at 27, Part II, § XII(2).
nounced that the United States will monitor Japan's implementation of the Agreement pursuant to section 306 of the 1974 Trade Act. If Japan's implementation is unsatisfactory, the USTR will consider "what further action" to take under Section 301.219

A strong argument can be made that, the Section 301 investigation mandated by the Congress in 1988 (and the potential imposition of Section 301 sanctions) was necessary to enable the U.S. government to negotiate successfully the broad changes that were incorporated into the 1991 MPA. The Section 301 threat provided Japan with the impetus to respond favorably to the numerous requests made by the U.S. government for improvements in the 1988 MPA. Although the United States was not able to obtain Japan's agreement to open up all of its public sector market to foreign firms, Japan did agree to make the special measures more transparent and non-discriminatory, and to expand the coverage of the 1991 MPA to an additional twenty-three projects. Seventeen of the twenty-three projects have a potential value of an estimated $6.4 billion.220

Part III Future Use of Section 301 with Respect to Japan

This section will consider the potential use of Section 301 in the future with respect to Japan.221 This discussion is not intended to be exhaustive as it is difficult to anticipate Section 301 investigations that may be mandated by the Congress, or trade barriers that may be the subject of Section 301 petitions self initiated by the USTR. However, it seems clear that a primary use of Section 301 for the foreseeable future will be to ensure that Japan fulfills its obligations under newly-negotiated trade agreements. As the key enforcement mechanism for trade agreements, Section 301's potential role increases with the negotiation of each new agreement with Japan. Another possible use of Section 301 will be to challenge government toleration of anti-competitive private activities.

I. Enforcement of Trade Agreements

A. Congressional Action

A fundamental aim of Section 301 is to ensure that foreign countries adhere to their trade agreement obligations.222 Since its enactment in 1974, this role of Section 301 has been strengthened repeatedly. Initially, Section 301 did not refer to violations of trade agreements, but rather to violations of international obligations and

219 Id.
221 For a 1987 perspective on the future use of Section 301 against Japan, see Thatcher, supra note 8, at 526-34.
222 1987 Senate Finance Committee Report, supra note 22, at 73.
the nullification or impairment of U.S. benefits under trade agreements. In 1979, Congress made the violation of a trade agreement with the United States explicitly actionable under Section 301. In 1988, Congress mandated retaliation under Section 301 when trade agreements were violated because of its concern with the uncertainty created among U.S. trading partners as to "when the United States will act to enforce its international rights and when it will choose to remain passive." 

To bolster the enforcement of trade agreements, Congress imposed several monitoring requirements. First, it required the Administration to report annually on the progress made as a result of agreements negotiated under the "Super 301" provision. If in its annual assessment, the Administration determines that a trade agreement is not having its intended effect, namely to increase U.S. exports, it will need to examine whether Japan is fulfilling all of its commitments under the agreement. If it finds that Japan has violated the agreement, and consultations are not successful, action under Section 301 would be expected to provide Japan with the necessary impetus to fulfill its commitments. This provision applies to the three "Super 301" agreements described earlier.

The second monitoring requirement is the annual review of telecommunications trade agreements to determine whether Japan is fulfilling its obligations. This requirement also compels a determination of whether Japan "otherwise denies, within the context . . . of such agreement" mutually advantageous market opportunities to U.S. telecommunications products and services. While the latter standard has not been applied or interpreted, it is reasonable to assume that it means something more than the violation of the terms of the agreement. Application of this provision could provide the basis for future Section 301 action. The annual scrutiny of telecommunications agreements has already led to the negotiation of several new telecommunications trade agreements with Japan.

Finally, there is the general Section 301 monitoring provision, which applies to all agreements negotiated under Section 301, such

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223 "Unjustifiable" acts referred to restrictions "which were illegal under international law or inconsistent with international obligations." 1974 Senate Finance Committee Report, supra note 9, at 163, 1974 U.S.C.C.A.N. at 7301. "Unreasonable" restrictions were those that "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.
227 See supra note 40 and accompanying text.
Through these various provisions for monitoring trade agreements, Congress has laid the basis for the use of Section 301 sanctions where necessary to enforce the terms of trade agreements.

B. Use of Section 301 to Enforce 1986 Semiconductor Arrangement

The United States has used Section 301 to impose sanctions against Japan when it failed to fulfill its commitments under an agreement. In April of 1987, the President determined that Japan had failed to implement or enforce major provisions of the 1986 Semiconductor Arrangement, which called for increased market access and an end to third country dumping. As a result of the Section 301 determination, the President invoked Section 301 authority to impose unilaterally 100 percent ad valorem duties on $300 million of Japanese exports to the United States.

The President suspended $51.6 million of those sanctions in June of 1987 after Japanese dumping in third countries was reduced. An additional $84.4 million in sanctions was lifted in November of that year when Japanese dumping in those markets ceased. Penalties of $165 million for failure to implement the Arrangement's market access provisions were continued until the Arrangement expired on

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230 The Congress is considering additional monitoring requirements. One proposal would require the USTR, following a request by any interested person, to determine whether a foreign country is in “material compliance” with a trade agreement. H.R. 1115, 102d Cong., 1st Sess. (1991). It would require the USTR to take into account foreign government practices not necessarily covered by the agreement in question but that “contributed directly or indirectly to material noncompliance with the terms of the agreement,” e.g., “structural policies, tariff or non-tariff barriers, or other actions which affect compliance with the terms of the agreement.” Where it found that a country was in “material noncompliance,” it would be required to retaliate under Section 301. Id.

231 The Arrangement between the Government of Japan and the Government of the United States of America concerning Trade in Semiconductor Products is comprised of an exchange of letters between Nobuo Matsunaga, Japanese Ambassador to the U.S. and Clayton Yeutter, U.S. Trade Representative. Letters between Nobuo Matsunaga, Japanese Ambassador to the U.S. and Clayton Yeutter, U.S. Trade Representative (September 2, 1986)(on file with U.S. Department of Commerce, Office of General Counsel)[hereinafter 1986 Semiconductor Arrangement]. In the 1986 Arrangement, which was negotiated as a result of a Section 301 investigation of Japanese practices that restricted market access for U.S. semiconductors, Japan agreed to end the dumping of semiconductors at prices below cost in the United States and third country markets and to provide increased market access for foreign semiconductors in the Japanese market. The United States agreed to suspend the Section 301 investigation and antidumping cases against Japanese manufacturers of EPROMs and 256K and above DRAMs. 1987 NTE Report, supra note 176, at 190.

232 Japan’s failure was determined to be “inconsistent with the provisions of, or otherwise denies benefits to the United States under, the Arrangement; and is unjustifiable and unreasonable, and constitutes a burden or restriction on U.S. commerce.” The White House Office of the Press Secretary, Press Release: Memorandum for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 1 (Apr. 17, 1987).

233 Id. at 2.
July 31, 1991, and was replaced by a new agreement.

The fact that the United States has imposed sanctions against Japan in only two instances is not a measure of the effectiveness of Section 301. The real force behind Section 301 that provides the United States with negotiating leverage is not the actual imposition of sanctions, but rather the threat of such sanctions. As illustrated above, in several recent negotiations with Japan, agreements have been reached only at the “last-minute,” but in time to avert the imposition of sanctions, as for example in the negotiation of the 1989 Cellular Telephone and Third-Party Radio Agreement and the 1991 MPA.

C. Enforceability of New Agreements

The Japanese trade agreements surveyed in this Article are

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234 1991 NTE Report, supra note 109, at 133.
235 The Arrangement between the Government of Japan and the Government of the United States of America concerning Trade in Semiconductor Products is comprised of an exchange of letters between Ryohei Murata, Japanese Ambassador to the U.S., and Carla A. Hills, U.S. Trade Representative. Letters between Ryohei Murata, Japanese Ambassador to the U.S., and Carla A. Hills, U.S. Trade Representative (June 11, 1991 and effective August 1, 1991)(on file with the U.S. Department of Commerce, Office of General Counsel)[hereinafter 1991 Semiconductor Arrangement]. The 1991 Semiconductor Arrangement reaffirmed the 1986 Japanese commitment to provide increased market access for foreign-made semiconductors and to deter injurious dumping. It contains a recognition that if “strong market efforts” are made by Japanese semiconductor users and foreign semiconductor suppliers, the foreign share of Japan’s semiconductor market is expected to rise to more than twenty percent by the end of 1992. However, the agreement explicitly recognizes that this target is not a guarantee, floor or ceiling. Id. at 4, § II(10).
236 The only other instance in which the United States has imposed Section 301 sanctions against Japan involved leather and leather footwear. See Thatcher, supra note 8, at 519-20.
237 Another instance in which the potential imposition of Section 301 sanctions played a role was in the negotiation of a resolution to a Section 301 petition filed by a U.S. firm, which alleged it had been denied market access through a combination of Japanese targeting and toleration of other anticompetitive practices. The petitioner was a firm with U.S. patent rights to amorphous metals, “alloys that are highly effective core materials for electrical distribution transformers.” 1990 NTE Report, supra note 64, at 121. Negotiations concluded with a “Joint Announcement” by the two governments, confirmed by an exchange of letters, in which Japan acknowledged, inter alia: (1) Japanese utilities would purchase 32,000 amorphous metal transformers over two years in order to conduct tests to determine whether the transformers could be mass-produced effectively in Japan; (2) transformer manufacturers would buy amorphous metals produced in the United States; and (3) Japanese steel producers and utilities would honor the U.S. firm’s process patent for amorphous metal until it expires in 1997. Both governments agreed to make efforts to encourage the relevant private parties to carry out the agreed-upon measures. Office of the United States Trade Representative, Press Release No. 90-52 (Sept. 21, 1990)(on file with U.S. Department of Commerce, Office of General Counsel).
238 It will be noted by anyone who examines the text of a document negotiated with the Government of Japan and labelled a “trade agreement” by the U.S. Government that the word “agreement” never appears. Japanese government officials negotiating the resolution of a trade dispute apply painstaking, persistent effort to ensure that the document executed to conclude the negotiations does not include the word “agree” and is never termed an “agreement.” Many hours of negotiations are devoted to searching for mutually acceptable terms that connote “agreement” without using that precise term. How-
distinctive on two bases. First, all are tied directly or indirectly to Section 301 provisions of the 1988 Trade Act. Second, each incorporates more precise commitments, than many prior agreements with Japan. The greater specificity of the recently-negotiated agreements has augmented the ability of the United States to enforce them. Earlier agreements have often relied more on broad assurances and general principles than concrete commitments; in some instances, they have depended on efforts of the Japanese Government to encourage its private firms to undertake certain actions on a voluntary basis. An example of the latter is the recently concluded resolution of the amorphous metals dispute.

The new agreements are largely procedural in nature in that they prescribe very specific measures to be undertaken by the Government of Japan or governmental or quasi-governmental entities to rectify identified problems.

The three procurement agreements (the 1990 Supercomputer Agreement, the Satellite Agreement, and the 1991 MPA) are aimed at the removal of Japanese governmental barriers to foreign goods and services. Fulfillment of the objectives of those agreements rests on changes in the procurement practices that appear to have a retarding effect on foreign purchases. Each prescribes the standards and processes to be followed by governmental entities in procurements in the various sectors covered by the agreements. Two agreements (the 1991 MPA and the 1990 Supercomputer Agreement) are amplifications of earlier agreements that proved inadequate to remedy particular problems.

The Satellite Agreement is slightly distinguishable. With the Japanese Government's decision (under threat of sanctions) to open up procurements of commercial satellites to foreign suppliers, the U.S. government recognized the need to ensure that Japan establish

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ever, the fact that the word "agreement" does not appear in documents negotiated with Japan does not affect the application of domestic law, namely Section 301, to it. Regardless of what it is called, the U.S. government treats a document that sets forth commitments of the Japanese government to resolve a trade dispute as a trade agreement for purposes of Section 301. For example, the USTR determined that the exchanges of letters of June 15, 1990, together with the attachments and associated understandings, constitutes agreements pursuant to Section 310(c)(1) of the 1974 Trade Act. 55 Fed. Reg. 25,761 (1990) (satellites); 55 Fed. Reg. 25,763 (1990) (forest products); and 55 Fed. Reg. 25,764 (1990) (supercomputers).

With respect to the "Super 301" agreements, "administration trade negotiators pushed hard for more specificity than in previous bilateral market access agreements on the theory that the extra detail would help ensure that Tokyo lives up to its new commitments. Japanese trade policymakers had no quarrel with this tactic since they recognize that Japan has an image problem in the implementation area. They also realize, however, that Japan will not start to shake its reputation for promising more than it delivers until U.S. exports of satellites, supercomputers and value-added wood products increase." Note: Super 301 Agreements, JAPAN ECONOMIC INSTITUTE REPORT 10, 11 (No. 25B June 29, 1990).

See supra note 237.
a process for such procurements that was transparent, non-discriminatory, competitive, and open. Here the difference in the legal frameworks of the two countries is important. In the United States there is a well-established and extensive system for federal government procurements that ensures that they are transparent, open, non-discriminatory, and competitive. Japan, however, does not have the same type of rigorous system that embraces the promotion of competition as a basic tenet. Japan also allows its governmental entities much more discretion than is found in the U.S. procurement process.

The non-procurement agreements (the Wood Products Agreements and the telecommunications agreements) were designed to remedy general government policies and practices (including regulations and standards) that served to prevent or retard the purchase of foreign products. However, these agreements are also procedural in nature, as they require the Japanese Government to change its procedures to remedy specific problems.

The greater specificity in the recently-negotiated agreements will facilitate determinations of violations of the agreements and increase expectations by U.S. industry that the U.S. government will take Section 301 action when necessary to force its trade partners, in particular Japan, to fulfill its commitments. Overall it enhances the enforceability of the new agreements.

It is increasingly obvious that Congress expects the Administration to take aggressive action to enforce its trade agreements, and if it does not, Congress is likely to step in with more specific mandates.

II. Government Toleration of Anti-Competitive Private Activities

A second area of possible future use of Section 301 involves the addition to the 1988 Trade Act of government toleration of certain anti-competitive private activities as "unreasonable" practices. It provides that an act, policy, or practice is actionable under Section 301 if it denies fair and equitable "market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by private firms or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms." The greater specificity in the recently-negotiated agreements will facilitate determinations of violations of the agreements and increase expectations by U.S. industry that the U.S. government will take Section 301 action when necessary to force its trade partners, in particular Japan, to fulfill its commitments. Overall it enhances the enforceability of the new agreements.

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243 HOUSE COMMITTEE ON WAYS AND MEANS, REPORT ON TRADE AND INTERNATIONAL
This new provision makes a foreign government's toleration of certain anticompetitive acts by private firms actionable if the government takes no action to remedy them.

There are limits on the application of this provision. Congress did not intend that it be used to regulate the business practices of foreign firms or to force foreign governments to accept U.S. concepts of antitrust law. Rather, it sought to provide the President and the USTR with the flexibility to "attack trade-restrictive activities by foreign private interests only when the foreign government is in essence at least a silent partner to the restrictive practice."244 The activities against which it is aimed are "pervasive or egregious activities in a foreign country by or among private firms which result in a persistent pattern of restricted market access by U.S. firms in a particular industry."245 Actionable practices would include purchasing policies or decisions made by a parent firm in a foreign country which affect access by U.S. firms to purchasing by the parent's subsidiaries in other countries.246 One area in which it has been suggested that the use of this provision would be appropriate involves the Japanese auto parts issue.247

A primary reason that anticompetitive practices may become a target of Section 301 is that over the years of negotiations with Japan on both a multilateral and bilateral basis, Japan has removed all, or virtually all, of its tariff barriers, and many of the more obvious and identifiable non-tariff barriers. However, U.S. firms continue to find entry into Japanese markets to be restricted. As a consequence, increasing attention is being directed at structural barriers, with anticompetitive private activities receiving increasing attention from the Congress as well as the general public.

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244 Id. at 86.
245 1987 Senate Finance Committee Report, supra note 22, at 85.
246 Id. The actionable activity includes, but is not limited to, "toleration of cartel-type behavior by or among private firms or toleration of closed purchasing behavior on the part of private firms that precludes or limits U.S. access in a concerted and systematic way. In determining whether foreign private firms engage in closed procurement practices, the USTR should examine actual levels of purchases of U.S. goods and services by those firms." Id.
247 For example, the Automotive Parts Advisory Committee (APAC), which was created by the Omnibus Trade and Competitiveness Act of 1988, supra note 14, § 2124, 15 U.S.C. § 4703 (1988), to advise the Secretary of Commerce on trade-related issues, recommended that "the U.S. Government begin preparation of a self-initiated Section 301 action against Japan on auto parts based on the failure of the Japanese Government to enforce actions to open its markets, to stop anticompetitive actions in auto parts trade, and to promptly comply with its commitments under the Structural Impediments Initiative (SII) and the Market-Oriented Sector Specific (MOSS) agreements which affect auto parts trade." APAC Policy Positions Affecting U.S. Japan Auto Parts Trade (adopted Apr. 10, 1991, by the APAC).
Conclusion

The purpose of Section 301 is to provide the United States with the leverage necessary to negotiate an end to foreign acts, policies, and practices that are unreasonable, unjustifiable, or discriminatory, or that violate trade agreements. Its aim is to provide foreign countries with a sufficiently strong stimulus to eliminate practices that bar or restrict U.S. exports and to adhere to their agreements by threatening to impose sanctions, and actually carrying out retaliatory threats when necessary.

The leverage of Section 301 is founded on the fact that U.S. markets are large and open in most respects. Section 301 retaliation restricts the access of foreign countries to the U.S. market, usually by imposing prohibitively high tariffs. The more important the U.S. market is to a foreign country, the greater the impact of the loss of market access. Smaller, less prosperous markets would not likely be able to use Section 301 as effectively as has the United States because access to their markets is not as important to other trading nations. However, because countries, like Japan, do not want to lose access to the U.S. markets, or wear the label of an "unfair trader," Section 301 serves as powerful leverage for removing trade barriers.

Section 301 played a key role in the negotiation of the trade agreements reviewed above. In each instance, the Section 301-related provisions, enacted by Congress in 1988, significantly strengthened the Administration's negotiating leverage and provided the necessary impetus for Japan to enter agreements to resolve the underlying trade issues. In certain cases, namely the negotiations of the 1989 Cellular Telephone and Third-Party Radio Agreement and the 1991 MPA, the process had been initiated for the imposition of sanctions when Japan finally agreed to the measures requested by the United States. But, even where Section 301 retaliation was more remote, as in the negotiation of the 1991 IVANS Agreement, the effect of possible sanctions under Section 301 was not insignificant in pushing Japan towards an agreement.

The presence of Section 301 also has enhanced significantly the quality of the recently-negotiated Japanese trade agreements. As a result, these agreements embody clearer, more explicit commitments, the violation of which can be objectively measured. Where the violation of an agreement can be determined with reasonable precision and objectivity, the likelihood that Section 301 will be a viable means of enforcing it is greater because all parties will have been on notice as to what would constitute a violation.

The overall objective of each trade agreement negotiated with Japan is to increase the opportunities for U.S. firms to sell their products and services in Japanese markets. Thus, the ultimate test of the effectiveness of any trade agreement is whether foreign markets
are more open to U.S. goods and services. If they are not, the United States may have no recourse but to impose sanctions under Section 301. As recent history with Japan has demonstrated, Section 301 can be a very powerful force behind U.S. trade policy.