GETTING WHAT WE BARGAINED FOR

Industry Evaluates U.S. Enforcement of Trade Agreements To Gain Access to Foreign Markets

Labor/Industry Coalition for International Trade (LICIT)

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About the Labor/Industry Coalition for International Trade (LICIT)

LICIT and its affiliate, the Coalition for Open Trade (COT), bring companies and unions together in support of increased and equitable international trade. LICIT has contributed to debate over trade agreement enforcement through, among other things, extensive work on the Uruguay Round negotiations, previous publications, and Congressional testimony. Information for this paper was collected for LICIT by John Magnus and Andrew Conrad, with help from Zoltan Van Heyningen and Alison Fitzgerald, all of Dewey Ballantine LLP. Questions or comments regarding this paper may be directed to Mr. Magnus at *john_magnus@deweyballantine.com* or Mr. Conrad at *andrew_conrad@deweyballantine.com*. Additional copies can be obtained at website *www.dbtrade.com*.

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LICIT

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Preface

This report focuses on the U.S. Government's use of trade agreements to obtain access for U.S. goods and services to foreign markets. Access to foreign markets is vital to the health of the U.S. economy, and trade agreements are the most important means of securing this access. The report is based on the conviction that well-crafted trade agreements can be remarkably effective if rigorously enforced -- and that, accordingly, the U.S. enforcement record and machinery must be subject to regular review and continual improvement.

The individuals who work on trade agreement enforcement and prosecute the market access claims of the United States are extraordinarily dedicated and, too often, under-appreciated. They work tremendously long hours, often under adverse conditions and without adequate resources, to secure market opportunities for U.S. firms and workers. Operating within an imperfect system, they have made and continue to make substantial progress in breaking down complex market barriers around the world. This report is intended to be a clear-eyed review of the results of the efforts made to date ***and*** *an expression of strong support for the work in which they are engaged.*

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Executive Summary

This report focuses on the U.S. Government's use of trade agreements to obtain access for U.S. goods and services to foreign markets. The dramatic slide in the exchange rates for several key currencies as a result of the current Asian financial crisis is already putting pressure on the U.S. current account, making foreign market access more important than ever for U.S. firms and workers. Successful enforcement of trade agreements is the primary means by which that access has been, and can continue to be, secured.

Whether the United States is "getting what we bargained for" and succeeding in international trade dispute settlement actually involves two broad questions. One -- the main subject of this paper -- is whether we are getting, through enforcement where necessary, the improved access to foreign markets for which we have negotiated and, typically, paid with our own trade concessions. The other has to do with enforcement actions against the United States, an important issue but one that is considered only briefly in this report at Section IV.

Trade agreements are proliferating. The Clinton Administration alone has concluded more than 245 trade pacts, including North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) agreements. High-profile pacts concluded in 1997 alone include the WTO Agreement on Basic Telecommunications, an Organization for Economic Co-operation and Development (OECD) anti-bribery accord, and a landmark Information Technology Agreement.

Enforcing trade agreements, while acknowledged to be a top government priority, can be plagued by a range of problems -- such as vague wording in trade agreements; inadequate analysis by panelists or the WTO Secretariat in Geneva; and resource constraints or other shortfalls in Washington. In addition, the United States has enjoyed greater (but not total) success in enforcing agreements that have built-in dispute settlement mechanisms, as compared with bilateral agreements whose enforcement depends principally on the use of Section 301 of the Trade Act of 1974.

Sections III-V of this report describe the U.S. Government’s enforcement machinery that has worked well in many cases but could be significantly improved. Accordingly, Section II sets out recommendations, briefly summarized here:

Recommendations to Improve Enforcement

***Intelligence gathering, analysis and coordination*. The National Trade Estimate (NTE) and other reports should be retooled and better utilized, and interagency coordination in collecting and acting on data on foreign trade barriers improved.**

***Benchmarks*. Negotiators must reverse the current trend away from agreements with specific, quantifiable and easily observable benchmarks -- so that implementation and enforcement can be accurately assessed.**

***Congressional oversight*. Greater oversight is needed of enforcement both overall and in individual cases. Hearings and other oversight efforts should address the commercial impact on U.S. industries, rather than simple "win/loss" records, and should result in concrete follow up actions. Oversight should extend to U.S. policy regarding terms for extending the current WTO dispute settlement rules -- with particular attention to transparency and implementation of panel decisions -- and to the use and effectiveness of Section 301 since the WTO's birth. Congress should also establish a WTO Dispute Settlement Review Commission.**

***Remedies.* Expired "super 301" and "procurement 301" provisions should be renewed, and Section 301 amended to provide for new remedies (such as civil fines) that will not be vulnerable to WTO challenge.**

***U.S. support for international dispute settlement*. Government litigation resources should grow in a manner commensurate with the growth in litigation, and private sector participation in trade consultations and dispute settlement proceedings should be regularized.**

Survey of U.S. Government Enforcement Efforts

WTO agreements. By agreement of its Members, the WTO's Dispute Settlement Understanding (DSU) is to be reviewed during 1998 and a decision taken as to whether and on what terms to extend it. It is early to assess whether this new system, which the United States advocated, has been a net success for the United States, and any such evaluation depends on cases brought both by and against the United States. Insofar as U.S.-initiated cases are concerned (35 so far), the relevant question is whether commercial benefits have materialized for (or likely to be realized by) U.S. industries, which may not correspond to the achievement of negotiated settlements or the "win/loss" record posted in panel rulings. To date, nine U.S. complaints have resulted in settlements and ten others in favorable panel decisions. Many of the U.S. industries involved express general satisfaction with these enforcement efforts, although in most cases it is too early to tell what the true commercial impact, if any, will be. Cases with a significant potential for commercial benefits include, for example, several cases brought under

the Trade-Related Intellectual Property (TRIPs) Agreement; the *Beef Hormones* case in which a European Union food regulatory measure was found not to be supported by adequate scientific research; and cases in which panels have ruled against Japanese alcoholic beverages taxes and Canadian restrictions on imported periodicals. Serious concerns remain, however, as to whether and how the governments involved will implement the favorable decisions secured by the United States. The early record also includes a very disappointing WTO panel decision on barriers to Japan's photographic film and paper market, broadly rejecting the application of basic General Agreement on Tariffs and Trade (GATT) principles to Japan's highly sophisticated methods of government-sponsored protectionism.

Bilateral agreements. The U.S. record in designing and enforcing bilateral market access agreements is considered mixed. A recent study by the American Chamber of Commerce in Japan (ACCJ) concluded that of 45 major bilateral agreements signed by the United States and Japan from 1980-1996, 13 were successful, 18 marginally successful, 10 complete failures, and four had mixed results. U.S. industries have likewise reported trouble in securing effective enforcement of bilateral agreements with such key trading partners as Korea and the EU. Some have attributed failures in enforcing bilateral agreements to the constraints imposed on U.S. trade diplomacy by the WTO agreements. U.S. officials have testified that adherence to WTO obligations will not excuse failure to resolutely enforce non-WTO trade agreements.

Questions/evaluation. Evaluating whether, in light of this survey of enforcement efforts, we are "getting what we bargained for" with respect to market access raises a number of questions, including the following:

- Do the WTO cases "won" by the United States involve very obvious violations?
- Is there a risk that the bringing of difficult cases, with a potentially greater upside for U.S. industries, will be avoided?
- Are there other reasons, including cost, why meritorious cases may not be pursued?
- Would affected U.S. industries benefit from:
    - A greater commitment of government enforcement resources?
    - A clearer process for private sector input?
    - A more transparent panel process in Geneva?
    - A more circumscribed role for the WTO Secretariat vis-à-vis panelists?
- What are sensible criteria for instances in which the U.S. Government should be willing to breach WTO commitments in response to a practice which itself is not covered by WTO rules?
- If Section 301 is not currently effective as a tool for addressing non-WTO issues, how can it be revived or supplemented?

U.S. Government Enforcement Architecture

Principal agencies. The Office of the U.S. Trade Representative (USTR) and the Department of Commerce each have monitoring and enforcement units. These units maintain trade compliance databases, prepare the annual *NTE*, and coordinate litigation of disputes under the WTO agreements and other trade agreements. These efforts have faced resource constraints. For example, the number of USTR lawyers focusing on enforcement has grown only modestly since the implementation of the Uruguay Round agreements, although the agency was recently granted and is utilizing budget authority to hire several new professionals to work on enforcement.

Mechanisms for identifying violations and enforcement priorities. Several mechanisms have been established to identify foreign government trade agreement violations. The most prominent of these is the *NTE*, an annual report to Congress identifying significant foreign trade and investment barriers. A second is Section 301, the U.S. government's general market access statute under which affected industries can request (or USTR can self-initiate) action against certain foreign government acts, policies or practices that burden or restrict U.S. commerce. Related mechanisms such as "Super 301" (which expired at the end of 1997) and "Special 301" require USTR to self-identify, and launch negotiations with, "priority foreign countries" whose practices present serious trade problems for the United States.

Processes for acting on a violation. Upon identifying an apparent violation, USTR by law must invoke dispute resolution, if available, under the agreement in question. However, many agreements -- particularly bilateral agreements -- lack dispute procedures. In such cases, Section 301 empowers USTR to act directly. Since bilateral commitments often reach beyond WTO commitments, many violations and barriers cannot be remedied through WTO dispute settlement. Consequently, it is important that each Administration stand by the pledge to ensure compliance with all U.S. trade agreements. The willingness to act vigorously will create a deterrent that makes resort to retaliatory action less likely to be required.

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I. Introduction

Compliance with agreements is the true litmus test for what we achieve in our negotiations and trade practices.

– Commerce Secretary William Daley, April 1997

Today, for many U.S. industries, access to markets abroad is increasingly essential to their existence. Approximately 12 million Americans have jobs in the export sector -- jobs that pay about 20 percent more than the average U.S. hourly wage. Exports are responsible for one-third of total U.S. economic growth since 1990.[1]

Bilateral and multilateral trade agreements are a primary means that the U.S. Government employs to help domestic industries gain access to overseas markets. Several trade agreements signed during 1997, for example, will provide significant opportunities in overseas markets. These include the Basic Telecommunications and Financial Services components of the WTO's General Agreement on Trade in Services as well as the Information Technology Agreement (ITA), which was also concluded under the auspices of the WTO. Another important 1997 agreement was the ground-breaking OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in which the governments of 34 countries pledged to make it a criminal offense to bribe foreign public officials.

America's trade agreements come in various shapes and sizes -- multilateral and bilateral, general and sector-specific, *etc*. Sectoral U.S.-Japan agreements cover bilateral trade in, for example, paper, flat glass, auto parts and insurance. Other agreements -- like the WTO accords on government procurement and subsidies -- cut across sectors and involve multiple signatories.

Monitoring and enforcing these agreements is an enormous task. The Clinton Administration alone has concluded more than 245 trade-related accords, including NAFTA and the WTO agreements. It is also a necessary task, for obvious economic reasons. In addition, making the political case for trade would be almost impossible if public confidence were undermined by trade agreements that were not enforced.

Yet, trade agreements differ in many significant ways from the domestic contractual arrangements most business people are familiar with. There are no courts in the international

[1] P. Kullman, "Commerce Department's Trade Compliance Center Gears Up," *Business America* at 28 (May 1997).

system with the power to force compliance by national governments. Moreover, trade agreements often contain vague provisions which were inserted to allow negotiations to conclude -- but which reflect more an absence of agreement than a definitive resolution of the particular problem at hand. Powerful interests in foreign countries may oppose full and faithful implementation of a market opening agreement.

As a result of these and other factors, full enforcement of U.S. trade agreements has often been elusive. This problem is not unique to any political party or Administration. Rather, the enforcement of trade agreements has troubled the U.S. Government for many years. In part the problem is one of resources. Effective enforcement requires significant resources and an implementation architecture that is up to the task. U.S. enforcement resources, already stretched, have not been growing commensurate with the growth in trade and trade disputes. Yet other factors such as political resolve play a major role as well. Effective enforcement also requires active Congressional oversight, because it helps to keep the Executive Branch focused on its enforcement efforts and, more importantly, it sends a clear message to our trading partners that the enforcement of trade agreements is important to Congress and that when the Administration acts to enforce trade agreements, it is acting with the full weight of the Congress behind it.

This paper sets out recommendations for improving U.S. enforcement of trade agreements; reviews the known U.S. enforcement record to date; and surveys the architecture of enforcement, including key federal agencies, statutory mechanisms for identifying trade agreement violations, and processes for acting on violations.

II. Recommendations To Improve Enforcement

Public support in the United States for trade liberalization through international agreements, already tenuous, cannot survive in a world where the agreements already concluded are not seen to be fully and vigorously enforced. LICIT recommends that the U.S. Government take the following structural and tactical steps to improve its enforcement of trade agreements:

A. Intelligence Gathering, Analysis and Coordination

1. Restructure the *NTE* to expand its utility.

   - The *NTE* should not be a mere collection of trade problems, but rather be a blueprint for action for which the Administration may be held accountable to Congress.

   - The *NTE* should contain a section identifying trade agreement provisions relevant to particular trade barriers and mandating action to remedy those barriers.

   - Another section of the *NTE* should identify specific practices which cause the United States concern and warrant discussion with the relevant trading partners.

- Yet another section should evaluate what the Administration has done in the previous year to remedy previously identified trade barriers.

2. Require each agency responsible for enforcing a trade agreement to publish evaluations from the affected industry or industries.

3. Ensure full, coordinated use of U.S. Government data-gathering and analytical resources, including Foreign Commercial Service, USITC, General Accounting Office, and U.S. Customs Service.

4. Enhance coordination among U.S. Government agencies engaged in enforcement.

5. Strengthen efforts to foster the development of a cadre of career negotiators who are better able to negotiate solid trade agreements that contain clear benchmarks and incorporate lessons learned from past trade agreement negotiations.

B. Benchmarks

Negotiate enforceable agreements with specific, quantifiable and easily observable benchmarks to determine whether requirements are being met. Although there has been a clear movement away from the use of benchmarks in trade agreements, it is time to reevaluate this trend. The more quantifiable the agreement -- the U.S.-Japan Semiconductor Agreements being a good example -- the more likely it can be properly enforced.

C. Congressional Oversight

1. Increase oversight by the House Ways and Means Committee and Senate Finance Committee of enforcement efforts both overall and in individual cases, especially WTO disputes. This oversight should be accomplished through hearings and informal consultative mechanisms that look beyond the formal win-loss record in dispute settlement proceedings to the commercial impact on U.S. firms and workers. Oversight hearings should result in concrete actions with regularized follow up procedures.

2. Ensure a significant Congressional role -- led by the House Ways and Means Committee and the Senate Finance Committee -- in determining U.S. policy regarding terms for extending the new WTO dispute settlement rules. Particular attention should be paid to such issues as transparency and implementation of panel decisions. The Administration should come to Congress by June 30, 1998 with a list of proposed amendments to the WTO Dispute Settlement Understanding (DSU) to make the WTO's dispute settlement procedures work more effectively for U.S. firms and workers. The Administration should also report on proposals that other countries are likely to submit and how the U.S. should respond to such proposals. Congress should be closely consulted in the

decisionmaking process regarding extension of the DSU and its assent clearly achieved before any decisions are made.

3. Hold Congressional hearings on the effectiveness of Section 301. These hearings should examine the role of Section 301 not only as means of bringing a case to WTO dispute settlement, but also as a bilateral tool for enforcement of trade agreements. Other important issues to be examined include new remedial authority for the President to impose fines and other measures not prohibited by the WTO agreements as well as why certain bilateral market access arrangements have failed in the past and how to avoid such failures in the future.

4. Enact legislation establishing a WTO Dispute Settlement Review Commission (*see* Section IV below).

D. Remedies

1. Renew Super 301, which expired at the end of 1997, and Title VII of the Omnibus Trade and Competitiveness Act of 1988, which expired in May 1996.

2. Amend Section 301 to provide for new remedies (such as civil fines) that will not be vulnerable to WTO challenge, and to provide for interim remedies to protect U.S. industry from further harm pending implementation of a WTO decision.

E. U.S. Support for International Dispute Settlement

1. Ensure adequate resources to Federal enforcement agencies. Litigation resources should be capable of increasing commensurate with the growth in litigation.

2. Formalize U.S. practice of allowing private sector participation in trade consultations and dispute settlement proceedings.

III. Survey Of U.S. Government Enforcement Efforts

A. Enforcement of the WTO Agreements

WTO Director-General Renato Ruggiero has aptly described the dispute settlement system as "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy."[2] The WTO dispute settlement system is among the most important means by which the United States acts to overcome barriers to foreign trade. The United States has lodged 35 formal WTO complaints during the organization's first three years. The results to date are summarized in the following table:

[2] "The WTO's 'Most Individual Contribution'," *About the WTO* (April, 17, 1997).

WTO CASES: UNITED STATES AS COMPLAINANT

"✓" designates that the United States prevailed on the merits
"+" designates that clear commercial gains are materializing
"?" designates that the commercial results are as yet unclear
"X" designates an unsuccessful result

I. Cases Reaching Panel Decision	**Agreement(s) Cited**	**Status**	**Legal Result**	**Commercial Benefits**
Japan – Taxes on alcoholic beverages	GATT	**Panel decision for United States** 7/11/96; upheld by Appellate Body 10/4/96.	✓	+
EU – Regime for importation/sale of bananas *Co-Complainants: Mexico, Guatemala, Honduras, Ecuador*	GATT, Import Licensing, Ag, TRIPs, GATS	**Panel decision for United States** 11/08/96; Appellate Body upheld, reversing on one issue, on 2/10/97.	✓	**?**
EU – Ban on hormone treated beef	GATT, SPS, TBT, Ag	**Panel decision for United States** 8/18/97; upheld by Appellate Body 1/16/98.	✓	**?**
India – Patent protection for pharmaceutical and agricultural chemicals	TRIPs	**Panel decision for United States** 9/5/97; upheld by Appellate Body 12/19/97.	✓	+
Argentina – Measures affecting footwear, textiles, apparel and other items	GATT, TBT, Textiles	**Panel decision for United States** 11/25/97; Appellate Body decision affirming U.S. win issued 3/28/98.	✓	**?**
Japan – Measures affecting photographic film/paper	GATT	Panel report in favor of Japan 1/30/98.	X	**?**
Canada – Measures concerning periodicals	GATT	**Panel decision for United States** 3/14/97; upheld by Appellate Body 11/11/96.	✓	**?**
EU – Customs classification of computer equipment	GATT	**Panel decision for United States** 2/5/98.	✓	**?**
UK– Customs classification of computer equipment	GATT	**Panel decision for United States** 2/5/98.	✓	**?**
Ireland – Customs classification of computer equipment	GATT	**Panel decision for United States** 2/5/98.	✓	**?**
Indonesia – National Car Program	GATT, TRIPs, SCM	Interim Panel report for United States issued 3/24/98.	✓	**?**
II. Settled Cases	**Agreement(s) Cited**	**Status**		**Commercial Benefits**
Korea – Measures concerning shelf-life of products	SPS	U.S. withdrew request on 07/31/95.		+
EU – Grain import duties	GATT	U.S. withdrew request on 4/30/97.		**?**
Japan – Measures concerning sound recordings	GATT	Settlement notified on 1/24/97.		+
Hungary – Export subsidies for agriculture *Co-Complainants: Argentina, Australia, NZ*	Ag	Settlement notified on 7/30/97.		**?**
Pakistan – Patent protection for pharmaceutical and	TRIPs	Settlement notified on 10/03/96.		+

agricultural chemicals				
Portugal – Lack of patent protection	TRIPS	U.S. withdrew request on 4/30/97. Change in patent law notified on 10/3/96.		+
Turkey – Taxation of foreign film revenue	GATT	Settlement notified on 7/14/97.		+
Philippines – Measures affecting pork and Poultry	GATT, TRIMs, Import Licensing	Settlement notified on 3/12/98.		**?**
Brazil – Trade and investment in the automotive sector	TRIMs, GATT, SCM	Settlement notified in 3/98.		**?**
III. Pending Cases	**Agreement(s) Cited**	**Status**		**Commercial Benefits**
Korea – Measures concerning testing and inspection of agricultural products	GATT, SPS, TBT, Ag	Pending consultations		**?**
Australia – Importation of salmonids	GATT	Pending consultations		**?**
Japan – Measures affecting distribution services	GATS	Pending consultations		**?**
EU/Ireland – Grant of copyright and neighboring rights	TRIPs	Pending consultations		**?**
Japan – Measures affecting agricultural products	GATT, SPS, Ag	Active panel		**?**
Belgium – Measures affecting commercial telephone directory services	GATS	Pending consultations		**?**
Denmark – Enforcement of intellectual property rights	TRIPs	Pending consultations		**?**
Korea – Taxes on alcoholic beverages	GATT	Active panel		**?**
Sweden – Enforcement of intellectual property rights	TRIPs	Pending consultations		**?**
India – Restrictions of imports of agricultural, textile and industrial products	GATT, Ag, Import Licensing	Active panel		**?**
Mexico – Antidumping investigation of high fructose corn syrup	Antidumping	Pending consultations		**?**
Canada – Importation of milk and exportation of dairy products	GATT, Ag, SCM	Pending consultations		**?**
EU – Exportation of processed cheese	GATT, Ag, SCM	Pending consultations		**?**
Chile – Taxes on alcoholic beverages	GATT	Pending consultations		**?**
Australia – Subsidies provided to producers/exporters of automotive leather	SCM	Settlement notified on 11/25/96; complaint renewed in September 1997 because of replacement subsidies.		**?**

Of the 11 cases decided by panels, the U.S. complaint has been upheld ten times and rejected once. Nine other cases have been terminated by settlements prior to any panel decision. The remaining cases are still pending in the system.

1. Cases Resulting in Panel Decisions

Summaries of several key panel decisions in U.S.-initiated cases follow:

- **Japan – Taxes on Alcoholic Beverages.** In June 1995, the EU, the United States, and Canada complained that Japan's higher taxation rate for whiskey unfairly protected domestic manufacturers of *shochu*, a Japanese liquor. The Panel found against Japan, and the Appellate Body affirmed in late 1997. (Japan had lost a GATT panel case on the same issue some years earlier, but has failed to implement that decision). The U.S. industry involved has declared itself generally satisfied with the 1997 decision. According to the Distilled Spirits Council of the United States (DISCUS), Japan provided an "excellent package" of concessions, including tariff concessions as well as reforms to the discriminatory tax. DISCUS estimates that U.S. exporters will save approximately $94 million per year as a result of the changes in the Japanese Liquor Tax Law.[3]

- **EU – Measures Affecting the Ban on Hormone Treated Beef.** In January 1996, the United States brought a WTO claim against the EU's ban on imports of beef treated with growth hormones, asserting that the ban was not based on science and was a disguised barrier to trade. A panel found against the EU, and in January 1998, the Appellate Body affirmed. U.S. industry has declared itself very satisfied with the outcome to date. The National Cattleman's Beef Association (NCBA) released a statement voicing its approval of the WTO's "science-based decision." The industry, however, is dissatisfied with the progress that has been made in implementing the decision and will press USTR and others to insist that the EU provide an acceptable plan as to how it will eradicate the ban. According to one industry source, the " EU mantra that all they have to do is risk assessment is totally unacceptable to us."[4] The American Farm Bureau, in a similar vein, notes that while the process is not moving as fast as some industry members would like, WTO Dispute Settlement is working as designed and faster than before the Uruguay Round.[5] Currently, there are indications that the EU, rather than implementing the panel decision, is looking for ways come up with "good science" that would allow it to avoid altering its discriminatory practices. Thus, implementation remains a major concern.

- **Canada – Certain Measures Concerning Periodicals.** In March 1996, the United States complained that Canada's prohibitive taxes on split-run magazines (*i.e.*,

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3 Phone conversation with Mark Orr, DISCUS Vice President for International Trade (January 1998).

4 Phone conversation with Chuck Lambert, NCBA Chief Economist (January and February 1998).

5 Phone conversation with Barbara Spangler, AFB Director, Trade and Transportation (January 27, 1998).

magazines with content identical to those sold in the United States, but with different advertising targeted to the Canadian market) violated the GATT Article III obligation of national treatment. In March 1997, a panel found against Canada, and in June 1997, the Appellate Body affirmed. Officials at Time Warner, whose *Sports Illustrated Canada* was the main periodical affected, stated that the Company was "gratified that its point of view was vindicated" by the panel and Appellate Body decisions. Time Warner explained that, in essence, the Canadian tax confiscated the Company's business and forced it out of the market. The WTO dispute settlement process demonstrated that such actions were not to be tolerated. Although the Appellate Body decision was announced in June 1997, Canada has yet to notify the WTO what steps it will take to remedy the situation. Recent press reports indicate that the Canadian industry is urging that the GATT-inconsistent taxes be replaced with other discriminatory taxes which may be more difficult to challenge in the WTO. As a result, here again, concerns persist regarding effective implementation of the panel decision.

- **India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.** In July 1996, the United States complained that India was violating its obligations under the TRIPS Agreement, (1) by failing to establish a mechanism that adequately preserved novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and (2) by failing to establish a system for the grant of exclusive marketing rights. In September 1997, a panel found in favor of the United States, and in January 1998, the Dispute Settlement Body adopted the Appellate Body Report, which upheld the panel decision, with modifications. While the pharmaceutical industry has expressed satisfaction with the decision, India has yet to notify the WTO as to what measures it will take to remedy its violation. Nonetheless, since India now accepts "mailbox" applications, U.S. industry is already benefiting.

- **Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items.** In October 1996, the United States lodged a WTO complaint against Argentina for excessive tariffs on footwear, textiles, and apparel and for imposition of a 3% "statistical tax" on all imports, which the United States alleged violated Argentina's obligations under the WTO agreements. In November 1997, a WTO panel found for the United States, calling for Argentina to lower its tariffs and to abolish its statistical tax. In late January 1998, Argentina announced that it would appeal the decision. Officials at the American Textile Manufacturers Institute expressed satisfaction with the Panel's decision but stated that the dispute settlement process -- which is not over yet -- has simply taken too long. The United States entered into consultations with Argentina in October 1996, yet relief for U.S. textile manufacturers is still nowhere in sight.

- **EU – Custom Classification of Certain Computer Equipment.** In November 1996, the United States brought a complaint against the EU regarding the reclassification of tariffs on Local Area Network (LAN) equipment and personal computers with multimedia capability. The United States claimed that the

reclassification violated the EU's tariff bindings under GATT Article II. On February 5, 1998, a panel ruled in the United States' favor, holding that the EU's tariff concession on automatic data processing machines applied to computer networking equipment and that the EU must therefore apply the lower automatic data processing machines tariff to LAN adapter equipment and PCs with multimedia capability. (The United States brought similar complaints against the UK and Ireland with identical results.) USTR Charlene Barshefsky stated: "We are pleased the WTO panel has ruled that these tariffs clearly violate WTO obligations. . . . These products are made in the USA with leading edge American technology. The EU tariffs affect billions of dollars in U.S. exports. It is clear that these unfair tariffs must be corrected."[6] U.S. industry sources express general satisfaction with the case's outcome at this early stage.

- **Japan -- Film:** The loss in a January 1998 decision of a WTO panel on barriers to Japan's photographic film and paper market has wide-ranging implications for the world trading system. The panel broadly rejected the application of basic GATT principles to Japan's unique government-sponsored, often informal, methods of protectionism, which involve the creation and maintenance of a closed market structure and a distribution system that excludes imports from key channels. The decision will have far-reaching consequences for the United States' ability to address imbedded protectionism in the Japanese and other Asian markets, especially given that the case was the most carefully documented instance of government protectionism ever submitted to GATT or WTO dispute settlement. The panel decision could provide a green light to countries that seek to copy Japan's system of opaque trade barriers. USTR Charlene Barshefsky stated that the "United States is very disappointed by this report. Its ruling sidesteps the real issues in this case and instead focuses on narrow, technical issues. However, the Panel's analysis in no way exonerates the Japanese Government for the actions it took to protect its photographic film and paper market from foreign suppliers…"[7] George Fisher, Chairman and CEO of Eastman Kodak, described the decision as "totally unacceptable." He said, "{i}t is unacceptable from the viewpoint of the principles of free trade and open markets; it is unacceptable from the viewpoint of U.S. industries' ability to compete in the Japanese market; and it is unacceptable from the viewpoint of Japanese consumers who are denied access to imported products."[8]

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6 *USTR Barshefsky Announces U.S. Victory in WTO Dispute on U.S. High Technology Exports*, Office of the United States Trade Representative (February 5, 1998).

7 *Statement by Ambassador Charlene Barshefsky Regarding the WTO Dispute on Photographic Film and Paper*, Office of the United States Trade Representative (December 5, 1997).

8 *Kodak Terms WTO Decision 'Totally Unacceptable,'* Eastman Kodak (December 5, 1997).

2. Settled Cases

The U.S. industries whose interests underlie the settled cases have generally been satisfied with the results brought about by these settlements, albeit with some reservations. Key examples include:

- **Japan - Sound Recordings.** In February 1996, the United States filed a WTO case against Japan for failing to provide copyright protection for pre-1971 sound recordings as required under the TRIPS Agreement. The case was settled on January 24, 1997, before a panel was established. Pursuant to the settlement, Japan passed legislation extending 50 years of copyright protection to pre-1971 sound recordings. The Recording Industry Association of America (RIAA), which represents companies that create, manufacture or distribute approximately 90 percent of the sound recordings produced and sold in the United States, hailed the settlement and the Japanese legislation as a "text book example of the tremendous potential for resolving conflicts on a multilateral basis through the WTO" and noted that "the amendment to Japanese legislation will put an end to the current trade in pre-1971 unauthorized recordings that is presently costing U.S. record companies half a billion dollars annually." [9] In January 1998, one year after the settlement, the industry is still expressing satisfaction. One industry source called the case "totally successful," while another stated that the resort to WTO dispute settlement was an "extremely efficient" way of bringing about change in Japanese practices.[10]

- **Pakistan - Patent Protection for Pharmaceutical and Agricultural Products.** In April 1996, the United States brought a case against Pakistan, stating that its Patents and Design Act violated the obligation under Article 70 of the TRIPS Agreement to provide exclusive marketing rights to patent holders and patent protection from the date of filing ("mailbox filing"). The case was settled in February 1997, before a panel was established. Under the terms of the settlement, Pakistan agreed to amend its laws to allow exclusive marketing rights as well as to permit mailbox filing. Pharmaceutical Research and Manufacturers of America (PhRMA), an industry association representing the United States' leading research-based pharmaceutical and biotechnology companies, has expressed satisfaction with the settlement. Although the settlement has already resulted in better protection for U.S. patent holders thanks to the introduction of mailbox filing, one PhRMA official stated that it was too early to determine whether or not the settlement would result in marketing exclusivity for products when they come to market.[11]

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9 *RIAA Hails Results of WTO Proceeding Against Japan Concerning Protection of Pre-Existing Sound Recordings*, Recording Industry Association of America (January 24, 1997).

10 Phone conversations with Steven Metalitz, International Intellectual Property Alliance Vice President and General Counsel (January 20, 1998) and Neal Turkewitz, RIAA Executive Vice President, International (January 21, 1998).

11 Phone conversation with, and E-mail message from, Thomas Bombelles, PhRMA Assistant Vice President of the International Division. (January 21 and 23, 1998).

- **Portugal – Patent Protection Under the Industrial Property Act.** In April 1996, the United States brought a WTO case against Portugal for refusing to provide patent protection for at least 20 years after filing as required under the TRIPS Agreement. The parties reached settlement in October 1996 when Portugal changed its law. Officials at PhRMA have expressed their belief that since Portugal accepts "mailbox" filing, U.S. industry is already receiving enhanced protection as a result of the settlement agreement.[12]

- **Korea – Measures Concerning the Shelf-life of Products.** In May 1995, the United States brought a WTO case against Korea, alleging that certain of Korea's product-by-product shelf-life standards were so short as to constitute a non-tariff barrier. One significantly affected product was pork. A settlement was quickly reached and notified on July 31, 1995. Since the settlement, U.S. exports have grown sharply, and the National Pork Producers Council has declared the settlement "a big victory." According to NPPC, the significant increase in Korea's pork imports since the settlement provides a clear indication of how the WTO settlement has opened the Korean market.[13] An official at the American Farm Bureau noted a "definite improvement in the movement of products going into Korea" since the settlement. [14] An official at the American Meat Institute, however, was hesitant to attribute increased market access exclusively to the WTO case. In his view, while the Korea shelf-life settlement certainly has not created problems for the U.S. industry, it is not a sufficient indicator to evaluate the WTO dispute settlement system.[15]

- **Turkey – Taxation of Foreign Film Revenues.** In July 1996, the United States brought a WTO claim alleging that Turkey's tax on revenues generated from showing foreign films violated the WTO's national treatment requirement. The case, settled in July 1997, had been self-initiated by the USTR. While the U.S. industry association -- the Motion Pictures Association of America (MPAA) -- did not explicitly seek the case, it has been pleased with the results. Since the settlement, box office taxes in Turkey have decreased from 25% to 12.5%. While noting that other market distortions remain in Turkey which were not addressed by the case, such as rampant video piracy, MPAA sees the settlement as a useful precedent to dissuade other countries from engaging in protectionist practices in the film industry. MPAA also reports that the WTO process generated results in a reasonable amount of time, and prompted Turkey to acknowledge its WTO violation.[16]

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12 *Id.*

13 Phone conversation with Nick Giordano, NPPC Assistant Vice President for Foreign Trade (January 1998).

14 Phone conversation with Barbara Spangler, American Farm Bureau Director, Trade and Transportation (January 27, 1998).

15 Phone conversation with Leonard Condon, AMI Vice President for International Trade (January 1998).

16 Phone conversation with Bonnie Richardson, MPAA Vice President, Federal Affairs and Trade (January 26, 1998).

3. Pending Cases

The pending U.S. challenges -- cases that could not be settled during consultations and have not yet been decided on by panels -- involve 13 different WTO members and nine different WTO agreements. While comment on most of these enforcement efforts is premature, there is one case, *Australia – Automotive Leather*, that highlights some of the challenges facing the U.S. enforcement effort. In October 1996, the United States brought a WTO claim alleging that Australia was subsidizing its automotive leather industry in violation of the WTO Agreement on Subsidies and Countervailing Measures (SCM). In November 1996, the parties reached a settlement and the case was dropped. However, this truce was short-lived, as Australia in December 1996 announced new subsidies to the same industry, including a $30 million grant and $25 million in subsidized loans. The intention was to replace the earlier, more clearly SCM-inconsistent, subsidy scheme with support that would be more difficult to reach under SCM rules. In September 1997, with support from a frustrated U.S. industry, USTR renewed the WTO complaint against Australia. Unsuccessful consultations were held in October and December 1997, and on January 22, 1998, the Dispute Settlement Body agreed to form a panel.

B. CFTA and NAFTA Enforcement

On the whole, enforcement of U.S. rights under the Canada-U.S. Free Trade Agreement (CFTA) was successful.[17] Since the successor NAFTA came into force in 1994, only two enforcement cases involving the United States have been brought, and both were decided adversely to the United States. One case concerned Canada's introduction of new tariffs on U.S. exports of dairy, poultry, and egg products. The panel held for Canada, holding that it was entitled following the Uruguay Round to translate its quantitative import restraints in these sectors into prohibitively high tariffs notwithstanding the tariff bindings earlier established under the free trade agreement.

The other NAFTA enforcement case concerned emergency "safeguard" tariffs imposed by the United States on corn brooms imported from Mexico, pursuant to Section 201 of the Trade Act of 1974 and based on an injury determination by the USITC. The NAFTA panel found that the safeguard measure violated NAFTA rules because the ITC's injury determination was not sufficiently explained. USTR Charlene Barshefsky commented: "While we are disappointed that the Panel found a narrow, technical flaw in the ITC's injury decision in this case, we are pleased that the Panel declined to rule on the substance of the ITC's injury finding or of the safeguards measures taken by the President. The Panel report will have virtually no effect on the ability of the United States to take action under our safeguard laws to respond to surges in imports."[18] (*See* Section IV, Enforcement Actions Against the United States).

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[17] *See, e.g., In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring* (October 16, 1989) (panel report in favor of United States).

[18] *USTR Underscores NAFTA Panel Decision on Corn Brooms to have Virtually No Effect on U.S. Safeguard Regime,* Office of the United States Trade Representative (February 12, 1998).

The CFTA and NAFTA have resulted in a substantial increase in intra-North American trade, making the United States' use of the NAFTA dispute settlement mechanism more important than ever. The early record is not encouraging.

C. Enforcement of Bilateral Agreements

Although some bilateral trade agreements have proven quite effective, the U.S. record in the enforcement of bilateral agreements is a cause of considerable concern for affected U.S. industries. Bilateral trade agreements -- a key policy tool for resolving sensitive trade disputes with some of our most important trading partners -- in many instances are not effectively enforced.

From 1980-1996, the United States and Japan, for example, entered into 45 major bilateral trade agreements.[19] In a comprehensive study of those agreements conducted by the American Chamber of Commerce in Japan (ACCJ), only 13 of the 45 were deemed to be successful, 18 marginally successful, 10 complete failures, and four so mixed as to be unrateable. The ACCJ found that the ineffectiveness of many bilateral agreements was due to vague terminology, lack of benchmarks, and the absence of effective follow-up at the implementation phase. The ACCJ also found that the successful agreements had effective provisions for ongoing consultations, and concluded that the U.S. Government should do more to record, review, monitor, and evaluate each agreement on a regular basis. The ACCJ specified that "[t]he Commerce Department's Office of Compliance and USTR's Trade Agreement Compliance Office should be bolstered to do this."[20] The situation has worsened since the end of the Uruguay Round negotiations. In its trade negotiations with the United States, the Government of Japan has adopted a *Monzenbarai* policy,[21] wherein Japanese officials have refused even to come to the table to exchange views on a range of trade-related issues.

A brief review of industries' reactions to several bilateral agreements follows:

- **Japan/automobiles.** On October 9, 1997, following the second annual review of a 1995 U.S.-Japan Auto Agreement, U.S. trade officials stated that there was little reason to be optimistic that Japan would take steps toward liberalizing its automobile and auto parts market.[22] They indicated that the Japanese Government was unwilling to take action to deregulate and improve access to domestic automobile dealers, critical to competing in the Japanese market. Remarks by U.S. industry echoed those by U.S. trade officials. Andrew H. Card, Jr., President and CEO of the American Automobile Manufacturers Association

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19 *Making Trade Talks Work: Lessons from Recent History*, American Chamber of Commerce in Japan at 12 (1997). USTR cites 31 U.S.-Japan "market opening" agreements since 1993. *Report on Trade Expansion Priorities Pursuant to Executive Order 12901 ("Super 301")*, 62 Fed. Reg. 52,604 (USTR 1997).

20 *Making Trade Talks Work: Lessons from Recent History* at 149.

21 "*Monzenbarai"* is a Japanese figure of speech meaning "to rudely refuse entry at the gate."

22 *U.S. Disappointed With Japan Auto Talks, Sees Few Short-Term Benefits*, INSIDE US TRADE (October 10, 1997).

(AAMA) stated that "It is regrettable that the second annual review of the U.S.-Japan auto trade agreement produced no new commitments from Japan to do more to reverse the auto trade imbalance . . . . The good news is that the U.S. government . . . delivered a strong and unmistakable message to Japan. That message is that the Japanese government must take concrete proactive steps to deregulate and open its automotive market."[23]

- **Japan/flat glass.** Another example is flat glass, where, despite a 1995 U.S.-Japan market opening agreement, industry sources report that foreign suppliers have made little progress due to continued anticompetitive practices. Japan's three flat glass manufacturers continue to control the distribution system through long-standing exclusive relationships. These relationships are preserved partly through equity holdings and partly through tactics such as threats of price discrimination and refusal to deal. The Government of Japan continues to tolerate this situation, notwithstanding obligations in the 1995 bilateral trade agreement and a 1993 finding by the Japan Fair Trade Commission that Japan's flat glass industry engages in anticompetitive practices.

- **Korea/autos.** In 1995, the United States and Korea signed a memorandum of understanding (MOU) on automotive trade. By October 1997, however, USTR announced it was designating Korea's auto policies as "priority practices" under the provisions of Super 301 – reflecting the total lack of results under the MOU. According to Andrew H. Card, Jr., of the AAMA, "{i}n 1995, the Koreans told the U.S., in effect, 'trust us, we will open our market.' As a result, the U.S. accepted a minimal, first-step agreement. Now, two years later the market is still closed. Korea has violated even that agreement…."[24]

- **Korea/telecom.** Korea was designated a "priority foreign country" in the first round of identifications under the Telecommunications Trade Act of 1988, and its behavior in this sector has generated recurrent trade complaints ever since. A series of partial agreements in 1989 and 1990 were formalized in a 1991 bilateral agreement, subject to annual review under Section 1377. Korean violations have been periodically identified but, in many cases, either left unremedied or corrected only after considerable delay. In addition, Korea was redesignated as a priority foreign country in 1996 based on newly devised import barriers outside the scope of the 1991 bilateral. These new practices, to which the U.S. Government has not found a successful response, include off-the-record administrative guidance instructing licensees to purchase only domestically produced equipment.

- **EU/wheat starch.** In June 1997, USTR halted a Section 301 investigation of EU wheat starch subsidies. USTR announced instead its intention to seek consultations under a 1996 bilateral agreement, despite the fact that the EU had not yet agreed to such consultations.[25] Petitioners were unhappy with the decision, with industry sources stating that, "You don't

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23 '*Japan Only Willing to Discuss the Past' in Second Annual Auto Review*, American Automobile Manufacturers Association (October 1997).

24 *Automakers Praise U.S. Action on Korea Auto Trade*, American Automobile Manufacturers Association (October 1, 1997).

25 *U.S. Drops Section 301 Case on EU Starch Subsidies, Seeks Talks*, INSIDE US TRADE (June 13, 1997).

have the industry asking to terminate the investigation…. But the industry compromised and acceded to it. . . . USTR said they [the EU] were too bothered."[26]

On the other hand, some bilateral trade agreements have been quite effective in opening markets to U.S. goods and services. These experiences provide valuable lessons for future negotiation and enforcement efforts.

- **Japan/semiconductors.** In 1986, the United States concluded a five year agreement with Japan to open the Japanese market to foreign semiconductors. The agreement included side agreements designed to: (1) establish an expectation that foreign market would exceed 20 percent; (2) provide for joint efforts to increase the number of foreign semiconductors that are "designed in" new Japanese electronics products; and (3) deter dumping of semiconductors in the U.S. and third country markets.

  In 1987, the U.S. Government imposed sanctions on Japanese electronics products in response to breaches of the agreement, resulting in an improvement of the foreign share of the Japanese semiconductor market. By July 1991, however, it was apparent that the threshold objective of 20 percent foreign share would not be met and that market share progress was not self-sustaining. As a result, the U.S. Government sought and concluded a second agreement which provided that the 20 percent figure was to be reached by December 31, 1992, with gradual and steady progress thereafter. By 1996, it was clear that the semiconductor agreements had created a structure for regular cooperation between Japanese semiconductor users and foreign semiconductor suppliers, increasing the foreign market share in Japan from 8.5 percent in 1985 to 25.4 percent in 1995 (a figure more in line with the results that free market forces would have yielded).

  In 1996, the United States and Japan and their respective industries extended their cooperation through a third semiconductor arrangement made up of industry-industry and government-government agreements. The inter-industry agreement provided for a continuation of cooperative activities between Japanese semiconductor users and foreign suppliers. With these continuing efforts, foreign market access in Japan has continued to increase, reaching 35.8 percent as of the second quarter of 1997. Import penetration has dropped somewhat since then, but remains at historically high levels.

- **Japan/insurance.** In October 1994, the United States and Japan signed the Insurance Sector Measures Agreement under the larger U.S.-Japan Framework Agreement. A supplemental insurance agreement followed in December 1996. The aim of the insurance agreements is to improve market access for foreign providers and intermediaries. A principal requirement was the introduction by Japan of phased product and rate liberalization in the primary and non-life sectors. One key issue for U.S. insurance providers is the "third sector," *i.e.*, those products that fall somewhere in between life and non-life such as hospitalization and cancer care insurance. While the third sector is relatively small, it is the sector in which foreign providers presently have the largest market share. The fear was that regulators would deregulate the third sector first, allowing Japanese providers to weaken their foreign

[26] *Id.*

competitors before the larger primary and non-life sectors were opened to foreign competition. Through difficult negotiations, a compromise was struck on the timing for deregulation of the third sector and other sectors. The International Insurance Council (IIC), the principal U.S. industry advisor during the U.S-Japan insurance talks, expressed satisfaction with the 1996 agreement, praising "both governments for bringing this difficult matter to a mutually acceptable solution."[27] However, whether the insurance agreements are a commercial success is unclear. Due to the phased nature of the required deregulation measures, many provisions have yet to be implemented. Industry sources have pointed to serious violations.

- **Japan/tobacco.** In October 1986, the United States and Japan entered into an agreement whereby Japan eliminated its tariffs on tobacco and implemented a system for automatic approval of retail prices for tobacco products. Japan Tobacco and U.S. suppliers also entered into distribution agreements. This agreement flowed out of a Section 301 investigation against Japanese practices in the tobacco industry. Imported brands now account for more than 20 percent of the Japanese market.

- **Japan/port practices.** The recent dispute between Japan and the United States over Japanese port practices offers some lessons for effective enforcement of trade agreements. Japan had long denied access to the Japanese market for port services by, among other things, preventing foreigners from getting licenses for terminal and stevedoring operations. After months of talks with little progress, the Federal Maritime Commission (FMC), the United States' independent shipping regulatory agency, announced that it would impose $100,000 fines on certain Japanese shipping companies each time one of their ships called at a U.S. port, unless Japan changed its port practices. Despite some resistance, at the last minute, Japan agreed to reform its port practices. That the FMC, an independent agency, was largely immune to political pressure, made its threat of sanctions credible and enabled it to act swiftly. Another factor contributing to a favorable resolution of the dispute was that it was settled bilaterally, without resort to WTO dispute resolution.

All in all, the record of enforcing bilateral agreements is decidedly mixed, a situation some have attributed to the constraints imposed on U.S. trade diplomacy by the WTO agreements. This problem has a long history, covering several Administrations, but it demands *current* solutions. Congress and the Administration should evaluate and make public their conclusions as to whether the WTO agreements are a cause of failure to enforce non-WTO trade agreements resolutely. The U.S. Government has promised vigorous enforcement of *all* U.S. trade agreements.[28]

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[27] *U.S. Insurance Industry Applauds U.S.-Japan Negotiators for Reaching Agreement in Trade Talks*, International Insurance Council (December 16, 1996).

[28] A fourth category of agreements needing vigorous enforcement is those arising out of proceedings under the U.S. antidumping and countervailing duty laws. Typically these agreements take the form of suspension agreements, concluded under 19 USC 1671c and 1673c, in which exporters and governments found to be engaged in unfair trade practices agree to curtail those practices and/or eliminate the resulting injury to U.S. industries. Enforcement of these agreements has raised problems from time to time in the past. Agreements resolving larger cases can lead to particularly severe enforcement challenges. The 1996

D. Questions/Evaluation of Enforcement Efforts

The scorecard of legal results and industry evaluations presented above can largely, but not entirely, speak for itself. Some patterns emerge clearly -- for example, that the United States has generally allowed the bilateral component of its trade diplomacy to recede in importance. Other patterns are more subtle but may perhaps be discerned with the aid of the following questions. Any searching evaluation of the system, and its utility to the United States, must address these questions:

1. WTO Cases

- The United States has clearly won the majority of the cases it has brought to the WTO, but how much significance should be ascribed to any "win-loss" record?

  - Do the cases "won" by the United States involve very obvious WTO violations? In the future, will the government bring "slam dunk" cases while more difficult cases, which require more work but have a potentially greater upside for U.S. industries, go begging?

  - Are there other reasons -- including cost -- why meritorious cases may not be pursued?

  - Are there real commercial results to go along with the legal wins? For example, in two of the most-heralded U.S. panel victories, *EU - Hormones* and *Canada - Periodicals*, there has been no implementation so far, and therefore no commercial benefit of any kind to the affected U.S. industry. While the governments involved have publicly stated that they plan to bring their regimes into compliance with WTO rules, the strongest indications to date are that they are simply searching for new ways to replicate their market barriers, albeit with measures that will prove more resistant to WTO panel review. In potentially stark contrast, in *Japan -- Film*, a clear "loss" for the United States legally, commercial gains may yet be realized as a result of representations (statements about the open nature of the Japanese market) the Japanese Government made before the WTO panel.

  - Does a "commercial gains" analysis, as opposed to a legal win/loss approach, help in assessing whether the wins to date balance the losses experienced in cases where U.S. measures have been found WTO-inconsistent (Section IV)?

- In looking at the "legal" results obtained to date, would greater U.S. Government resources have helped? Would any of the cases have benefited from a more formalized process for private sector input into the USTR-led litigation effort?

- Would a more transparent panel process in Geneva have helped in any way? If affected U.S. interests had been allowed to participate, would this have exerted pressure in ways that

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U.S.-Canada Softwood Lumber Agreement, which was intended to settle a large and long-standing dispute, highlights some of the factors contributing to inadequate enforcement.

would have hastened or magnified commercial benefits flowing from a favorable panel decision?

- Would greater WTO Secretariat resources -- for panel support, translation, etc. -- have been beneficial to the affected U.S. industries? Would affected U.S. parties have been better off if the Secretariat's role were much more circumscribed, and a more judicial model (judges with law clerks) observed?

2. Non-WTO Cases

- What are sensible criteria for instances in which the U.S. Government should be willing to breach WTO commitments in response to an act, policy or practice which itself is not covered by WTO rules? Has a case of this nature emerged so far during the WTO's lifetime?

- If Section 301 as currently constituted is not effective as a tool for addressing non-WTO issues and/or encouraging rapid compliance with WTO rulings, how can it be revived or supplemented?

- Is the U.S. Government following its stated policy for "mixed" cases (involving some WTO issues and other issues clearly outside the scope of WTO rules), which calls for USTR to proceed expeditiously with respect to non-WTO issues even if the WTO issues are to be presented to a dispute settlement panel? If not, why not, and what are the negative consequences?

IV. Enforcement Cases Against the United States

A distinct but important aspect of "getting what we bargained for" is ensuring that obligations undertaken by the United States are not improperly expanded through dispute settlement cases initiated by trading partners. Like other countries, the United States must live up to the commitments it has undertaken, but it is likewise essential that the negotiated limits on U.S. commitments be respected. History demonstrates that this is not something the United States (or U.S. industries) can take for granted.

A table of WTO actions brought against the United States to date follows. As the table demonstrates, the United States has been active in the system not only as a complainant but also as a defendant.

WTO CASES: UNITED STATES AS DEFENDANT

I. Cases Reaching Panel Decision	Complainant	Agreement(s) Cited	Resolution
United States – Standards for reformulated and conventional gasoline	Venezuela, Brazil	GATT, TBT	Panel decision in favor of Venezuela and Brazil 1/17/96; upheld by Appellate Body 4/22/96.
United States – Restrictions on imports of underwear	Costa Rica	GATT, ATC	Panel decision in favor of Costa Rica 11/8/96; upheld by Appellate Body 2/10/97.
United States – Measures affecting imports of woven wool shirts and blouses	India	ATC	Panel decision in favor of India 1/6/97; upheld by Appellate Body 4/25/97.
United States – Import prohibition of certain shrimp and shrimp products	India, Pakistan, Malaysia, Thailand and the Philippines	GATT, TBT	Panel decision in favor of complainants 4/6/98.
II. Settled Cases			
United States – Import duties on automobiles from Japan under section 301 and 304 of the trade act of 1974	Japan	GATT	Settlement notified 7/19/95.
United States – Imports of women's and girl's wool coats	India	ATC	India withdrew complaint on 4/25/96.
United States – The Cuban Liberty and Democratic Solidarity Act	EU	GATT, GATS	Complainant requested panel suspend its work on 4/25/97.
United States – Antidumping duties on color television receivers	Korea	AD	Korea withdrew request 1/5/98.
United States – Tariff increases on EC products	EU	GATT, DSU	United States withdrew measure 7/15/96; EU dropped claim.
United States – Antidumping investigation regarding imports of fresh or chilled tomatoes from Mexico	Mexico	GATT, AD	U.S. Department of Commerce official releases indicate that this case has been settled as of 10/96.

III. Pending Cases			
United States – Antidumping measures of imports of solid urea from the former German Democratic Republic	EU	AD	Pending consultations
United States – Broom corn brooms	Colombia	GATT, Safeguards	Pending consultations
United States – Textile and apparel products	EU	ATC, Rules of Origin, GATT, TBT	Pending consultations
United States – Government procurement (Mass. Law against business with Burma)	EU	GPA	Pending consultations
United States – Antidumping duties on color television receivers	Korea	AD	Pending consultations
United States – Countervailing duty investigation of imports of salmon	Chile	GATT	Pending consultations
United States – Antidumping duty on dynamic random access memory semiconductors of one megabyte or above	Korea	AD	Active panel
United States – Import prohibition of certain shrimp and shrimp products	Philippines	GATT, TBT	Pending consultations
United States – Imports of poultry products	EU	GATT, SPS, TBT	Pending consultations
United States – Tariff rate quota for imports of groundnuts	Argentina	GATT, Ag., Rules of Origin, Import Licensing	Pending consultations
United States – Tax treatment for "foreign sales corporations"	EU	GATT, SCM	Pending consultations

As shown by this table and the pre-WTO history of GATT dispute proceedings against the United States, a broad array of U.S. statutory and regulatory measures has been and likely will continue to be subject to challenge in Geneva. This makes effective U.S. use of the WTO dispute settlement system as a defendant a matter of great national importance. As a general matter, LICIT believes that the United States has already brought its trade policies and other

relevant policies into line with the WTO agreements, and that any panel decision to the contrary must be rigorously scrutinized to ensure that panel is not improperly expanding on commitments voluntarily undertaken by the United States. A key LICIT recommendation in this regard is that Congress adopt, and the President sign, legislation establishing a WTO Dispute Settlement Review Commission composed of judges who will review in a careful and public manner all panel decisions finding the United States in violation of WTO rules.

One area in which challenges against the United States have tended to cluster is environmental regulations that have some incidental impact on trade. In the early years of the WTO, these cases have been quite prominent, and the defense of the challenged U.S. measures raises important issues considered at length in other studies.

A second area in which the potential for improper expansion of U.S. obligations is especially troubling involves the U.S. unfair trade (antidumping and countervailing duty, or AD/CVD) laws. In pre-WTO dispute settlement under the GATT 1947, panels frequently were asked to and did rule against the United States in AD/CVD cases, announcing constraints on the use of these trade remedies which neither the United States nor any other country had actually accepted under the relevant agreements. Several of these panel reports were blocked by the United States, as allowed by GATT dispute settlement rules at the time. With the onset of "binding" dispute settlement under the WTO, however, the prospect of improper panel rulings in this area is much more troublesome.

The problem should be ameliorated to some extent by the inclusion, in Article 17 of the WTO Antidumping Agreement, of language obligating panels to defer to reasonable determinations by national authorities both on factual issues and on interpretation of the WTO texts. In the Uruguay Round package, this standard of review was implicitly (but not explicitly) extended to cover panel reviews of countervailing duty determinations as well. One important "housekeeping" item on the U.S. trade agenda should be to make this broader coverage explicit.

In addition, special provisions in the Uruguay Round Agreements Act relating to U.S. implementation of adverse panel decisions in this area must be faithfully applied. Implementation of panel decisions recommending USITC or Commerce Department actions that are inconsistent with U.S. law, or with the sound enforcement of U.S. law, must be firmly rejected (in favor, if necessary, of compensation to or suspension of concessions by the relevant trading partner).

The recent NAFTA Chapter 20 panel case involving a U.S. safeguard measure on corn brooms imported from Mexico (*see* Section III.B above), while not an AD/CVD case, is somewhat ominous in this regard. There, the panel held that the safeguard measure violated the NAFTA because the USITC had not adequately "explained" its injury finding.

V. U.S. Government Enforcement Architecture

A. Principal Federal Agencies and Staffing

1. Office of the U.S. Trade Representative

USTR is the primary U.S. government agency responsible for trade policy. USTR negotiates trade agreements and chairs interagency committees responsible for formulating U.S. policy on trade-related matters.

USTR is also charged with the enforcement of trade agreements, including the litigation of disputes under the WTO and other trade agreements. In January 1996, USTR established an Enforcement and Monitoring Unit whose mission is to ensure that other nations live up to their obligations under trade agreements with the United States. According to public statements by USTR, the Unit gives priority to promoting high dollar, high volume U.S. exports and high growth industries, reducing barriers which affect job creation and existing jobs (including high wage, high skill jobs), barriers that are widespread and recurring, especially those that affect the largest and fastest growing markets in the world, and keeping U.S. small and medium-sized businesses competitive and expanding in the global marketplace.

Monitoring compliance with trade agreements is one of the Unit's major tasks. Accordingly, the Unit is responsible for developing and maintaining a comprehensive database and tracking system, preparing the *NTE* and the Annual Report on the President's Trade Agreements Program, and identifying foreign government practices for U.S. enforcement actions (*i.e.*, coordination of the "Super 301" and "Special 301" processes, described below).

2. U.S. Department of Commerce

In July 1996, Commerce established a Trade Compliance Center (TCC). The TCC has a core staff of approximately 20 professionals. Its stated goal is to investigate and evaluate foreign compliance with multilateral and bilateral trade agreements to ensure that U.S. workers and companies receive the full benefit of these agreements. The TCC's responsibilities include the maintenance of a trade agreements database and the generation of analysis on foreign compliance with trade agreements. The TCC's duties also involve responding to inquiries concerning trade agreements and informing U.S. firms of opportunities made available by trade agreements.

In February 1998, Secretary Daley unveiled the TCC's trade agreements database. The newly available database provides users with the texts of approximately 200 agreements, accessible on the internet.[29] Secretary Daley also announced the establishment of a new public-private partnership whose goal is to improve the flow of market access and trade agreement

[29] "Commerce, USTR Boost Trade Monitoring Efforts," *Washington Trade Daily* at 3-4 (February 16, 1998). The contact number for the TCC is (202) 482-5228, and the TCC database can be found at http//www.mac.doc.gov. On February 12, 1998, Patrick A. Mulloy was appointed Assistant Secretary for Market Access and Compliance.

complaints to Commerce. The new partnership enables private industry, trade associations, and Commerce's District Export Councils to each designate a "compliance coordinator," who will work with Commerce to gather relevant complaints from their respective memberships and provide such complaints to the TCC for possible action.[30]

Commerce has also established a subsidies enforcement office, which is responsible for monitoring compliance with the WTO Subsidies Agreement. Activities of this office include publicizing subsidy notifications posted by WTO Members, counseling U.S. industries on subsidy-related disputes, and maintaining a library of subsidy-related information for use by the U.S. trading public.[31]

3. Staffing and Resources at USTR and Commerce

Despite its substantial enforcement responsibilities (having initiated 75 enforcement actions since mid-1996)[32] and defensive caseload (*see* Section IV), USTR has only 21 lawyers, two of whom do not work in enforcement. Given the explosive growth in litigation, this represents quite a modest increase over the 14 lawyers in the agency at the end of the Uruguay Round. Fortunately, USTR was authorized to hire seven new professionals in FY 1998 to work on enforcement, and LICIT is pleased to note that USTR is using this new authority. This budget increase is a small step toward remedying years of inadequate support for trade agreement enforcement. LICIT hopes that, among other benefits, this increase will enhance USTR's ability to bring greater transparency and public accountability to the process of litigating international trade disputes.[33]

Commerce likewise has limited enforcement resources. In 1996, the TCC was allocated $350,000 to hire 12 people and build a computer program. Then-Secretary Kantor committed 25 people, in total, to staff the TCC (staffing is currently below 25). Beyond these allocations, the TCC is funded from existing budgeted resources.[34] For fiscal 1997, $2.5 million of Commerce's budget was earmarked for the TCC. In fiscal 1998, that figure is set to rise to $3.0 million.

These increases matter. The pace at which new trade agreements come on-stream is so great that the government is having trouble keeping track of them, much less fully monitoring

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30 *Id.*

31 The Commerce Department official currently responsible for this office is Carole Showers, who can be reached at 202/482-3217.

32 "Commerce, USTR Boost Trade Monitoring Efforts," *Washington Trade Daily* at 3-4 (February 16, 1998). Statement by USTR Charlene Barshefsky.

33 An "earmark" provision in the FY 1998 Commerce/State/Justice appropriations bill allocates an additional $1 million to the USTR budget, to be used exclusively for dealing with WTO complaints lodged *against* the United States.

34 Srodes, James "Trade Cops," *World Trade* at 31 (March 1997).

and enforcing them.[35] The increasing complexity of foreign trade barriers is also an important factor, as foreign governments can staff trade consultations and dispute proceedings with a large delegation of officials who know everything there is to know about the opaque regulatory schemes that are often raised in the United States' complaints. The United States, whose small cadre of government lawyers must prosecute all of these complaints, could find itself overwhelmed -- especially given the lack of formal procedures for utilizing the expertise of affected U.S. private sector interests.

A "regional" analysis shows another dimension of the resource problem. The United States and Japan have some 45 bilateral trade agreements in force, yet as a result of budget cuts, staffing at the USTR's Office of Japan is down to five, and staffing at its Department of Commerce counterpart is down to seven. Although, in both agencies, there are non-country desk personnel who help out on enforcement issues, it should come as no surprise that many U.S.-Japan bilateral agreements have not been effectively enforced. Similarly, since 1993, USTR has negotiated some 13 trade agreements with China, and the United States is involved in complex negotiations regarding China's proposed accession to the WTO. Nonetheless, USTR and the Department of Commerce each have only four people committed full-time to deal with China-related issues (including Hong Kong and Taiwan). USTR has also negotiated 12 trade agreements with Korea since 1993, addressing market access in such key sectors as automobiles, telecommunications and agricultural products. Despite this, Commerce's Office of Korea and Southeast Asia has only one person devoted full time to Korea, while in USTR's Office of Asia and the Pacific, Korean issues must compete for the time of seven people who are responsible for the entire region. As indicated by Korea's failure to abide by the auto trade agreement, these agreements require steady monitoring.

4. Interagency Coordination

Given the impact of trade policy decisions, many government agencies are involved in the decision-making and enforcement process. Interagency coordinating mechanisms have been developed to resolve conflicting views and interests with the goal of creating a balanced and consistent national trade policy.

The USTR, along with the Secretaries of Commerce, State, Treasury, Agriculture, and Labor and others as appropriate, advises the President on carrying out functions under the trade laws. Much of the work is handled by the Trade Policy Review Group (TPRG), which is chaired by USTR and staffed at the assistant secretary level, and by the Trade Policy Staff Committee (TPSC), whose members are drawn from the office director level.

The National Economic Council (NEC) provides additional interagency coordination. Chaired by the President, its members include the Vice President, the Secretaries of State, Treasury, Agriculture, Commerce, Labor, Housing and Urban Development, Transportation, and Energy, Administrator of the EPA, Director of OMB, USTR, Chairman of the Council of

[35] During the research for this report, officials at USTR and the Department of Commerce described differing estimates of the number of outstanding U.S. trade agreements.

Economic Advisors, National Security Advisor, and the Assistants to the President for Economic Policy, Domestic Policy and Science and Technology Policy.

B. Statutory Mechanisms for Identifying Violations and Enforcement Priorities

Identifying violations is a key responsibility of the Federal agencies charged with the enforcement of trade agreements. Several mechanisms -- some new, some longstanding -- have been established to identify foreign government violations. In some cases, the U.S. Government initiates identification and with others, private industry initiates identification. The distinction can be important because U.S. industries that file complaints may be subject to reprisals in the foreign markets of concern. Self-initiation by the government can limit this exposure.

1. National Trade Estimate (NTE)

USTR is required by statute to submit the *NTE*, a report on significant foreign trade barriers, to the President, Senate Finance Committee, and appropriate committees in the House of Representatives by March 31 each year.[36] USTR has characterized the *NTE* as a "vital source of information," which "plays a crucial role in the President's trade policy."[37] The *NTE* is an inventory of the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. persons, and the protection of intellectual property rights.

The *NTE* covers significant barriers to U.S. exports, regardless of their consistency with international trading rules. The report divides foreign barriers into several categories including: (1) import policies, (2) standards, (3) government procurement, (4) export subsidies, (5) lack of intellectual property protection, (6) services barriers, (7) investment barriers, and (8) government-tolerated anticompetitive practices with trade effects. The publication of the *NTE* also triggers deadlines for self-initiation by USTR under the "Special 301" and "Super 301" mechanisms (see below). Also, wherever possible, the *NTE* includes estimates of impact on U.S. exports. *The NTE, however, does not provide legal analysis or conclusions as to which listed barriers or practices violate trade agreements.*

2. Trade Policy Agenda and Annual Report

The President is also required to submit a Trade Policy Agenda and Annual Report to Congress each calendar year, no later than March 1.[38] The Agenda, prepared by USTR, includes a statement of objectives and priorities of the United States for the year, actions to be taken during the year to achieve the Agenda's stated objectives, and progress made during the previous

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[36] Section 181 of the Trade Act of 1974, as amended (19 USC 2241) by section 303 of the Trade and Tariff Act of 1984; section 1304 of the Omnibus Trade and Competitiveness Act of 1988; and section 311 of the Uruguay Round Trade Agreements Act (19 USC 2241). The *NTE* is the product of an idea put forward by former U.S. Senate Finance Committee Chairman Lloyd Bentsen (D-TX).

[37] *USTR Releases 1997 Inventory of Foreign Trade Barriers*, Office of the United States Trade Representative (March 31, 1997).

[38] Section 163 of the Trade Act of 1974, as amended (19 USC 2213).

year in achieving applicable objectives. Before submitting the Agenda for any year, the President must seek advice from the trade policy advisory committees established under 19 USC 2155 and the appropriate committees of the Congress.

The Annual Report details the operation of the trade agreements program as well as the provision of import relief and adjustment assistance to workers and firms during the previous calendar year. The Annual Report also features the national trade policy agenda for the calendar year in which it is submitted. In addition, the Annual Report includes information regarding new trade negotiations, changes in trade agreements and nontariff barriers, and measures taken to seek removal of significant foreign import restrictions.

3. Super 301

Since the 1980s, USTR has been required by statute and then by Executive Order to review -- within six months of its submission of the *NTE* (*i.e.*, by September 30) -- U.S. trade expansion priorities and to identify "priority foreign country practices" whose elimination is "likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent." [39] USTR reports the results of its review to the House Ways & Means Committee and the Senate Finance Committee, and publishes these results in the *Federal Register*. Within 21 days of filing this report, USTR is required to initiate Section 301 investigations on all priority foreign country practices identified.

Super 301 has expired but can be renewed by statute or Executive Order.

4. Special 301

Under Special 301, USTR must identify -- within 30 days of submitting the *NTE* to Congress -- those foreign countries that (1) deny adequate and effective protection of intellectual property rights or fair and equitable market access to U.S. persons that rely upon intellectual property protection; and (2) those countries USTR deems to be "priority foreign countries," (*i.e.*, those countries whose practices have the greatest adverse impact on relevant U.S. products and who are not entering into good faith negotiations).[40] USTR may identify a country even though that country is in compliance with its specific obligations under the TRIPS Agreement.

USTR is required within 30 days to initiate a Section 301 investigation of all countries identified, unless USTR determines that an investigation would be harmful to U.S. interests. As a matter of administrative practice, USTR also maintains a "priority watch list" of countries whose practices meet some but not all of the criteria for priority foreign country identification, as well as a "watch list" and a "Special Mention Category."

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[39] Section 310 of the Trade Act of 1974, as amended by section 1302 of the Omnibus Trade and Competitiveness Act of 1988, extended to 1994 and 1995 by Executive Order 12901 (March 3, 1994), and extended to 1996 and 1997 by Executive Order 12973 (September 27, 1995).

[40] Section 182 of the Trade Act of 1974, added by section 1303 of the Omnibus Trade and Competitiveness Act of 1988 (19 USC 2242).

5. Telecommunications Trade Act (§ 1377)

USTR is required by law to review the operation and effectiveness of existing U.S. telecommunications trade agreements by March 31 of each year.[41] In its review, USTR is required to determine whether any act, policy or practice of a foreign country is not in compliance with a telecommunications trade agreement or otherwise denies, within the context of such an agreement, mutually advantageous market opportunities to the telecommunications products and services of the U.S. firms. The GATS Agreement on Basic Telecommunications is an important new agreement has been added to the list of agreements covered by § 1377.

6. Government Procurement Agreements

Title VII of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2515), until its expiration in 1996, required USTR to identify each year those foreign countries that were signatories to the WTO Government Procurement Agreement (GPA) and were violating it. Criteria for identifying a country included a significant and persistent pattern or practice of discrimination in government procurement against U.S. goods and services, identifiable harm to U.S. businesses, and significant purchases by the U.S. Government of products or services from that country. The statute also covered non-signatories that failed to apply transparent and competitive procurement procedures or maintain effective prohibitions on bribery, and whose practices resulted in identifiable harm to U.S. businesses.

Title VII was used mostly in the telecommunications sector. In February 1992, USTR identified the EC on account of its "Utility Directive," which required EC utilities to favor domestic goods and services in their procurement over those from the United States and other foreign countries. In May 1993, the U.S. Government imposed sanctions against the EU over discrimination in telecommunications procurement, extending these sanctions in 1995 to new EU members Austria, Finland, and Sweden.[42] Title VII was also used in response to the Government of Japan's telecommunications procurement practices. In July 1994, USTR identified Japan under Title VII; three months later, USTR withdrew threatened sanctions based on a bilateral agreement.

Title VII was also used to identify discriminatory government procurement practices in the power generation equipment and medical technology sectors.

This provision has lapsed, but is being considered for renewal via Executive Order.

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41 Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 USC 3106).

42 Sanctions against Germany were dropped in March 1994 based on a commitment that German telecommunications utilities would not apply the discriminatory provisions of the EC directive to block procurement of U.S. goods and services.

7. Intelligence Gathering and Related Efforts

U.S. trade policy needs to be supported by a global trade intelligence network whose mission is to collect information on trade opportunities and identify trade barriers. The Commerce Department's Foreign Commercial Service (FCS) is an essential component of this network. The FCS has a staff of 1,300 individuals stationed in 78 countries, which represent over 95 percent of the global market for U.S. goods. The FCS provides U.S. exporters with detailed market research covering specific industry sectors, current business trends, and trade leads. In addition, the Department of Commerce, through its Office of Trade Development, provides ammunition for USTR in the conduct of trade negotiations. Its industry specialists work closely with the private sector to identify trade barriers as well as opportunities by product or service, sector, and market.

The State Department, as the primary provider of foreign affairs information to the U.S. Government, makes use of its worldwide network of embassies and consulates to provide trade policy makers with in-depth analysis on economic and related trends. The Department, through the efforts of its Economic, Business, and Agricultural Affairs Group, also serves as an advocate before foreign governments for U.S. industry operating abroad. The State Department is advised by a private sector Advisory Committee on International Economic Policy.

The U.S. International Trade Commission (USITC) is another important participant in the U.S. Government's efforts to gather trade intelligence. It conducts studies on a wide range of trade-related matters, including any issue requested by the President, Senate Finance Committee, or House Ways and Means Committee. The USITC also maintains an extensive international trade library, which is open to the public. The General Accounting Office (GAO), the investigative arm of Congress, also provides support by conducting audits of U.S. trade programs to evaluate their effectiveness. The GAO recently issued a report identifying the extent to which certain foreign sanitary and phytosanitary measures unfairly restrict U.S. exports and the ability of the U.S. Government to address such measures.

The ability of the government and private sector to collect enforcement-related data is closely related to the specificity of the agreements themselves. Unless the parties agree beforehand regarding what data will form the basis to evaluate progress under an agreement, much energy will be spent arguing over whose data are correct. One factor contributing to the success of the U.S.-Japan Semiconductor agreements was that the agreements fully described the required data and at what point in the chain of production that data should be collected.

C. Private Sector Role

1. Section 301 -- Petitions from Industry

Section 301 of the Trade Act of 1974, as amended, is a very broad grant of authority to the President to take action, notwithstanding any other provision of U.S. law, in response to "unreasonable" and "unjustifiable" foreign government acts, policies and practices that "burden or restrict" U.S. commerce.[43] Under Section 302, any interested person may file a petition with

[43] *See* Sections 301-309 of the Trade Act of 1974, as amended (19 USC 2411-19).

USTR requesting action under Section 301. The petition must set forth the allegations in support of the request. USTR must review these allegations and determine whether to initiate an investigation within 45 days of receiving the request.

The statute requires public notice of determinations and, in the case of decisions to initiate an investigation, publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if requested in a timely fashion.

In deciding whether to initiate, USTR has discretion to determine whether action under Section 301 would be effective in addressing the act, policy, or practice in question. However, USTR has specific time limits within which it must determine whether an act, policy, or practice meets the criteria of Section 301 and what actions it will take if it makes an affirmative determination. Before making its determinations, USTR must provide an opportunity for views to be presented and obtain advice from appropriate private sector advisory committees.

U.S. industries face a difficult choice in determining whether to request Section 301 action in light of the ever-increasing evidentiary threshold created by USTR. Section 301 is often most useful to industries and companies that have no other option than to attack foreign market barriers. Facing a major competitor operating from a protected home market, a U.S. supplier may have to choose between pressing for access and exiting the business. This difficulty is exacerbated by the severe weakening of Section 301 which has resulted from the WTO agreements. (See Section V.E below.)

2. Private Sector Role in "Special," "Super," and Other 301 Offshoots

In each of the "specialized" 301 mechanisms discussed above (for telecom trade barriers, intellectual property barriers, government procurement barriers, etc.), private industry has an important, albeit more limited, role. For example, in the telecommunications sector, sections 1374 and 1375 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3103-04) authorize USTR to designate priority foreign countries whose policies and practices deny market opportunities to U.S. exporters of telecommunications products and services. While there is no formal petition process, USTR relies on industry input in making priority foreign country designations. Section 301 offshoots combine private sector input with government identification and formal deadlines for monitoring -- yielding what is perhaps the ideal method of launching trade proceedings. Some believe that the best example of this has been Super 301, which provides for annual reviews and thereby fosters continuous monitoring of potential market access opportunities.

3. Private Sector Role in Litigating Cases

Generally, USTR finds ways to utilize private sector expertise when litigating WTO cases where the United States is a plaintiff. However, the process for doing so should be recognized and formalized. The Conference Report for the FY 1998 Commerce/State/Justice appropriations bill, urged that USTR:

> *permit participation of non-governmental U.S. persons in the development of U.S. positions and in the preparation for consultations and dispute settlement proceedings, provided that such persons are supportive of the United States Government's position in the proceedings and have a direct interest in the matter in dispute…*[44]

In many cases, the private interests affected by foreign barriers have expertise that government officials -- if only because of their broader responsibilities -- cannot possibly hope to replicate. If the dispute settlement system is to work for the United States, this expertise must be fully brought to bear.

D. The Process for Acting on a Violation

1. Agreements that Have Dispute Settlement Mechanisms

Once an apparent agreement violation is identified under Section 301, USTR is directed to make use of dispute resolution, if available, under the agreement. If the U.S. complaint is upheld, USTR is authorized to use the powers set forth in Section 301 (c) to help encourage compliance with the decision of the dispute resolution entity. The tools available under Section 301(c) provide U.S. officials with added leverage in negotiations on how to implement the panel findings. These tools include the authority to suspend trade concessions and to impose duties or other import restrictions on goods and services of the offending country.

One concern is how quickly international dispute settlement begins and what evidentiary burdens are placed on private sector complainants. As WTO dispute settlement becomes more and more fact-intensive, there appears to be a resulting tendency at USTR to delay launching WTO proceedings and continue pressing petitioners for more facts and evidence while the initial statutory 12 or 18 month period runs. Given the additional time necessary to litigate in Geneva and then gain implementation of a panel ruling, this approach can severely delay effective relief and place an enormous burden on private petitioners.

2. Agreements Without Dispute Settlement Mechanisms

Section 301(a) also requires USTR to act in response to violations of trade agreements which lack formal dispute mechanisms. If USTR fails to take action in the face of a violation, Section 301(a)(2) requires that USTR justify the failure in writing based on specific criteria.

Where there is a violation of a bilateral agreement that lacks dispute resolution procedures, Section 301(a) enables USTR to exercise its Section 301(c) authority to encourage compliance without resort to international dispute resolution procedures. The WTO agreements do not cover all significant trade problems, and many bilateral agreements have been negotiated that reach beyond WTO commitments. Thus, it is possible for countries to violate bilateral trade agreements without violating the WTO agreements. The United States Government has stated that "[N]either Article 23 [of GATT 1994] nor Section 301 requires the United States to use

[44] H.R. Rep. 105-405 (1997).

DSU procedures when the Trade Representative considers that an investigation does not involve a Uruguay Round Agreement."[45] However, the DSU states that when a WTO Member seeks redress of a violation of obligations or nullification of benefits under the WTO agreements, it shall "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding…"[46]

Some U.S. trading partners try to hide behind the WTO agreements, claiming that so long as they keep to their WTO commitments, they are free to violate bilateral trade agreements. The Administration, however, has made a firm commitment to enforce bilateral agreements without regard to potential WTO constraints, as set forth in the Statement of Administrative Action to Uruguay Round Agreements Act:

> *The Administration intends to use Section 301 to pursue vigorously foreign unfair trade barriers that violate U.S. rights or deny benefits to the United States under the Uruguay Round agreements. The Administration equally intends to use Section 301 to pursue foreign unfair trade barriers that are not covered by those agreements. This is what Congress intended…when, on the one hand, it made a more effective and expeditious dispute settlement mechanism the first principal U.S. negotiating objective and, on the other hand, the Congress made major modifications to strengthen Section 301 for use against both those practices falling within and outside trade agreements to which the United States is a party.*[47]
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> * * *
>
> *Neither Section 301 nor the DSU will require the Trade Representative to invoke DSU dispute settlement procedures if the Trade Representative does not consider that a matter involves Uruguay Round agreement. Section 301 remains fully available to address unfair practices that do not violate U.S. rights or deny U.S. benefits under the Uruguay Round agreements and, as in the past, such investigations will not involve recourse to multilateral dispute settlement procedures.*[48]

The Administration also pledged that it would respond to violations of bilateral trade agreements, even if threatened with counter-retaliation at the WTO:

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45 Uruguay Round Agreements Act, Statement of Administrative Action (URAA), H. Rep. No. 103-316 at 1018 (1994).

46 Article 23, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

47 URAA. at 1033.

48 *Id.* at 1035.

> *Just as the United States may now choose to take Section 301 actions that are not GATT-authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking actions in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone-treated beef.*[49]

E. Section 301 – Powerful Tool or Toothless?

Section 301 has long been the U.S. Government's principal tool to encourage compliance with trade agreements and to retaliate against unfair trade practices. Unfortunately, while Section 301 remains on the books as valid law, it is plagued with difficulties which call into question its continued usefulness.

Although Section 301 authorizes USTR to suspend trade agreements obligations, impose duties, and employ other measures in response to unfair trade practices, the WTO agreements severely limit the U.S. Government's practical ability to impose these sanctions. Administration commitments to the contrary notwithstanding, WTO Members have committed not to withdraw concessions made under the WTO agreements without permission from the WTO itself. Since most sanctions available under Section 301 would involve the suspension of concessions made under the WTO agreements, absent resort to WTO dispute settlement mechanisms, the use of Section 301 leaves the United States open to counter-retaliation. This dilemma has significantly weakened the U.S. Government's willingness to enforce certain trade agreements -- in particular, bilateral trade agreements whose commitments go beyond those under the WTO.

The Section 301 process as currently implemented can place an unrealistic burden on petitioners, making access to it difficult for all but those with very substantial resources:

- The U.S. Government places an exceptionally high burden of production of evidence upon industries before it will take up a case. The resulting investigative and legal expenses discourage the bringing of many legitimate cases.

- Section 301 is the exclusive means by which the private sector may formally petition USTR to bring a case to the WTO. Yet, USTR may take up to a year before it decides to bring a case to the WTO. The WTO, in turn, may take another year to 15 months to render its decision, not to mention up to 15 months to get the decision implemented, after a four month period for an appeal. Meanwhile, U.S. industry still suffers from the practices that prompted the petition.

Finally, for industries with significant exposure in restricted foreign markets – *i.e.*, industries with sunk investment – bringing a Section 301 petition is difficult because the public nature of the process may subject the industry with political or economic costs in the foreign markets.

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[49] *Id.* at 1036.

In the past, Section 301 has been effective tool in helping to ensure the enforcement of U.S. trade agreements. Although its current effectiveness is in doubt, Section 301 could be significantly strengthened by expanding the President's authority to employ measures in response to unfair trade practices, such as fines, that are not prohibited by the WTO Agreements. It may also be appropriate to reconsider the current standards by which some practices are designated "unjustifiable" and therefore subject to mandatory action by USTR and other practices are designated "unreasonable" and thus subject to discretionary action by USTR.

F. Comparison -- Foreign Government Mechanisms for Enforcing Trade Agreements

1. Canada

Canada's Department of Foreign Affairs and International Trade (DFAIT) produces an annual publication entitled, "Canada's International Market Access Priorities." Similar in many respects to the NTE, this publication lays out Canadian priorities for enhancing access to vital markets during the coming year. The report covers key markets such as the United States, Japan, Korea, the EU, Hong Kong, and India, and outlines Canadian market access-related activities regarding goods, services, and investment. For each market, the report includes a brief summary of trade relationships, market access conditions, and examples of specific trade barriers. The Canadian Government has also established an International Trade Advisory Committee and Sectoral Advisory Groups on International Trade through which it consults with the private sector on market access issues. In addition, the Canadian Government has set up a confidential e-mail and fax hotline where individuals, companies, or organizations can provide DFAIT with specific information regarding the foreign barriers they face.

2. Japan

The Japanese Ministry of International Trade and Industry (MITI) releases an annual publication, modeled after the NTE, entitled "Report on the WTO Consistency of Trade Policies by Major Trading Partners." This report, among other things, discusses the trade practices and laws of Japan's major trading partners, examining their conformity with international agreements. One of the report's stated goals is to "identify, analyze, and propose solutions to problems in trade policies and measures of Japan's ten largest trading partners using a 'rule-based' approach."[50]

3. European Union

The centerpiece of the European Union's trade compliance program is its Trade Barriers Regulation (TBR), which came into effect in January 1995 (succeeding the "New Commercial Policy Instrument"). The TBR furnishes EU companies, industries, and Member States with a mechanism for responding to trade barriers impeding access to EU or third country markets.

[50] *Report on the WTO Consistency of Trade Policies by Major Trading Partners*, MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY at 2 (1997).

Under the TBR, affected parties may petition the Commission to seek enforcement of EU rights under international trade agreements.

The TBR targets a wide range of practices, including "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action [on the part of the European Community]." [51] Article 10 of the TBR sets forth a nonexhaustive list of factors relevant to the Commission's assessment of what constitutes injury under the TBR. The TBR encompasses "nonviolations," which, while not strictly illegal, are nevertheless harmful to trade. The TBR, however, does not reach acts or measures covered by other EU policy rules.

TBR procedures work as follows: (1) A complaint is lodged by an affected party (an industry, enterprise, or Member State); (2) the Commission rules on the admissibility of the complaint within 45 days; (3) the case is then either (a) terminated for lack of merit, (b) suspended due to satisfactory action taken by the third country, (c) suspended to allow for negotiation of an agreement recommended by the Commission, or (d) pursued further by the initiation of international dispute settlement procedures. Although the TBR widens the range of parties able to initiate action against trade barriers, it applies generally to multilateral agreements, not bilateral agreements.

Despite rigorous promotion by the Commission, European companies have made limited use of the TBR since its inception. The TBR is complemented by the EU's "Market Access Strategy," launched in 1996. [52] The Strategy established new coordinating procedures between the departments of the Commission, the Member States, and the private sector, as well as procedures to ensure systematic follow-up to trade complaints. Another component is a "Market Access Database," which is widely available on the Internet and lists trade barriers affecting EU exports by sector and country. [53] The database provides information regarding customs duties, taxes, import licensing requirements, and other issues of concern to exporters, and enables EU businesses and authorities to exchange information confidentially on-line. Currently, the database identifies over 800 specific barriers, up from 350 when it was launched. An additional 400 barriers have been identified and are to be included upon further verification. [54] In September 1997, the database reportedly received 100,000 hits a day, up from 30,000 a day in December 1996. The EU recently launched a new website within the database devoted solely to services. [55]

The European Commission also publishes a "Report on United States Barriers to Trade and Investment." This annual review of U.S. trade practices largely mirrors the *NTE*.

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51 *What is the Community's Trade Barriers Regulation?*, EUROPEAN COMMISSION (1996).

52 "Commission Surveys Market Access Strategy," *European Report* at 4 (November 7, 1997).

53 *Id.*

54 *Id.*

55 *Id*

Glossary of WTO Agreements

(see table at pp. 9-10)

Ag:	WTO Agreement on Agriculture
Antidumping:	WTO Agreement on Implementation of Article VI
GATS:	General Agreement on Trade in Services
GATT:	General Agreement on Trade and Tariffs
Import Licensing:	WTO Agreement on Import Licensing
SCM:	WTO Agreement on Subsidies and Countervailing Measures
SPS:	WTO Agreement on Sanitary and Phytosanitary Measures
TBT:	WTO Agreement on Technical Barriers to Trade
Textiles:	WTO Agreement on Clothing and Textiles
TRIMs:	WTO Agreement on Trade-Related Investment Measures
TRIPs:	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights