

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

by Alan O. Sykes

**It is proper to use Section 301 of the 1974 Trade Act to enforce compliance with commercial treaties by foreign countries. Section 301 permits the US to impose sanctions for unfair trade practices, and has been successfully used in the past. The section could be used for practices that don't legally violate treaties, such as protection, use of loopholes or trade preferences.**

© COPYRIGHT Georgetown University Law Center 1992

Section 301 of the Trade Act of 1974 allows the United States to threaten, and if necessary to impose, trade sanctions against countries that engage in certain "unfair" international trade practices. This Article defends the use of Section 301 to induce other nations to fulfill their legal obligations to the United States under international trade agreements that lack effective third-party dispute resolution. It also develops a limited argument for the use of Section 301 against practices that do not violate any international agreement, principally when a foreign country increases its level of protection, when it takes inappropriate advantage of loopholes or ambiguities in existing trade agreements, or when (as with many developing countries) it maintains a high level of protection relative to the United States yet is the beneficiary of important trade preferences. Finally, the Article reviews the history of Section 301 cases to date and suggests tentatively that the statute has proven reasonably successful as promoting the national economic interest.

In the years since World War II, tariffs and other barriers to international commerce declined dramatically pursuant to the General Agreement on Tariffs and Trade (GATT)(1) and other international compacts.(2) Yet substantial barriers to trade remain that are outside the coverage of existing international agreements or reflect imperfect compliance with those agreements. Exporters can gain much from the reduction of these remaining barriers and, therefore, pressure their political representatives to pursue market-opening initiatives. For the most part, these initiatives involve proposals for additional bilateral or multilateral concessions in a variety of sectors, many as part of the continuing Uruguay Round of GATT negotiations.

Offers of reciprocal concessions, however, are not the only strategy for opening foreign markets. Instead, foreign governments may be threatened with sanctions if they maintain existing trade barriers. The United States employs these threat strategies to a considerably greater extent than any other nation, usually pursuant to Sections 301-310 of the Trade Act of 1974(3) (Section 301). This statute authorizes the United States Trade Representatives (USTR) to challenge a foreign

government practice that infringes upon U.S. rights under a trade agreement(4) or is otherwise "unjustifiable,"(5) "unreasonable or discriminatory,"(6) and "burdens or restricts United States commerce."(7) Initially, the USTR must negotiate for the elimination of the practice at issue, but it has broad authority to retaliate when negotiations fail. Further, the statute does not provide the USTR with the authority to make concessions in return for the elimination of an objectionable practice. Thus, when the United States proceeds under Section 301, it has made an important strategic decision-- a decision to utilize the "stick" rather than the "carrot."(8)

On its face, Section 301 can encompass virtually any foreign government practice unilaterally deemed objectionable by the United States, whether relating to U.S. imports, U.S. exports, U.S. investments, or any other matter of commercial significance. Since its inception, however, the overwhelming majority of Section 301 actions have involved practices impeding U.S. exports. A handful of other cases have involved impediments to U.S. investment abroad, the refusal of foreign governments to afford intellectual property protection to U.S. firms, and foreign practices that restrict the ability of U.S. firms to purchase natural resources or other raw materials from abroad. Section 301 has been invoked infrequently with the objective of protecting U.S. firms from import competition.(9) In this respect, Section 301 is sharply distinguishable from other U.S. trade statutes such as the tariff schedules,(10) the antidumping(11) and countervailing duty laws,(12) and the escape clause.(13) These other statutes are intrinsically protectionist and are ordinarily detrimental to the national economic interest.(14) By contrast, successful actions under Section 301 almost invariably benefit the U.S. economy, other things being equal.

The domestic benefits of Section 301, however, afford little comfort to officials in other nations, who often react with indignity to the initiation of Section 301 proceedings and maintain that the very existence of Section 301 is objectionable.(15) Participants in the Uruguay Round of GATT negotiations have urged the United States to abolish Section 301 altogether.(16) The Director-General of GATT recently characterized Section 301 as "a good example of what our world could come to" if the present

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

Uruguay Round of GATT talks fails, arguing that unilateral action under Section 301 undermines the multilateralism of the GATT system.<sup>(17)</sup> Academic commentary is often equally critical.<sup>(18)</sup>

Although international political opposition to Section 301 is readily understandable, the mere fact that Section 301 elicits criticism abroad is not enough to establish its folly. One might argue, for example, that if Section 301 actions regularly succeed at opening foreign markets, all nations benefit--the United States and sometimes other exporting nations gain the opportunity to make profitable sales, while importing nations avoid the inefficiencies that would otherwise likely attend their protectionist policies. Perhaps a certain amount of political discomfort should be tolerated if the result is more open trading system and an improved allocation of resources.

An obvious counterargument is that whatever the success of the "stick" at reducing protection abroad, it nevertheless seems inferior to the "carrots." If the United States obtains access to foreign markets through reciprocal concessions rather than threats of retaliation, the economic gains are usually greater, because protection diminishes in the United States as well. Further, the "carrot" avoids the political tensions accompanying threats to use the "stick" and thus contributes generally to international harmony. Therefore, the argument might run, the United States should eschew efforts to open foreign markets through unilateral threats of retaliation, even if those threats succeed with some regularity, and rely exclusively upon reciprocal concessions.

Both of these positions, however, are too simplistic. Although reciprocal trade agreements have considerable virtue, they are only useful if the parties adhere to them. And, to provide an incentive for compliance, some sanction must exist for non-compliance. When concern for reputation is not enough to induce nations to honor their commitments and when trade agreements do not provide effective third-party dispute resolution with the power to coerce compliance, a powerful agreement can be made for unilateral or "self-help" measures to penalize a breach of promise.

In another recent article, I discussed the 1988 "mandatory retaliation" amendments to Section 301 (Section 301(a)), which apply when the United States asserts that a foreign government practice violates an existing trade agreement.<sup>(19)</sup> I argued that these amendments, on their face, seem a sensible strategic adaptation to the imperfections of dispute resolution under GATT. Section I for of this Article refines and elaborates the theoretical argument for unilateral sanctions there, focusing on four

key concerns: the role of renegotiation in lieu of sanction; the strategic choice of measured retaliation in preference to more substantial sanctions; the importance of disabling opportunism under the statute; and the likelihood that large nations such as the United States are better able to devise effective unilateral sanctions than small nations, arguably creating a considerable asymmetry in the ability to utilize threats. It concludes that unilateral sanctions by large nations in response to a breach of agreement can nevertheless be in the joint interest of parties to such agreements, large and small, and that the key features of Section 301(a) provide valuable leverage to the United States while disabling the most obvious forms of opportunism. One cannot rule out the possibility, however, that threats pursuant to Section 301(a) will fail to induce compliance with trade agreements and instead precipitate trade wars and increased protectionism on the part of all parties. Thus, the value of unilateral sanctions policy under Section 301(a) is unilateral an empirical issue.

Section II addresses a set of issues not considered at all in the earlier article--whether it is ever desirable to threaten sanctions when the foreign government behavior at issue is perfectly legal under existing international agreements and thus cannot be characterized as a breach of promise.<sup>(20)</sup> Even here, the "stick" may provide a useful alternative to the "carrot," under certain limited conditions. The clearest case arises when a foreign government increases the level of protection in its home market. Another important class of cases arises when the terms of a trade agreement are vague to the point of being unenforceable and a signatory takes advantage of the situation to pursue policies deviating from a mutually advantageous interpretation of the agreement. A third class of cases involves developing nations will have a high average level of protection and already receive substantial trade preferences on their to developed nations. This list is not necessarily exhaustible--indeed, it is difficult to rule out conclusively the utility of the "stick" in any case when the chances for success are high and political constraints make the "carrot" infeasible. It is possible, however, to identify large classes of cases in which threats are particularly unlikely to succeed and Section II develops some important examples.

Section II concludes with a review of the statutory provisions applicable to practice that are legal under existing trade agreements--Section 301(a). In contrast to Section 301(a), the statute here provides virtually no guidance to the USTR regarding the appropriate circumstances for the use of threats. As a consequence, the danger arises that the statute will be used opportunistically or imprudently, and an argument can be made for amending it to disable such uses. Without such

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

amendment, the value of Section 301(b) as an instrument of trade policy depends heavily upon the ways in which the USTR exercises its relatively unfettered discretion and upon the extent to which the mere existence of unfettered discretion may damage the reputation of the United States by raising fears abroad of opportunism.

In the end, however, the theoretical analysis simply confirms that threat strategies can serve a constructive purpose in various kinds of trade disputes and also confirms the potential for threats to backfire and precipitate greater protectionism. The case for a statute such as Section 301, therefore, must ultimately rest on empiricism. Section III develops some initial, tentative evidence about the consequences of Section 301 in practice. Drawing upon a compilation in the Appendix of every Section 301 investigation to date, Section III argues that threats pursuant to Section 301 have been quite successful at securing concessions by foreign governments. The actual imposition of sanctions has been infrequent (albeit the sanctions occasionally have been substantial), and for the most part sanctions have eventually been lifted. These conclusions hold equally for cases involving alleged violations of trade agreements and those simply challenging foreign practices as "unfair." Despite the widespread criticism of Section 301,(21) a plausible case can be made that the statute has been a practical success. And, although the empirical discussion by no means precludes the possibility of improving the statute, it does suggest that calls for outright repeal of Section 301 may be misguided.

To be sure, Section 301 may require considerable refinement if the Uruguay Round reaches a successful conclusion. The case for unilateral threat strategies ultimately rests on the existence of important aspects of commercial relations that are outside the scope of international compacts, or that are subject to compacts without effective third-party dispute resolution. The Uruguay Round, if successful, may do much to alleviate both problems, though it assuredly will not solve all of them. The possible implications for Section of a Uruguay Round agreement are discussed briefly at the end of Section I.

### I. Unilateral Sanctions for Breach of Promise in Trade

#### Agreements: An Analysis of Section 301 (A)

Exchange creates value, and contracts facilitate exchange when the parties cannot conclude all aspects of the transaction immediately and simultaneously. But contracts can only serve this function if the parties expect promises to be kept, at least with sufficient probability. It is in the

contracting parties' interest ex ante, therefore, that some means for enforcing the bargain exist ex post.

Lawyers are intimately familiar with one mechanism for the enforcement of contractual promises--the lawsuit, either for specific performance or of damages. An appropriately designed system of contract law enhances the returns to contracting by encouraging parties to perform their part of the contract when performance is economical. Contract law can also provide incentives for parties to take precaution against contingencies that may make performance more costly and to take other measures to increase the gains from trade.

Even for domestic contracts between private actors, however, this system of enforcement has significant drawbacks. It requires the existence of some third party with the authority to resolve matters of controversy and the coercive to enforce its judgments. At a minimum, such third-party enforcement is costly. Further, one or both parties may lack confidence in the third-party decision-maker's ability to resolve conflicts objectively and competently. As a consequence, complete or partial substitutes for third-party dispute resolution evolve in various contexts. The parties may rely upon "self-help" remedies of one sort or another, as with the repossession remedy in certain consumer sales agreements.(22) Alternatively, especially in long-term relationships, the parties may design their contract as best they can to reduce the danger of opportunistic behavior and the associated disputes requiring formal intermediation.(23) In the extreme case, an agreement may not be viable unless each party can induce the other to honor its promises simply by threatening to dissolve the agreement in the event of a breach.(24)

The difficulties with third-party enforcement are compounded when applied to "contracts" among nations. The very existence of national boundaries is evidence of a reluctance to cede sovereign powers to entities outside them. And, although some authority to resolve disputes and to exercise enforcement authority has been vested in entities such as the United Nations,(35) those powers are quite limited and have never extended to the subject of interest here--international trade agreements. As a consequence, appropriate strategies to encourage compliance with these agreements can be valuable.

#### A. The Imperfections of GATT Dispute Resolution and the Limits of

##### Reputational Incentives for Compliance

Neither third-party enforcement mechanisms nor unilateral

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

sanctions policies are logically necessary to induce trading nations to comply with their commitments under international agreements. By violating such commitments, a nation will develop a reputation for unreliability, and thereby, to some extent, discourage other nations from entering future agreements with it. This loss of prospective opportunities for beneficial agreements, in the abstract, could suffice to induce all nations to honor their commitments without any further sanction for breach. In practice, however, nations do accuse each other of violating their commitments--many of the Section 301 cases enumerated in the Appendix, for example, involve precisely such an allegation.(26) It is thus indisputable that reputational concerns alone are not enough to ensure perfect compliance with trade agreements, at least in the view of complaining signatories. Likewise, greater compliance might be secured through the prospect of additional sanctions for non-compliance.

As suggested above, the parties might create additional by devising an impartial, third-party dispute resolution process, empowered to impose punishment for violations of the agreement. Indeed, such a process may well have been by the drafters of GATT. Most allegations of non-compliance under GATT are governed by Article XXIII.(27) When a dispute arise, the disputants are required to consult with each other to determine whether an accommodation can be reached. If these consultation fail to reach an accord, the matter be referred to a "panel," consisting of a group of GATT experts drawn from nations not involved in the dispute. The panel then rules on the complaint's legal merits, at which time the disputants are encouraged to enter further consultations in pursuit of an accord. Failing agreement, the matter is referred to the GATT "Council," consisting of a representative of each GATT signatory wishing to participate. The Council can revisit the issues in the dispute and make its own determination on the merits, or simply "adopt" the panel's report. If any disputant refuses to abide by the Council's determination, Article XXIII authorizes the Council to impose sanctions, consisting of the withdrawal of trade concessions otherwise afforded to the recalcitrant signatory.(28)

Although these procedures on their face might seem to provide a rough equivalent to judicial dispute resolution, in practice they have come to function quite differently. Perhaps most importantly, as GATT practice has ultimately evolved, the Council will not act to make a finding on the merits of a dispute, much less to authorize sanctions, absent a "consensus" that includes the disputants. Thus, the losing disputant can effectively prevent the Council from reaching a finding on the merits.(29) A fortiori, the losing disputant can block any authorization for sanctions,

and, as a result, sanctions have been authorized only once in the history of GATT.(30)

Thus, the GATT system at present relies little upon true third-party dispute resolution. Dispute "panels" exist for the purpose of providing signatories with legal guidance conflicts of interpretation arise, but they have no authority to order compliance with their findings or to invoke sanctions. GATT signatories acting collectively through the Council do have the power to authorize sanctions but do not exercise it, preferring instead to leave the disputants to work out their differences among themselves.(31)

It seems unlikely that the drafters of GATT anticipated this evolution toward deference to consensus. If they had, they probably would not have bothered to include the now superfluous provisions authorizing sanctions. In any case, the absence of true third-party enforcement, and the fact that reputation alone is not a perfect substitute, leaves only one further option to enhance the level of compliance--the threat of unilateral action by aggrieved signatories.

### B. Strategic Analysis of Unilateral Sanctions

Trivially, a threat of unilateral sanctions for breach of agreement, if effective, can induce greater compliance with the bargain ex post to the benefit of the nation issuing the threat. Perhaps less obviously, the evolution of unilateral sanctions policies can promote the mutual interests of parties to trade agreements ex ante: a properly conceived threat of sanctions for violations ex post increase the likelihood of compliance ex ante and thus increase the expected joint gains from entering the agreement. As a consequence, parties will conclude more mutually beneficial agreements.

The proposition that unilateral threats can enhance the level of compliance with agreements and thereby make them more valuable to the parties follows immediately from some well known results in rudimentary game theory. A simple illustration will make the point and will suggest some useful guidelines for the construction of efficient unilateral sanctions.

Consider the following stylized model of the trading relationship between two countries, A and B. Each country exports only one good to the other and must choose between two levels of protection for its home market--"high" and "low." The decision on the level of protection is made by self-interested political officials in each nation who desire to maximize their political welfare. Assume that officials in each nation, acting noncooperatively, and thus taking the policy of the other nation as fixed, prefer the "high" level of protection for the

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

home market because it maximizes the political rewards afforded to them by their import-competing industries without materially reducing the level of political support afforded to them by their exporting industries.

Officials in each nation realize, however, that they can reap political rewards from their export industry by negotiating an agreement providing greater access to the export market. To secure such access, suppose they must in return afford overseas exporters greater access to their home market. Such an agreement will be advantageous (putting aside, for the moment, questions about its enforceability) if the increased political support from the domestic export industry exceeds the reduced political support from the domestic import-competing industry that has lost its protection. Assume this condition holds, and that officials in each nation could increase their political support through a binding, reciprocal agreement to reduce protection to the "low" level in each country.<sup>(32)</sup> Assume further that a "low-low" agreement dominates either possible "low-high" agreement.

To analyze this strategic environment, one must make some assumptions about the timing of the decisions by each nation. For purposes of the illustration, suppose policy makers decide what policy to pursue in isolation and information about the policy pursued abroad will be revealed only after each country has made its own choice--a "simultaneous moves" game. Intuitively, one might imagine that at the beginning of the month, officials in country A and country B each decide whether to impose "high" or "low" protection in secret. From the trade statistics and other information that arrive at the month's end, officials in each country can infer the other country's choice at the month's beginning, and the political payoffs associated with the strategy pair chosen will be realized. With this "simultaneous moves" assumption, the game's strategic structure is in fact the classic Prisoner's Dilemma.<sup>(33)</sup>

The problem confronting the players is to sustain the mutually advantageous "low-low" bargain over time in the face of the obvious temptation to cheat--after all, no matter what choice is made by officials abroad at the beginning of the month, officials at home are better off in that month by choosing "high" protection. To discourage cheating by the other party, the players must adopt strategies imposing future penalties large enough to make cheating unprofitable. And, putting aside the use of military force and other sanctions unrelated to the trade agreement, the threat of retaliating with "high" protection in a future period or periods is the only strategy available. The question then arises whether such retaliatory threats will suffice.

The "length" of the game is obviously crucial in this regard. The threat of sanction in a future play of the game is meaningless if the game is played only once, making the "high-high" outcome inevitable. But trading relationships between nations are open-ended, and thus the game is in fact a "repeated Prisoner's Dilemma." Theoretical analysis of this phenomenon suggests that sustained compliance can emerge if the game has an "infinite horizon"--that is, if the game does not have a known, final period and "discounting" of the future is not too high. The players then can threaten to respond to a breach of the agreement by the other party with some sort of retaliatory breach strategy, and this threat can be forever effective as a deterrent, because the game is never expected to end soon.<sup>(34)</sup> Arguably, the open-ended duration of typical trade agreements and the indefinite life expectancy of political parties and other political coalitions influencing trade policy will lead trade policy officials to view their strategic interaction as having an infinite horizon.

Further, even if trade agreements are more appropriately viewed as "finite horizon" games, compliance for an extended period is possible. To be sure, sustained compliance cannot emerge in a game with a known, fixed final play or in which the future is too heavily discounted, if the players expect each other to behave fully "rationally" under these conditions.<sup>(35)</sup> But sustained compliance can emerge in a finite game if each player believes the other player may eschew the logic of cheating and initially comply. That is, if players think there is sufficient probability of the other player complying for a period, each player may try complying at the outset and continue to comply until the other player stops complying, or until the end of the game approaches and the threat of retaliation by the other player becomes insufficient to overcome the one-time gains from cheating.<sup>(36)</sup>

Thus, whatever the appropriate conception of the "horizon" in a trade agreement, theory suggests sustained compliance can emerge under appropriate circumstances. This proposition applies equally to the two-country game sketched above and to an N-country game--an important extension given that many trade agreements (such as GATT) are multilateral rather than bilateral.<sup>(37)</sup>

Theory does not suggest, however, that sustained compliance will necessarily emerge, only that the possibility exists.<sup>(38)</sup> Experimental studies thus provide a useful supplement to theoretical analysis of the repeated Prisoner's Dilemma and tend to confirm the possibility of compliance emerging often,<sup>(39)</sup> especially when the gains from compliance are considerable.<sup>(40)</sup> Some experimentalists tout the virtues of particular strategies for achieving the benefits of compliance, such as the "tit for

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

that" strategy whereby a player complies on the first play and then responds to each period of cheating by his opponent with a single period of cheating in retaliation.<sup>(41)</sup> The utility of the strategies cannot be ruled out, however, and certainly no consensus exists as to any single "optimal" strategy.

This discussion of the repeated Prisoner's Dilemma, as noted, is meant to be illustrative rather than to suggest the Prisoner's Dilemma is the only acceptable strategic description of trade agreement games. Indeed, the strategic interaction among parties to trade agreements is plainly far more complex. Such agreements ordinarily encompass many commodities, and it is possible to vary the level of protection for the home market continuously through incremental changes in tariffs, quotas, and other trade restrictions. In fact, the strategic options are broader yet. Because governments interact on a wide range of issues in addition to trade, threats and concessions can cut across all manners of diplomatic concerns. Further, the extension of the analysis from two to N countries is by no means trivial and may be radically more difficult for strategic structures other than the Prisoner's Dilemma. And, the stylized simultaneous moves assumption is not self-evidently the most realistic. One might instead contemplate a stylized sequential moves game. It is also possible that, at times, no sanctions will exist that do not damage the political interests of officials who impose them, and hence the credibility of the threat to impose sanctions may be jeopardized.

In short, no game-theoretic model yet devised and analyzed captures the full complexity of actual trade agreements. Nevertheless, the insights of game theory generally, and the repeated Prisoner's Dilemma in particular, support several intuitively appealing propositions about the value of unilateral threats in trade agreements. First, even when third-party enforcement to ensure compliance is unavailable, there is reason to be optimistic that strategies designed to elicit compliance from other countries will allow the gains from compliance to be realized. Indeed, this proposition is trivially confirmed by the mere existence of trade agreements, for nations would not bother to incur the costs of negotiating them if the expected level of compliance was negligible. Our knowledge of the repeated Prisoner's Dilemma and similar repeated games thus affords an important component of any positive theory about the existence of agreements lacking effective third-party dispute resolution, such as GATT.

Second, to induce another country to comply, each country must adopt a strategy to penalize cheating to some extent. If another country knows cheating will never be punished,

by contrast, it will surely exploit the situation by deviating from the bargain. A fortiori, if another country knows cheating will be rewarded, it will exploit the situation. A strategy to induce compliance by other countries must therefore employ the "stick" rather than the "carrot."

Third, if cheating is to be dissuaded, the magnitude of threatened sanctions must be sufficient to wipe out the gains. This observation suggests the possible virtue of heavy sanctions, although the question remains whether all "cheating" should be deterred.

Finally, implicit in the logic of how to sustain compliance, the mere announcement of an intention to punish cheating is not enough. Other countries must believe the threat. If another country engages in a period of cheating to test the threat's credibility, the threatened sanction must be utilized.

### C. Complications

Although the case for some manner of unilateral policy to dissuade breach of agreement seems compelling, a variety of additional considerations bear upon its proper design. The role of renegotiation in lieu of sanction, for example, has yet to be discussed. Further, just as in contracts between private actors, compliance with obligations ex post may not always be desirable--breach of agreement may be "efficient" in a sense to be defined below--a proposition that has important implications for the proper magnitude of sanctions. In addition, although unilateral sanctions may serve a valuable function in policing opportunistic behavior, so may the domestic authority to impose "sanctions" be employed opportunistically. This danger must be avoided. Finally, the ability of nations to impose significant sanctions upon trading partners may vary considerably with their size and the strategic environment in which only one nation can issue credible threats against the other will be considered below.

#### 1. Renegotiation

The simple strategic framework of the repeated Prisoner's Dilemma admits of only one strategy for policing the bargain--the threat to retract the initial trade concession. Often, however, compensatory concessions by the party wishing to deviate from the agreement may provide an alternative to the imposition of sanctions for both nations. In effect, the parties might renegotiate the bargain in response to breach.

To be sure, renegotiation would make little sense if the political costs and benefits of alternative concessions were

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

known with certainty at the time of the initial negotiations. The parties would simply strike the best bargain possible at the outset, and any subsequent effort to retract a concession would represent opportunistic behavior deserving of sanction. Indeed, game theorists often worry about opportunistic renegotiation as a threat to the stability of the bargain. If renegotiation could yield an agreement that was better for all concerned than the outcome in which the defector is "punished," the temptation to defect is obviated because everyone might prefer renegotiation to punishment. This problem is akin to, though not quite the same as, the problem arising if threats of punishment are not credible, and it has led theorists to explore the possibility of "renegotiation-proof" equilibria for games.<sup>(42)</sup>

Yet GATT dispute resolution, as noted, relies heavily upon renegotiation as an alternative to sanctions.<sup>(43)</sup> While renegotiation might in principle represent opportunism, it can also facilitate a mutually advantageous adjustment of the bargain. Trade concessions are made under conditions of uncertainty, and the costs and benefits of alternative concessions may change over time. It is well accepted, for example, that industries in the United States and elsewhere tend to intensify their political efforts to secure protection as their financial condition worsens, and the events affecting financial conditions, industry-by-industry, are no doubt difficult to forecast.<sup>(44)</sup> Thus, a bargain that increases the expected welfare of the officials who negotiate it *ex ante* may prove unfortunate for them *ex post*. As a consequence, they may wish to avoid their initial commitments, not simply as an effort to "cheat" on the bargain, but because the political costs of performance prove unexpectedly high. Just as concessions appearing attractive *ex ante* may become unattractive *ex post*, however, so may concessions appearing unattractive *ex ante* become attractive *ex post*. In many cases, therefore, the parties may find it advantageous to substitute one set of concessions for another through renegotiation. The possibility of renegotiation of this sort makes concessions more attractive *ex ante*--the expected gains from the initial concessions increase, because officials know that the concessions can be retracted under certain adverse contingencies without incurring sanction. More concessions will be made *ex ante*, and the level of protection will tend to decline.

This analysis suggests that parties to trade agreements may well want to respond initially to a breach of promise with an offer to accept compensatory concessions. If so, sanctions are inappropriate unless the proffered compensation is insufficient to restore the value of the bargain. The structure of GATT provides considerable evidence showing the desirability of such a policy--if renegotiation were typically a manifestation of

opportunistic behavior rather than an efficient *ex post* adjustment of obligations, the drafters of GATT would likely have undertaken to discourage renegotiation, when in fact they did much the opposite.

### 2. Efficient Breach and the Magnitude of Sanctions

A related complication concerns the possibility of trade concessions proving inefficiently burdensome *ex post* under circumstances in which renegotiation is excessively costly or otherwise problematic due to strategic behavior. The analogue from the literature on private contracts is the possibility that the cost of performance *ex post* will exceed its value to the parties, and that "efficient breach" in such cases may be better facilitated by a damages remedy than by forced renegotiation or "specific performance."

To clarify, consider for a moment the private contract analogy. Suppose a seller can produce some good or service at a cost "*c*," where *c* is a random variable not known to the seller until some date in the future when production occurs. A buyer will value the good or service on that date at "*V*." Suppose the parties enter the contract for the seller to supply the good or service at price "*p*," but when the time to produce arrives, the realized value of *c* exceeds *V*, so that the cost of performance exceeds the benefits. Because the seller would lose more than the buyer gains, it is efficient for the seller to breach the contract.

In principle, the possibility of renegotiation can suffice to ensure efficient breach. In the example above, the seller could simply approach the buyer and offer some amount at least equal to  $V - p$  but no greater than  $c - p$  to extinguish the contractual obligation. The buyer will be in at least as good a position by accepting such an offer as by insisting upon performance, and the seller will also be as well situated, with one or both of them strictly benefitting.

Interestingly, however, contract law does not rely entirely upon renegotiation to ensure efficient breach. If it did, it would suffice for courts to award specific performance in any breach of contract action and to let the parties renegotiate against that backdrop. Instead, the seller often has the option to breach the contract without renegotiating and pay "expectation damages," in this example equal to  $V - p$ . This measure of damages will encourage the seller to perform when performance is efficient, yet ensure the profitability of breach when breach is efficient.<sup>(45)</sup> The reason that courts distrust the specific performance remedy in many cases and provide the expectation damages alternative is neither obvious nor uncontroversial. Perhaps the transaction costs of

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

renegotiation against a backdrop of specific performance exceed the costs of renegotiation against a backdrop of a damages remedy, or perhaps the courts prefer to avoid any involvement in policing compliance with a specific performance order.(46)

In any event, a parallel to the efficient breach concept and to damages as an alternative to renegotiation arises in international trade agreements. Clearly, signatories would contract ex ante to allow avoidance of obligations ex post whenever the costs of avoidance to adversely affected parties are exceeded by the benefits to the party released from performance.(47) In other words, from the standpoint of the officials who negotiate the agreement, breach may be "efficient" in a political sense, and it is in their mutual interest ex ante to facilitate such breach.(48) Not surprisingly, therefore, GATT contains express provisions allowing signatories to avoid their commitments.(49)

Further, these provisions allow the avoidance of commitments even if renegotiation fails to reach a satisfactory outcome for those adversely affected. Under Article XXVIII, for example, a signatory wishing to raise a tariff above its negotiated ceiling may do so, and adversely affected parties are then entitled to withdraw "substantially equivalent concessions." (50) A similar principle applies when signatories invoke the Article XIX "escape clause" and negotiations over compensatory concessions are unsuccessful.(51) Although the phrase "substantially equivalent concessions" is not defined, it suggests a level of concessions affecting a volume of trade comparable to that affected by the concessions withdrawn by the other party.(52) Thus, while parties may well debate whether or not some proposed withdrawal is precisely "equivalent," the "substantial equivalence" requirement places reasonably tight limits on the penalty for withdrawal of concessions and plainly precludes any sort of "massive retaliation" for breach. Likewise, it reflects an unwillingness on the part of the drafters of GATT to rely solely upon renegotiation as a basis for adjusting the bargain.

Whatever the criticisms of the damages remedy as an alternative to specific performance in a private breach of contract action,(53) therefore, the presence in GATT of the "substantial equivalence" principle suggests the virtue of a "damages remedy" from the perspective of the GATT negotiators. A plausible conjecture as to its importance is that signatories may at times find it valuable to withdraw a concession when compensatory concessions would be unpalatable as, perhaps, during a general business cycle downturn. Then, the revocation of substantially equivalent concessions abroad may minimize the joint political losses ex post, and the parties to the agreement will prefer to facilitate such adjustment of the bargain ex ante. In any

event, the fact that GATT affords signatories the "damages" option has important implications for the appropriate magnitude of unilateral sanctions to penalize breach of agreement under GATT. A threat of massive unilateral sanctions, if credible, makes renegotiation the only viable option for the avoidance of commitments. It would thereby deny GATT signatories the benefit of the bargained-for "damages" remedy in lieu of renegotiation and perhaps suggest the price for avoidance of GATT obligations through renegotiation would be higher than contemplated at the time of agreement. Such a strategy could well be viewed as renegeing on the bargain and thus discourage other nations from entering additional trade agreements in the future. This observation suggests the virtue of measured retaliation in response to any breach of agreement and rules out various strategies for massive retaliation known to promote cooperation in games such as the repeated Prisoner's Dilemma.(54)

Further, in deciding upon the proper level of measured retaliation under a unilateral sanctions policy, the bargain struck under GATT likely provides a useful guide. Thus, the withdrawal of "substantially equivalent concessions" seems an appropriate choice of unilateral sanction to apply in the event of unsuccessful renegotiation.

### 3. Opportunism in Sanctions Policy

The proposition that the magnitude of the sanction ought to accord with the terms of the bargain suggests a more general point. Just as statutes such as Section 301 may serve the useful purpose of establishing sanctions for cheating on trade agreements, they may also facilitate "cheating." Rather than penalizing bona fide violations of GATT, for example, Section 301 might be employed in efforts to foist opportunistic interpretations of the agreement upon trading partners. If sanctions were used for such purposes, or if trading partners feared they might be so used, otherwise viable trade agreements could be frustrated.

Consequently, in the design of sanctions policy, it is important to include provisions that disable opportunism where possible. Provisions requiring deference to the terms of existing trade agreements and prohibiting sanctions for behavior that is in compliance plainly serve this function. Likewise, if a bona fide dispute arises over the meaning of the bargain's language, trading partners will be reassured by provisions requiring deference to impartial third-party legal interpretation.

### 4. Size Disparities

To be effective at inducing compliance with trade

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

agreements, threats of unilateral sanctions, if carried out, must impose significant detriment upon the target of the sanction. Large countries, such as the United States, often have considerable coercive power, because their economies represent a considerable percentage of the world market for many goods and services. If access to the U.S. market is restricted, the target nation cannot readily make up the losses by redirecting its exports.

In contrast, small nations may have less hope of influencing the behavior of other nations through a unilateral threat of sanctions, as a loss of access to their market may be of little consequence given alternative opportunities. Likewise, for many developing nations, threats to restrict imports as a sanction may not be credible, because the bulk of their imports are of vital raw materials that they cannot do without. Not surprisingly, therefore, statutes such as Section 301 are the sole province of larger trading entities. Only the European Community has formally adopted a similar measure.<sup>(55)</sup>

For several reasons, however, any limited ability of smaller nations to issue effective threats of unilateral sanctions is not a telling objection to threats of sanctions by larger nations. First, the powerlessness of smaller nations should not be exaggerated--they are included in trade agreements precisely because their concessions are of some value to others. A fortiori, the withdrawal of those concessions will be of some detriment. Second, "smallness" cuts both ways--if a nation is a tiny fraction of world supply for most goods and services, then its loss of access even to a market as large as the United States may not be terribly disadvantageous because it may be able to redirect its exports to other markets without considerably depressing prices. Third, smaller nations may be able to act collectively to impose sanctions if the need arises. Fourth, as noted, "reputation" is an important constraint upon opportunistic behavior by larger and smaller nations alike. Both have considerable interest in playing by the rules to ensure that dealings with them in the future will be perceived as worthwhile. Thus, smaller nations need not fear victimization by the unbridled opportunism of larger nations. Finally, and most importantly, joint gains arise simply from appropriate threats of sanctions by larger nations, even if smaller nations cannot also use unilateral sanctions to contribute to policing the bargain. The more that major trading powers are able to encourage other nations to adhere to their commitments under trade agreements, the more the returns to such agreements will increase. More agreements will then be negotiated, benefiting both small and large nations.

Perhaps the best analogy for the size disparity problem is to the repossession remedy in certain consumer sales

contracts, a remedy that is especially valuable when the costs of legal process are great in relation to the value of the interest being protected. Absent the repossession remedy, sales would be riskier and consumers who must buy on credit might confront significantly higher prices. Thus, all can benefit from agreeing to allow the seller to repossess. This is true even though the buyer has no viable "self-help" remedy of his own in the event of a breach of contract by the seller (such as a breach of warranty).

### D. Implications: The Design of Section 301(a)

Section 301(a) applies when a foreign government practice "violates, or is inconsistent with. . .or otherwise denies benefits to the United States" under a trade agreement,<sup>(56)</sup> or "is in violation of, or inconsistent with" other international legal rights of the United States and "burdens or restricts United States Commerce."<sup>(57)</sup> The terms "inconsistent" and "otherwise denies benefits" are not explicitly defined, but plainly include, among other things, practices denying the United States reasonably anticipated commercial benefits, even if the practices do not technically violate the letter of any trade agreement or other international legal obligation.<sup>(58)</sup> In short, Section 301(a) applies when the foreign practice at issue impairs the rights or reasonable expectations of the United States under international agreements affecting commerce.

Plainly, Section 301(a) may be understood as a self-help strategy for discouraging breach of agreement by trading partners.<sup>(59)</sup> Its announcement of a policy whereby the United States will punish violation, and not reward or ignore it, can deter violations while protecting the interests of the United States in preserving access to foreign markets. The more difficult question is whether Section 301(a) simultaneously facilitates opportunism by the United States, or raises fears of opportunism, and thereby creates costs exceeding its benefits. A closer look, however, suggests that Section 301(a) considerably disables opportunism and is generally consistent with terms of the primary bargain that it serves to enforce (the GATT).

#### 1. Negotiation in Preference to Sanction

Procedurally, Section 301 cases may commence following a petition from a private sector group<sup>(60)</sup> or upon the USTR's own initiative.<sup>(61)</sup> A determination that the case has potential merit results in a decision to "initiate" an investigation. The USTR must then request informal consultations with the country in question.<sup>(62)</sup> If these consultations do not yield a satisfactory solution, the USTR may invoke formal dispute resolution pursuant to the

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

international agreement in question--usually, though not always, the GATT.(63) No later than eighteen months after the initiation of the case, the USTR must make a determination whether the practice in question violates or is consistent with the legal rights of the United States.(64) If that determination is affirmative, the USTR must simultaneously determine what action to take in response to the practice.(65) No retaliatory action is necessary if the foreign government agrees to modify its practice to accord with the legal rights of the United States, or if the foreign government provides the United States with satisfactory compensation for the violation in the form of trade concessions on other goods or services.(66)

In short, when a trading partner is found to have violated its obligations, it is first given the opportunity to bring its behavior into compliance with those obligations before any sanction is imposed. It is also given an opportunity to "renegotiate" by offering compensatory concessions. This structure mimics the approach to dispute resolution under GATT Article XXIII(67) and thus has the considerable virtue of respecting the terms of GATT while still providing the United States with some leverage in the face of GATT's inability to coerce signatories to comply with its terms.(68)

Indeed, the argument might be made that these features of Section 301(a) are, if anything, too lenient toward violations. They seemingly encourage trading partners to cheat on obligations in the hope of avoiding detection, knowing all sanctions can later be avoided by a cessation of cheating. And, even if cheating were almost certain to be detected, trading partners nevertheless might cheat in order to reap transitory gains pending the conclusion of formal dispute resolution.

There are, however, two counterarguments. Taken together they make a reasonable case for this feature of the statute. First, when foreign governments modify their policies to avoid U.S. sanction, their officials may in many cases incur significant political cost by appearing to "capitulate" to a U.S. threat. Even where they elect to conform their behavior to avoid sanction, therefore, the penalty for the original cheating may at times be significant.(69)

Second, and perhaps more persuasive, cases of blatant cheating under trade agreements are very much the exception rather than the rule. Given the opportunities to renegotiate embodied in trade agreements such as GATT and the "escape clause" feature allowing nations to take protective measures when an industry is "seriously injured,"(70) the temptation to engage in flagrant violations of commitments is largely removed. Flagrant violations

mar the reputation of trading nations, as noted, and discourage other nations from entering agreements with them. Given the legitimate alternatives for protective measures without flagrant cheating, the reputational costs of flagrant cheating are rarely worth incurring.

Instead, "cheating" most often takes the form of a suspect construction of an arguably ambiguous obligation. Under GATT, in particular, nations can assert that their protective measures are justified by balance of payments problems,(71) or in the case of developing countries the need to promote an infant industry.(72) They may claim national security is at stake(73) or their export restrictions avert a local short supply problem.(74) Measures restricting imports may be justified as public health measures,(75) or measures necessary to protect domestic agricultural production.(76) An agricultural export subsidy may be said to be legitimate because it does not yield a "more than equitable share" of world trade,(77) and an apparently illegal export subsidy may be characterized as a legitimate domestic subsidy coincidentally benefitting exporters almost exclusively.(78) In short, under GATT and other trade agreements of interest, numerous provisions exist that inevitably beget differences of interpretation. A review of past Section 301 disputes confirms that such provisions form the basis for the great majority of disputes involving alleged violations of agreements.(79)

Under these circumstances, the U.S. policy of delaying sanctions until formal dispute resolution confirms the existence of a violation, followed by a window of opportunity for the trading partner to conform its practices without sanction, seems imminently sensible. A contrary approach, under which the United States imposed upon other nations its unilateral interpretation of ambiguous provisions, would create abroad greater apprehension of opportunism on the part of the United States. And, as noted earlier, if trading partners anticipated the imposition by the United States of a self-interested construction of ambiguous provisions in the event of a dispute, they would be discouraged from entering agreements with the United States at the outset.(80) The conciliatory approach of Section 301(a) may therefore be justified as a device for disabling opportunistic behavior in the most common class of disputes where the parties have bona fide differences over the terms of the bargain.

An important caveat relates to dilatory tactics by trading partners. Because of the consensus principle under GATT, a disputant can often delay the formation of a panel for many months, and once a panel is formed it can delay providing panel members with the information necessary to the investigation.(81) If U.S. sanctions were certain to

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

be delayed until the panel completed its work, this strategy would appear attractive to any trading partner who anticipated the possibility of an adverse panel ruling. To counter this strategy, Section 301 now requires the USTR to make a unilateral determination on the merits if formal dispute resolution fails to conclude within eighteen months.(82)

Although this provision raises the distinct possibility of the imposition of sanctions by the USTR based upon a unilateral construction of the bargain, it is nevertheless justifiable if eighteen months provides sufficient time for formal dispute resolution to conclude in the absence of dilatory tactics.(83) Then, any failure to obtain an impartial ruling is precipitated by the other disputant. Under those circumstances, an adverse inference on the merits of the position advanced by the other disputant seems warranted--a fact that ought to be obvious to all trading nations. Consequently, the reputational penalty ordinarily incurred for threatening sanctions on the basis of a unilateral construction of the agreement should not arise.

### 2. The Sanction

Failing agreement on modification of the challenged practice or compensation, the statute provides a range of retaliatory options. These include the authority to impose duties or quantitative restrictions upon exports of goods and services from the country under investigation.(84) Any such sanction must "be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden being imposed by that country on U.S. commerce."(85) Thus, subject to stated exceptions, the statute seemingly requires retaliation at a level no more substantial than the detriment imposed upon U.S. interests by the violation in question. Implicitly, it also suggests the duration of retaliation should be limited to the duration of the objectionable practice. This principle appears to be followed by the USTR.(87)

The earlier discussion of efficient breach and of the sanctions embodied in various provisions of GATT provide a rationale for this limitation. The equivalence requirement under Section 301 comports directly with the GATT principle of allowing withdrawal of "substantially equivalent concessions" by a party adversely affected by a tariff increase or escape clause action, if compensation is not forthcoming.(88) By placing an upper bound upon the retaliatory sanction, Section 301 implicitly recognizes the virtues of efficient breach and vindicates the bargain under GATT while preserving negotiating leverage.

E. A Note on the Uruguay Round

V

As indicated, the need for unilateral threat strategies to help enforce existing trade agreements arises because of deficiencies in third-party dispute resolution. Threat strategies would not be necessary if trade agreements afforded cheap, impartial, and expeditious third-party adjudication backed by the coercive authority to induce compliance with the bargain.

The prospects for improvement in GATT dispute resolution are, at this writing, considerable. As noted, the most serious deficiency in GATT dispute resolution is the 'consensus' rule--the GATT cannot take action to sanction breach of the agreement, or even to form a dispute resolution panel, without a "consensus" that includes the party in violation. As a consequence, an aggrieved party must in practice rely either on the willingness of the violator to provide compensation through renegotiation or on unilateral sanctions. The "consensus" rule has been attacked by a number of commentators(89) and may soon see some modification. Prior to the suspension of Uruguay Round negotiations in December 1990, the

dispute resolution negotiations produced a draft "Understanding on the

V

Interpretation and Application of Articles XXII and XXIII of the General Agreement on Tariffs and Trade."(90) As a step toward modification of the consensus rule, the draft Understanding suggests granting a complaining party the right to a dispute panel unless the GATT Council acts to block its formation.(91) It further provides for a twelve-month (or less) time frame in which panels are to complete their work and have their results considered by the GATT Council.(92) The draft, if implemented, also would establish an intermediate level of "appellate review" between the panel decision and the final Council action.(93) Finally, the draft suggests an intention to modify the procedure for the authorization of sanctions by the Council to make sanctions more likely if a signatory proves recalcitrant.(94) On the whole, therefore, the draft represents a significant movement in the GATT toward the creation of a definitive process for the interpretation of the Agreement, which cannot be impeded by a party in violation. It also goes far toward establishing a system under which the losing party in a dispute will be unable to block the authorization of sanctions.

It remains to be seen how much of the draft will survive as a final agreement, and indeed whether any final agreement will emerge.(95) But if the Uruguay Round does produce an effective procedure for third-party dispute resolution, the need for unilateral threat strategies to protect U.S. interests will diminish greatly. The continued existence of the statutory authority for unilateral action

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

may in fact become counterproductive, as such actions may be perceived as facilitating opportunism while serving no constructive function. If such a scenario arises, it may be desirable for Section 301(a) to be amended in order to preclude sanctions not authorized by GATT in cases of GATT disputes. Section 301(a) may still play a useful role in its current form, however, for protecting U.S. rights under other commercial agreements, present or future. And, even with respect to GATT disputes, it would still fulfill the useful functions of allowing private petitions to spur the government to act and empowering the President to impose GATT-authorized sanctions.

### II. The Use of Threats Absent Express Agreements: Analysis of Section 301(b)

The case against passivity when trading partners violate their commitments is a powerful one and provides at least plausible justification for Section 301 (a). But one must also consider the rest of Section 301. Provisions in Section 301 (b) authorize the USTR to retaliate against "unreasonable or discriminatory" practices that "burden or restrict United States commerce."<sup>(96)</sup> Such practices do not violate international agreements, and the question arises whether the United States should ever employ the "stick" in an effort to secure changes in such practices.

International trade theory offers some initial, limited insights. It suggests that, subject to some standard caveats, more trade liberalization is better than less, and hence reciprocal concessions are better than unilateral concessions, holding constant the size of any unilateral concession.<sup>(97)</sup> Of the caveats, however, the most important is directly relevant to discussion of Section 301. If trade policy abroad is held constant, large countries do not always gain from their own concessions, and are occasionally better off eliciting unilateral concessions by trading partners if they can. This proposition is an implication of "optimal tariff" theory which suggests, in essence, that large countries can use tariffs to exploit the collective monopsony power of their consumers.<sup>(98)</sup>

In addition, even when reciprocal concessions are better than unilateral concessions, unilateral concessions are still better than no concessions. Putting aside the large country caveat, a unilateral reduction of protectionist barriers will usually enhance the economic welfare of an importing nation as well as its trading partners. Consequently, when reciprocal concessions are for some reason infeasible, threat strategies for obtaining unilateral concessions may have merit. To be sure, if those strategies backfire and result in greater protection through retaliatory moves, all nations will lose.

Perhaps the first question to ask about threat strategies, therefore, is whether they have a reasonable chance of succeeding. On this issue, trade theory must yield to game theory.

#### A. When Do Threats Work Best?

The discussion of the repeated Prisoner's Dilemma in Section I affords one example of a strategic environment in which "threats" have value. The initial conciliatory or "cooperative" move by each party to a lower level of protection can be sustained by the threat of each player to abandon cooperation if the other does so first. The repeated Prisoner's Dilemma may have some direct applicability to trading relationships that are not governed by a preexisting, express agreement--a proposition that will be developed later.

Clearly, however, the Prisoner's Dilemma structure is not always descriptive of the settings in which nations may contemplate threat strategies to elicit concessions from others. In particular, the threatened sanction may be costly to either the imposing nation (or their political officials), holding constant behavior abroad. Suppose, for example, that the existing level of protection has not been reduced in return for any reciprocal concession abroad, but simply represents a political optimal balancing of import-consuming interest favoring liberalization and import-competing interests favoring protection. An increase in the level of protection will then impose a political cost at home unless an offsetting political benefit is elicited through changes in behavior abroad. The question then arises whether the threat to take an action that is costly rather than advantageous to the officials issuing the threat, other things being equal, can be credible and suffice to induce officials abroad to make the desired change in their own policies.

Repeated games with this strategic structure have also been studied, though not as much as the repeated Prisoner's Dilemma. The models again suggest that many "equilibria" are possible. In some models, threats are successful at eliciting the desired behavior and in others, they are not.<sup>(99)</sup> Empirical analysis and case studies also yield a range of findings.<sup>(100)</sup> Thus, neither theory nor accumulated experience provides any definitive guidelines. Threat strategies can assuredly work, but they can likewise fail.

Strategic analysis can, however, be helpful in revealing factors that may make success more likely, or at least mitigate the consequences of failure, and thereby increase the "expected returns" from threat strategies. For example, asymmetries in economic power can affect the

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

desirability of any threat strategy. If the target of a threat has no capacity to retaliate effectively, then the damage from an unsuccessful threat of sanctions cannot exceed the damage done by the sanction itself when imposed. The downside risk of the threat strategy is thus lessened, other things being equal, relative to cases in which damaging retaliation is a possibility. On average, smaller countries are likely to have fewer options for meaningful retaliation, because their smaller market shares reduce their ability to influence the price of exports from other countries. Likewise, threats of retaliation by smaller countries are somewhat less likely to be credible, because the burden of trade restrictions will fall primarily on their domestic consumers rather than their foreign suppliers.

By the same reasoning, large countries are more likely to influence the behavior of other nations with threat strategies. Their larger market shares enable them to affect the export prices of their trading partners to a greater extent through new trade restrictions; thus, they can impose greater damage on the target of sanctions, on average, with a tariff or quantitative restriction of given magnitude. Further, their threats are more likely to be credible, because new trade restrictions do relatively less damage to their own economies and more damage to trading partners. Indeed, when a large country employs trade sanctions, its economy need not suffer at all, as an appropriate tariff can conceivably increase economic welfare as noted above.<sup>(101)</sup>

However unseemly the conclusion as a guide for policy, therefore, threats are more likely to be effective when issued by larger countries against smaller countries. A bully is more likely to sway the behavior of a weakling.<sup>(102)</sup>

Similarly, in fashioning a threat, the proposed sanction should minimize the cost to the imposing nation for the given damage imposed upon the target. This policy increases the likelihood that the threat will be credible. It also minimizes the damage at home if the threat fails and the sanction must be imposed as a result. Thus, for example, sanctions that do not violate GATT are likely preferable to sanctions that do. Since a GATT violation carries a reputational penalty, nations will be less likely to enter trade agreements in the future if they perceive a greater chance of a breach as part of unilateral sanctions policy.

Finally, as suggested above, only credible threats can induce the target to capitulate. To enhance the appearance of credibility, the issuer of a threat may wish to disable itself from "bluffing," or otherwise increase the costs of inaction should the target of the threat prove

intransigent.<sup>(103)</sup> For example, political officials may take strong public positions threatening retaliation, so that failure to retaliate in the face of intransigence would make them look weak and impose significant political costs.

Much more might be said on these issues, but a thorough essay on threats and sanctions in strategic interaction is not the objective here. Rather, it suffices to note that threat strategies can prove fruitful, and hence their use cannot be dismissed out of hand in cases when reciprocal concessions are an unattractive substitute. This conclusion holds whether threatened sanctions would benefit or disadvantage the officials who employ them. The analysis now proceeds to another critical question: when, if ever, are threat strategies preferable to concessions as a way to gain access to foreign markets?

### B. The Limited Case for Threats

Without purporting to offer an exhaustive list of cases, there are several settings in which threat strategies in the absence of prior express agreements warrant serious consideration because concessions may be imprudent or infeasible. Likewise, there are settings in which threat strategies appear quite ill-advised.

Cutting across all of these settings is the issue of the consequences of preferential, bilateral concessions. Under GATT, tariffs and other customs barriers must be applied on a "most-favored-nation" basis,<sup>(04)</sup> subject to exceptions involving developing countries,<sup>(105)</sup> customs unions,<sup>(106)</sup> and free trade areas.<sup>(107)</sup> Thus, putting aside the exceptions, GATT signatories cannot impose a ten percent tariff on widgets from country X and a twenty percent tariff on widgets from country Y, if both X and Y are members of GATT. Country Y is entitled to the ten percent most-favored-nation rate.<sup>(108)</sup> Consequently, when the United States uses threat strategies to encourage nations to comply with their GATT obligations--the subject of Section I above--it ordinarily will not encourage discrimination in favor of the United States, as such discrimination is generally forbidden.

When the United States extracts concessions on matters outside the scope of GATT and other trade pacts requiring most-favored-nation policies, however, it may well engender discrimination in its favor--a common objection to "bilateralism"<sup>(109)</sup> in trade policy. Such discrimination is not only harmful to third countries that find their exports displaced by the United States, but is a source of potentially serious inefficiencies worldwide. For example, suppose the tariff on widgets exported from the United States to country X is ten percent, and the tariff on widgets exported from country Y to country X is twenty percent.

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

The result may well be an incentive for excessive investment in widget production within the United States, driven not by the superior efficiency of U.S. production, but by the comparatively low tariff on U.S. exports.

Even though the United States will gain from such preferences, the effect on worldwide economic welfare can easily be adverse, and the welfare effect on third countries is almost invariably so. Indeed, the welfare effect in the importing nation may even be adverse if, by giving the United States a preference, it switches to a higher cost supplier (the United States) for its imports and the gain to consumers due to a lower price is insufficient to offset the loss in tariff revenue.(110)

These observations have two important implications. First, if the United States is to pursue policies that result in preferential bilateral concessions, it must either be comfortable with the possibility of reducing worldwide welfare or rule out certain concessions because of their adverse effects on others.(111) Of course, if the pursuit of self-interest at the expense of others is palatable, this issue need not influence policy.

Second, the possibility of a retaliatory response by third nations must always be considered. If the United States increases its exports to country X at the substantial expense of the European Community, for example, the Community may not react passively. In assessing the wisdom of any threat strategy, therefore, the effects of the proposed concessions on third countries and their likely response must always be considered.

With these issues in the background, consider the following settings in which threat strategies are comparatively appealing and unappealing.

### 1. Increased Protection Abroad

Suppose a U.S. trading partner significantly increases the level of protection in its home market for some industry or sector. Assume this change in policy does not violate any existing trade agreement with the United States,(112) but nevertheless imposes considerable harm upon U.S. export interests. Furthermore, suppose the United States openly pursues a policy of accepting without challenge any new protective measure abroad that does not violate international agreements and undertakes to secure the removal of such trade barriers only through subsequent offers of concessions. This strategy has two potentially serious deficiencies. First, it invites trading partners to raise protective barriers for the very purpose of lowering them to obtain subsequent concessions. Prior to a GATT negotiating round, for example, the United States might

anticipate an increase in unbound tariffs abroad and the necessity of significant U.S. concessions simply to restore the status quo ante. Eventually, the United States might offer all politically feasible concessions and still have made little progress in securing better access to foreign markets. It would gain economically to the extent lowering barriers to imports was advantageous, but would lose the opportunity to gain in export markets as well.

Second, even putting aside cases in which protection abroad increased for the purpose of extracting subsequent concessions from the United States, a "concessions only" strategy forgoes the opportunity to maintain access to foreign markets through "implicit cooperation." Return for a moment to the stylized Prisoner's Dilemma of Section I,(113) and suppose an express agreement to maintain "low" protection in each country is for some reason infeasible. An equilibrium in which both countries adhere to "low" protection might nevertheless evolve without express agreement over the course of repeated interaction. Neither the theoretical nor the experimental studies of the repeated Prisoner's Dilemma suggest the need for any formal agreement to sustain the cooperative solution.(114) Thus, for example, each country might unilaterally adopt a "tit for tat" policy, keeping its market open as long as the other country does the same, while periodically checking to see whether the other country is adhering to "low" protection. For such equilibria to evolve, however, threat strategies are essential after each country has made its initial "concession" (in the stylized model, a reduction of protection from "high" to "low").

Of course, the strategic interaction among trading nations is vastly more complex than the stylized 2x2 Prisoner's Dilemma, and rarely, if ever, does one observe implicit initial "concessions" that might be sustained thereafter by "tit for tat" or some other threat strategy. Indeed, if implicit "concessions" are attractive to each nation, why not memorialize them in an explicit agreement? The transaction costs of doing so are arguably modest given all the opportunities for diplomatic contacts between governments. The absence of express agreement is perhaps good evidence of the absence of any agreement. Thus, it is surely too simplistic to imply that every increase in protection abroad should be viewed as "cheating" on an implicit bargain over reciprocal concessions.

Nevertheless, the analogy to the repeated Prisoner's Dilemma is not completely inapt. All nations maintain protective barriers that are not covered by any international agreement, and this situation will assuredly continue whatever the outcome of the Uruguay Round. A prospect of systematic retaliation when those barriers are increased may well discourage nations from increasing

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

protection in many instances, at least when the political gains are small. This, in turn, will discourage the trading community from drifting toward greater protection in areas not yet subject to the discipline of international agreements.

As for the costs, the damage to the U.S. economy when deterrence fails and sanctions must be imposed can, in principle, be kept to a modest level by exploiting the principles of optimal tariff theory.(115) Indeed, any effective "sanction" inevitably exploits the teachings of optimal tariff theory to some extent. A restriction on access to the U.S. market cannot possibly impose any detriment upon a trading partner unless the United States has some monopsony power over the price of the good or service at issue. Were it otherwise, the costs of the trade restriction would pass through in full to the U.S. consumer and impose no harm upon foreign producers. In choosing among possible targets of sanction, the United States may also be able to strengthen its hand by targeting the exports of powerful interest groups abroad--those capable of exerting considerable pressure upon their governments to capitulate and avoid sanction.

Finally, although counter-retaliation in response to U.S. sanctions is always a concern, it seems less likely in this class of cases as long as the magnitude of the sanction is roughly commensurate with the initial harm to the United States. Sanctions, then, have a purely reactive quality, responding to greater protectionism abroad with measured retaliation but not initiating protectionism.(116)

An obvious caveat is that the United States should not retaliate if to do so would violate an express bargain. In addition, because sanctions are costly, it would be foolhardy to respond to every move abroad that increases protective barriers. Action should be limited to instances in which U.S. interests are significantly impaired. It seems equally clear, however, that a policy of passivity in response to every "legal" increase in protection abroad invites opportunism and forgoes a potentially valuable opportunity to restrain the level of protection in sectors where the discipline of GATT and other international agreements has yet to emerge.(117)

### 2. Ambiguity Revisited

Many contracts have ambiguous provisions. The transaction costs of clarifying the terms of the bargain ex ante can be considerable and the gains modest, either because the probability of pertinent contingencies materializing is small, or because the parties expect to work out the details of their relationship over the course of dealing in the long term.

International trade agreements also have considerable ambiguities, a problem compounded by the absence of background default rules from statutes or the common law. Indeed, as suggested in Section I, the bulk of GATT disputes arise over conflicts of interpretation.(118) Dispute panels may provide sufficient guidance to develop settled "common law" interpretations. Unfortunately, this mechanism for clarifying the bargain does not always work. A dispute panel may decline to issue an interpretation of a seemingly high ambiguous provision.(119) Indeed, signatories may not even bother to seek a dispute panel if the provision at issue is so unclear as to defy crisp interpretation.

When this problem becomes important with respect to a particular provision, perhaps the ideal solution is for signatories to return to the bargaining table for further negotiations. Nonetheless, GATT negotiating rounds are infrequent, and signatories must adapt to ambiguity in the interim. Under these circumstances, opportunities for implicit cooperation may again become important. Tacit convergence upon particular interpretations of the agreement are in fact familiar in GATT, even tacit convergence on agreement to ignore portions of the existing text.(120)

Drawing once again upon the repeated Prisoner's Dilemma, tacit cooperation might emerge if signatories can identify the "efficient" interpretation of the agreement--that is, the interpretation the signatories would negotiate for themselves in the absence of transaction costs--and then adhere to that interpretation as long as others do the same. Actions inconsistent with the efficient interpretation would be met with some sanction.

To be sure, the sanction need not involve protective measures. For example, if the dispute arises because the United States believes the European Community is subsidizing its agricultural exports excessively and thereby acquiring "more than an equitable share of world export trade,"(121) export subsidies by the United States might constitute the appropriate sanction. But mirror image behavior may not always be the best option. An alternative sanction may exist that imposes the same harm on the target of the sanction, at less cost to the United States. Further, in some disputes, the opportunity to engage in mirror image behavior may not exist.(122)

Thus, whatever the practice that manifests opportunism in the face of ambiguous provisions, circumstances may arise in which sanctions against the exports of the nation at issue are a plausible response. Such measures can, in principle, encourage all parties to an agreement to adhere to an efficient construction of the bargain. In addition, to

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

the extent unilateral policies succeed in enhancing the efficiency of performance, all nations gain *ex ante*. The returns to participation in the agreement increase, and reciprocal trade agreements become more attractive.

This analysis is subject to an obvious objection. When a country offers a unilateral interpretation of an ambiguous provision, backed by a threat of sanctions against countries that do not adhere to the interpretation, what is to guarantee the proposed interpretation is the "efficient" one and not itself an opportunistic one? Only the good faith and good judgment of officials who administer such policies can prevent a battle of contrary, opportunistic positions. Thus, although the problem of opportunism in the face of ambiguity provides a reasonable justification for occasional sanctions in theory, it may or may not provide convincing justification in practice, given the institutional imperfections associated with the administration of sanctions policy.

### 3. The GSP Interface

GATT authorizes developed nations to extend tariff preferences to developing nations, and the United States has done so quite liberally in the past pursuant to its Generalized System of Preferences (GSP).(123) As a result of GSP, most of the politically "easy" concessions have already been made to GSP beneficiaries. The import restrictions that remain on their products tend to be on items of high sensitivity such as textiles, footwear, sugar, and the like.(124)

In addition, several factors lead developing nations to protect their markets heavily. As noted earlier, Article XII of GATT authorizes protection for balance of payments purposes.(125) Developing nations regularly take advantage of this provision to impose tariffs or quantitative restrictions to discourage imports, arguing that their hard currency earnings from exports must be conserved to pay public debts denominated in foreign currency.(126) In addition, Article XVIII, concerning governmental aid to economic development, authorizes protection to promote the development of infant industries.(127) Finally, because access to the markets of developing countries has, in many cases, only recently become a matter of economic significance, developing nations have not always been asked for substantial concessions in return for access to the markets of developed countries.(128) All of these factors combine to produce a situation in which the average level of protection in developing nations is far higher than for the developed nations in GATT.(129) Consequently, while U.S. firms seeking to export to developing nations regularly confront sizeable trade barriers, many developing countries exporting to the

United States receive preferential, virtually duty free, treatment.

For several reasons, this asymmetry in the level of protection may well justify the occasional use of threat strategies to open the markets of developing nations. First, because of GSP, further concessions by the United States may at times be politically infeasible. Indeed, in some instances, the United States may be unable to offer enough to secure the desired concession, even putting political considerations to the side. Second, the wide differences in the average level of protection, coupled with the existence of special preferences, provide the United States with a certain amount of political "high ground" when it asks for liberalization. This observation addresses not only to the fairness of the U.S. position, but may provide officials abroad with some political comfort when acceding to U.S. demands. The smaller the political costs of accepting U.S. demands, the greater the likelihood of success of the threat strategy.

Third, because of GSP, threats can be recharacterized as concessions, a difference that is more than semantic. The GSP is subject to periodic review, and the United States can assert that a continuation of preferences is conditional upon the beneficiary adopting a reasonable trade policy toward the United States. In effect, the continuation of GSP benefits becomes a "carrot" in return for concessions abroad, and what is on the surface a threat strategy can in fact become a mutually advantageous reciprocal concessions strategy. Concessions by developing countries will encourage U.S. officials to maintain GSP preferences in the face of rising imports under the program.(130)

Finally, the danger of counter-retaliation is plainly diminished in the case of developing nations. Their market power is on average smaller, and because they already maintain high trade barriers, their options for new trade restrictions are more limited.

### 4. "Ineffective" Concessions: A Note on Japan

Rudiger Dornbusch has recently argued for the systematic use of Section 301 against Japan.(131) He believes that a variety of poorly understood non-tariff barriers, perhaps cultural in nature, impede U.S. exports. Conventional reciprocal concessions, he suggests, will not address the problem, and thus he urges the United States to pressure Japan to establish quantitative targets for import growth, akin to the quantitative targets in the U.S.-Japan semiconductor agreement.(132)

Both the empirical premise and the proposed remedy in

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

Dornbusch's argument are controversial. The proposition that unique impediments exist to penetrating the Japanese market may or may not be correct. A combination of language barriers, quality problems, and marketing ineptitude on the U.S. side may explain much of the apparent difficulty in selling to Japan. Likewise, the perception that selling in Japan is unduly difficult may be an artifact of its persistent trade surplus, attributable in part to the need for foreign capital in the United States driven by U.S. fiscal policy, and the ability of the Japanese to supply it.

Further, even if unique non-tariff barriers exist in Japan and are important, it is not clear that the Japanese government has the capacity to do much about them. It does little good to threaten the Japanese government with sanctions if no action by that government would enable the United States to achieve its objectives. Dornbusch concedes the point by proposing not that Japan offer conventional trade concessions, but that it offer the United States a guaranteed rate of growth in its exports, presumably assured by a policy of government persuasion, government procurement orders, or outright import subsidization.(133)

Even if one accepts arguendo the desirability of such policies, however, it is certainly questionable whether the Japanese government would embrace them in response to threats of sanction, at obvious political cost to the officials who appear to capitulate to U.S. demands. Further, export growth targets for the United States could easily result in significant displacement of exports from other sources, such as Europe, and the likely adverse reaction of those other countries must be considered. The capacity of the Japanese to retaliate in response to the imposition of sanctions can also hardly be doubted. Notwithstanding the persistent trade imbalance between the United States and Japan and the various other reasons advanced for an aggressive stance under Section 301, therefore, threat strategies here appear quite risky.

### 5. Long Standing Practices

Subject to exceptions implied by the first three categories above, it is usually imprudent to threaten nations with sanctions if they refuse to dismantle long standing trade barriers. The argument against a threat of sanctions in these cases relates closely to the argument in favor of sanctions in response to new protectionist actions abroad.(134) Recall that one objection to offering a concession in exchange for the elimination of a new trade barrier is that such a strategy encourages nations to erect new trade barriers to extract concessions. In the end, all politically feasible concessions may be made without

having much effect on the overall level of protection abroad.

By much the same reasoning, if a nation dismantles its long standing trade barriers in response to threats and obtains no concessions in return, it will eventually have nothing left with which to bargain in the course of future negotiations for reciprocal concessions. Anticipating this prospect, nations can be expected to be especially resistant to U.S. demands to open their market when the challenged practice involves a long extant trade barrier.

Compounding the problem is the fact that the United States hardly occupies the "high ground" in most of these cases. For every long standing barrier impending U.S. exports to the country at issue, that country can likely point to a long standing barrier impeding its exports to the United States.(135) Even ignoring the apparent unfairness of the U.S. demand for a unilateral concession under these circumstances, capitulation by foreign officials will be politically awkward and thus comparatively unlikely. Other things being equal, therefore, the fact that a practice is well established should weigh very heavily in favor of the "carrot" rather than the "stick."

### 6. Threats Following Unsuccessful Trade Negotiations

Another class of cases in which the "stick" seems especially ill-advised consists of those in which the "carrot" has already been tried and either failed altogether, or produced an inadequate level of concessions from the U.S. perspective. If the United States has bargained for a concession abroad and been unable to secure it in the course of a GATT negotiating round or some comparable forum, the impasse provides valuable information. It suggests that the political costs of the concession of officials of the country in question are considerable and the likelihood of success with any particular threat is accordingly diminished.

In addition, if the United States adopts a strategy of attempting to secure through threats those concessions for which it has proven unwilling to "pay" with its own concessions, it impairs the value of trade negotiations to its trading partners, for example, that the United States accepted a certain package of concessions in return for its own, but later informed the other party to the bargain that it would revoke some U.S.

concession unless further concessions were forthcoming. Such behavior

V

amounts to breach of contract. Yet the threat of imposing a sanction under Section 301 if further concessions are not

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

forthcoming is analytically equivalent to the threat of revoking one of the initial concessions and is thus much the same as renegeing on the bargain. If trading partners anticipate such behavior, they will expect to gain less from reciprocal trade agreements with the United States and consequently be less inclined to enter them.

### C. Implications: The Design of Section 301(b) V2

Foreign government practices that do not violate U.S. legal rights V

nevertheless violate Section 301 (b) if they are "unreasonable" or "discriminatory" and addition "burden or restrict United States commerce." (136) An "unreasonable" act is defined as an act that is "unfair and inequitable." (137) The statute provides a non-exclusive list of example of unreasonable acts, including denial of "market opportunities" or "opportunities for the establishment of an enterprise," failure to protect intellectual property rights, engagement in export targeting, and denial of worker rights. (138) The statute offers no comprehensive definition of "discriminatory" acts. It does indicate, however, that such acts include a denial of most-favored-nation or national treatment (139) in "appropriate" cases involving goods, services, or investment. (140)

Plainly, these definitions encompass virtually any trade practice the USTR wishes to attack. Every governmental restriction upon U.S. exports of goods and services or U.S. investment, and every purported deficiency in the protection of intellectual property, is potentially "unreasonable." Likewise, every regulatory restriction applicable to U.S. firms or investors, but not to others, is potentially "discriminatory." And, to the extent such practices have any adverse impact upon U.S. commercial interests, a burden or restriction upon U.S. commerce arises.

Because Section 301(b) provides little indication of which practices will V

be subject to challenge, it is inconceivable that foreign governments will be deterred from engaging in "unfair" behavior. Rather, its ambiguity simply provides the USTR with the option to utilize the "stick" in negotiating for the removal of trade barriers whenever the USTR finds it advantageous.

Conceivably, this breadth of agency discretion is unavoidable. Although it is possible, as above, to define categories of cases in which threats seem a more

appealing strategy than elsewhere, perhaps an exhaustive listing would be too difficult to formulate. The statute might take the alternative approach of disabling the USTR from issuing threats in certain classes of cases, as where the practice in question is long standing or has been the express topic of prior GATT negotiations. These restrictions, however, might require a list of exceptions, such as when the target country is a GSP beneficiary with a high average level of protection. The proper list of exceptions might be as difficult to specify as the proper list of cases in which threats may be desirable.

Yet the absence of statutory guidance carries considerable risks. Most obviously, the USTR may use its discretion unwisely, challenging practices under conditions when the likelihood of success is low and retaliation is high, or acting in a manner that discourages trading partners from negotiating with the United States for reciprocal concessions. As drafted, for example, Section 301(b) could be invoked to challenge indisputably permissible practices under GATT. And, the mere fear that Section 301 may be used to renege on the bargain may diminish the willingness of other countries to negotiate with the United States. The risk of abuses due to regulatory "capture" is also perhaps somewhat greater when the regulators have broad discretion. The statute might be administered to benefit the constituency of the President rather than to pursue threat strategies when the potential gains and the likelihood of success are greatest. Thus, an argument might be made for statutory changes to prohibit the use of Section 301(b) in some cases, such as those in which the behavior abroad is indisputably legal under express agreements and does not fall within some list of exceptions tailored to capture the cases in which threats are relatively attractive. (141)

It is difficult to say much more in the abstract about the wisdom of Section 301(b). The lack of detail means there are few details to discuss. As the statute is presently drafted, therefore, its utility will turn heavily upon the skillfulness with which the USTR utilizes its extensive discretion. Hence, what remains is to examine the historical experience with Section 301.

### III. The U.S. Experience with Section 301

A comprehensive, quantitative assessment of how Section 301 has V

affected U.S. trade is likely to be impossible. Trade statistics do not exist at a proper level of aggregation for all of the products and services at issue. Further, a myriad of variables account for changes in trading volumes, and it would require an extraordinary wealth of data on economic

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

conditions in other countries to control properly for these variables and isolate the effects of Section 301. Consequently, the analysis to follow is far less ambitious and relies upon the most crude indicators of success and failure.

Drawing upon U.S. government sources, the Appendix list prominent

V

characteristics of Section 301 cases filed since the inception of the statute through 1990. It indicates the filing date and the date of termination or suspension for closed and inactive cases. It indicates the nature of the practice under investigation, as well as the reason it was challenged: to gain access to the market of the target country; to eliminate "unfair" competition in third country markets; to protect the U.S. home market; to gain opportunities for investment in the target country; to induce the target country to afford better intellectual property protection; or to eliminate export restrictions in the target country that increase the cost of raw materials to U.S. industries. The Appendix also indicates whether the challenged practice was alleged to violate an international trade agreement with the United States and whether a formal, international dispute resolution body ruled on the allegation. It notes whether the investigation involved agricultural products, a notoriously contentious area under GATT with highly ambiguous GATT obligations, and whether the target country was at the time of filing a GSP beneficiary.

Most importantly, the Appendix indicates whether, in the course of the investigation, the target country acceded to U.S. demands either in whole or in part by modifying or abolishing the challenged practice. It also indicates whether, in lieu of modifying its practice, the target country provided compensatory concessions. Finally, the Appendix indicates whether the United States retaliated at any time under Section 301 and, if so, the nature of the retaliation and its duration.

The listing includes a number of cases filed but never formally "initiated." Counting these cases, the total number of investigations is ninety-four. Of this total, only eleven cases were devoted exclusively to allegations of "unfair" U.S. imports and had as their sole objective the reduction of import competition in the U.S. market.(142) Most of these import cases were de facto countervailing duty actions filed in the early 1980s.(143) Since the concern of this paper is with the use of threats to gain access to

foreign markets, and since these cases overlap significantly with other trade

V

statutes, further discussion of them is omitted. This exclusion leaves a total of eighty-three cases with clear market-opening objectives or related goals involving exports to third country markets, barriers to foreign investment, access to raw materials, or intellectual property protection abroad.

Any inferences from the information in the Appendix are subject to two obvious cautions. First, not all cases are of equal economic significance. The gains to the United States from many small "successes" may be swamped by the costs of retaliation in a single large "failure." Second, apparent "success" need not translate into actual "success." If the country under investigation agrees to modify its practices, but substitutes some subtle nontariff barrier or some barrier that does not violate any international agreement, the United States may gain little. Third, even when the foreign government concession effectively eliminates the barrier in question, the use of threats may do damage to U.S. relations with that government, which may have adverse effects upon other matters of importance to U.S. interests. Hence, all of the conclusions to follow are tentative.

### A. Cases Involving Alleged Breach of Agreement

Of the eighty-three cases involving market-opening or related initiatives, a clear majority (forty-eight)(144) included alleged violations of U.S. legal rights under existing trade agreements, usually rights under GATT. Agricultural disputes have been the most common, (twenty-six out of forty-eight),(145) suggesting that conflicts attributable to imprecise GATT obligations are an important source of Section 301 actions. Only a modest number of the cases, thirteen of forty-eight, involved GSP beneficiaries.(148)

Of the forty-eight breach of agreement investigations brought under Section 301(a), the foreign country eliminated or modified the challenged practice, or provided compensatory concessions, in thirty-one of them. Of the remaining seventeen cases, the dispute remains the subject of ongoing negotiations in thirteen cases; the case was deemed "settled" by the adoption of the Tokyo Round Subsidies Code in one case;(148) the petition was dismissed as meritless in one case;(148) and the United States modified its own product standards to comply with those abroad in one case, thereby mooting the dispute.(149) In only one instance did the investigation prove a clear "failure," resulting in the cancellation of the U.S.-Argentina Hides Agreement in 1982.(150)

As for retaliation, some manner of sanction was imposed in seven out of the forty-eight cases.(151) The sanctions

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

were lifted in their entirety twice after subsequent settlements were negotiated,(152) and a sanction remains in place in six cases,(153) though the level of sanction in some of those cases has declined. The incidence of retaliation has declined somewhat over time, with only three instances of retaliation in the last twenty-two cases,(154) and sanctions were subsequently lifted for the most part in each case.(155) Only one instance of retaliation involved a GSP beneficiary (Argentina);(156) three involved the European Community(157) and three involved Japan.(158)

The target country acceded to U.S. demands, at least in part, in eight out of nine export promoting cases where a dispute panel ruled in favor of the United States.(158) In one cases, foreign intransigence has resulted in lasting retaliation.(160) It is instructive that settlements were reached without the need for formal dispute resolution in a substantial percentage of the investigations.

Of the thirteen cases involving GSP beneficiaries, one petition was dismissed as meritless.(161) In the remaining twelve cases, the foreign country acceded to U.S. demands ten of twelve times;(162) both exceptions arising in cases involving Argentina.(163)

It is, of course, impossible to know how many of these disputes would have been resolved to the satisfaction of the United States even in the absence of a Section 301 proceeding. But, subject to this and earlier disclaimers, the overall impression suggested by this quick review of the cases is that Section 301 is fairly successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights. Countries often accede to U.S. demands prior to the conclusion of formal dispute resolution, and where dispute panels complete their work, a finding favorable to the United States usually results in a settlement acceptable to USTR.(164) Retaliation has been fairly uncommon. Because the "success" rate appears to be so high, it is difficult to identify factors that seem terribly important to the likelihood of success or failure. Nothing in this group of cases is inconsistent with the proposition that success is more likely with a GSP beneficiary, however, or the complementary proposition that retaliation is more likely in cases involving larger trading partners such as the European Community or Japan.

### B. Cases Not Involving Alleged Breach of Agreement

Of the eighty-three cases not involving efforts to protect the U.S. home market, thirty-five were instances in which the practice under investigation was not alleged to violate any international obligation.(165) Virtually all of the cases

involving U.S. exports of services, restrictions on foreign investment by U.S. companies, and alleged inadequacies of intellectual property protection abroad, fall into this category, along with a number of others.

Notwithstanding the absence of any alleged infringement of U.S. legal rights, these cases were also fairly successful at inducing foreign governments to eliminate or modify their practices. Such "success" occurred in twenty-seven of the thirty-five cases.(168) Of the remaining eight cases, the petition was dismissed as meritless in one;(167) it was withdrawn for undisclosed reasons in one (possibly a favorable settlement);(168) two cases were "settled" by a commitment to participate in Uruguay Round services negotiations;(169) the United States modified its own product standards to moot one dispute;(170) and two cases remain open.(171) The only complete "failure" was the Canadian broadcasting dispute involving tax incentives for Canadian firms to advertise on Canadian stations in preference to U.S. stations--mirror image legislation was enacted by the United States and remains in effect.(172) The other use of retaliation was against Brazil in a pharmaceutical patent rights case.(173)

Although GSP beneficiaries were the target of less than one-fourth of the cases involving alleged breach of trade agreements, they were the target of twenty out of thirty-five cases here. In seventeen instances, the beneficiary agreed to eliminate or modify the challenged practice.(174) Of the other five cases, the petition was withdrawn in one,(175) a commitment to Uruguay Round negotiations settled two;(176) and the other two remain open.(177) Retaliation occurred only once, as noted, against Brazil.

Official sources provide only limited background on the practices at issue in these cases. Thus, for example, it is not possible to tell whether the challenged practices were new or long standing. It is clear from the nature of the challenged practices, however, that few of them involve topics which might have been the topic of prior GATT negotiations.

Again, subject to the disclaimers discussed above, the overall impression is that the statute works fairly well. Foreign governments accede to U.S. demands, at least in part, in the clear majority of cases when the United States presses its position to a conclusion. Retaliation is infrequent, and there is no evidence that the USTR exercises its discretion imprudently to renege on prior U.S. commitments through Section 301. Finally, a hefty majority of investigations involve disputes in which threat strategies have relatively greater appeal--those involving GSP beneficiaries.

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

### CONCLUSION

Despite the widespread international criticism of U.S. actions under Section 301,(178) and the many calls for its repeal,(179) theory suggests that a threat of unilateral sanctions can serve a valuable purpose in certain trade disputes. A prospect of sanctions can encourage foreign nations to comply with their obligations under reciprocal trade agreements, with attendant benefits to the economies of both nations. It can also discourage opportunism in the face of ambiguous obligations, discourage rising protectionism in sectors not yet subject to the discipline of international agreements, and encourage developing nations to liberalize their highly restrictive trade policies. Of course, imprudent use of the "stick" in international trading relations can also produce economically undesirable retaliation and counterretaliation and undermine efforts to achieve further trade liberalization through a process of reciprocal concessions. But upon a preliminary and admittedly tentative review of the U.S. experience with Section 301, there is little evidence that these adverse consequences have materialized. To the contrary, target countries accede to U.S. demands in a considerable majority of cases, and retaliation is infrequent. The USTR defers to ongoing international negotiations in resolving disputes and respects the process of normal dispute resolution under existing trade agreements.

This rather favorable assessment of Section 301 may or may not survive with time. Thus far, the USTR seems to have resisted capture by import-competing interest groups, and Section 301 has not become a pretense for imposing new protectionist measures for the benefit of the President's constituency. The design of the statute may have much to do with the fact that Congress entrusted the "stick" to the same agency representing the United States in reciprocal trade negotiations. The USTR would impair its ability to succeed in this aspect of its function if it were to employ Section 301 to cheat on existing bargains, or to challenge long standing practices that are more appropriately modified through an exchange of "carrots." One cannot rule out the possibility that the USTR's practices will change and that the existence of Section 301 will at some point become counterproductive. Likewise, as noted, an expansion of GATT coverage coupled with improvements in GATT dispute resolution may greatly reduce the need for unilateral measures such as Section 301.

Thus, the message here is not that Section 301 is ideally designed or that it must remain ever and always a part of the U.S. trade policy arsenal. Rather, the claim is much more modest--in response to those who have been so

critical of the statute in the past, it is important to recognize that a limited theoretical case can be made for unilateral threat strategies, and that Section 301 in many though by no means all of its particulars is consistent with such theoretical arguments. Further, the worst fears of critics regarding capture, opportunism, and unilateralism have simply not materialized to date, and the limited evidence available suggests instead that the statute may have been reasonably successful in promoting the national economic interest. For these reasons, Section 301 is perhaps one of the rare successes among U.S. trade statutes, uncharacteristic in its commitment to opening markets rather than protecting them. (1)General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. (2)See, e.g., John H. Jackson, *Restructuring the GATT System* 36-37 (1990) (discussing impact of GATT on reducing tariffs). (3)19 U.S.C. [subsection] 2411-2420 (1988). (4)Id. [section] 2411(a)(1)(A). (5)Id. [section] 2411(a)(1)(B)(ii). (6)Id. [section] 2411(b)(1). (7)Id. [section] 2411(a)(1)(B)(ii), (b)(1). (8)The economic literature contains little analysis of the use of threat strategies to open foreign markets. Rather, the use of strategic analysis in modern international trade theory is largely limited to two topics. The first concerns "optimal tariff" or subsidy battles between countries with the ability to influence their terms of trade (i.e., a degree of market power). See, e.g., Harry Johnson, *Optimal Tariffs and Retaliation*, 21 *Rev. Econ. Stud.* 142 (1953); Kyle Bagwell & Robert W. Staiger, *A Theory of Managed Trade*, 80 *Am. Econ. Rev.* 179 (1990). The second is "strategic trade policy," whereby nations compete with each other to capture rents in industries with supracompetitive returns attributable to increasing returns or positive externalities. A useful collection of essays is found in *Strategic Trade Policy and the New International Economics* (Paul R. Krugman ed., 1986). Two rate examples of papers devoted to the class of issues considered in this paper are Richard E. Baldwin, *Optimal Tariff Retaliation Rules*, in *The Political Economy of International Trade* 108 (Ronald W. Jones & Anne O. Krueger eds., 1990); and John McMillan, *Strategic Bargaining and Section 301*, in *Aggressive Unilateralism* 203 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). The *Aggressive Unilateralism* volume contains a number of other useful essays, which focus primarily on the "Super 301" provisions of the 1988 trade act. These provisions have now expired and consequently are not directly addressed in this Article. (9)See *infra* note 141 and Appendix for a summary of Section 301 actions to date. (10)19 U.S.C. [subsection] 1202, 3001 (1988). (11)Id. [subsection] 1673, 1677(k). (12)Id. [subsection] 1303, 1671. (13)Id. [subsection] 2251-2252. (14)For an elementary exposition of the costs of protectionism through conventional tariffs or quantitative restrictions,

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

see, e.g., Peter B. Kenen, *The International Economy* 17-19, 175-77 (1985); David D. Friedman, *Price Theory* 536-45 (2d ed. 1990). For critical analysis of particular U.S. trade statutes, see, e.g., John J. Barcelo, III, *The Antidumping Law: Repeal It or Revise It*, in *1 Antidumping Law: Policy and Implementation* 53 (John H. Jackson ed., 1979); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 *Colum. L. Rev.* 199 (1989); Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 *Law & Pol'y Int'l Bus.* 507 (1990); Robert Z. Lawrence & Robert E. Litan, *Saving Free Trade* (1986) (escape clause). (15)See, e.g., U.S. Comes Under Attack Over Trade Policy at GATT Council Meeting, *Defends Super 301*, 6 *Int'l Trade Rep. (BNA) No. 26*, at 830 (June 28, 1989) (U.S. attacked for citing Japan, India, and Brazil for possible sanctions); U.S. Delays 301 Oilseeds Decision Until GATT Panel Produces Finding, *EC Reacts Sharply*, 6 *Int'l Trade Rep. (BNA) No. 28*, at 894 (July 12, 1989) (U.S. attacked for citing E.C. for possible sanctions). (16)See GATT's Dunkel Criticizes U.S. 301 Law, *Urges Continued Commitment to GATT Round*, *Int'l Trade Daily (BNA)* (May 24, 1990), available in WESTLAW, International Database, BNA-BTD File. (17)Id. (18)See, e.g., Jagdish Bhagwati, *Political Economy and International Economics* 63-67 (Douglas A. Irwin ed., 1991); Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *Aggressive Unilateralism*, supra note 8, at 1; Jim Powell, *Why Trade Retaliation Closes Markets and Impoverishes People*, *CATO Policy Analysis No. 143*, Nov. 1990, at 6-11; Thomas O. Bayard, *Comment on Alan Sykes' "Mandatory Retaliation For Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301,"* 8 *B.U. Int'l L.J.* 325 (1990). (19)Alan O. Sykes, "Mandatory Retaliation" for Breach of Trade Agreements: Some thoughts on the Strategic Design of Section 301, 8 *B.U. Int'l L.J.* 301 (1990). (20)Academic criticism of Section 301(b) has been especially harsh. See, e.g., Daniel G. Partan, *Retaliation in United States and European Community Trade Law*, 8 *B.U. Int'l L.J.* 333 (1990); Jagdish Bhagwati, *The World Trading System at Risk* 48057 (1991). (21)See supra note 20. (22)To be sure, such remedies may be constrained by legal rules that are enforceable through third-party dispute resolution. See Richard A. Posner, *Economic Analysis of Law* 119-22 (3d ed. 1986). (23)See Victor P. Goldberg & John R. Erickson, *Quantity and Price Adjustments in Long Term Contracts: A Case Study of Petroleum Coke*, 30 *J.L. & Econ.* 369, 370-71 (1987) (focus on quantity and price adjustment mechanisms in petroleum coke contracts which enable the parties to curtail mutually harmful behavior); Paul J. Joskow, *Price Adjustment in Long-Term Contracts: The Case of Coal*, 31 *J.L. & Econ.* 47, 51 (1988) (major challenge in structuring long-term contracts involves

specifying price adjustment provisions to guard against opportunistic behavior and implementing provisions that do not lead to adaptation problems during the contractual relationship). (24)See L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 *J. Bus.* 27, 28-30 (1980); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J.L. & Econ.* 297, 302-08 (1978). (25)See, e.g., Thomas M. Franck, *Judging the World Court* 6-9 (1986). (26)Of the 92 cases filed since 1975, 48 have involved the alleged violation of a trade agreement. See *infra* note 144 and Appendix. (27)GATT, supra note 1, art. XXIII. A roughly similar mechanism for dispute resolution applies under Article XII, *id.* art. XII, concerning the use of protective measures for balance of payments purposes, and under certain provisions of the Tokyo Round Codes. See, e.g., *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT Subsidies Code)*, done Apr. 12, 1979, art. 13, 31 *U.S.T.* 513, *T.I.A.S. No. 9619*, 1186 *U.N.T.S.* 204 (entered into force Jan. 1, 1980). (28)GATT, supra note 1, art. XXIII. For a summary of dispute settlement in GATT, see Barry E. Carter & Phillip R. Trimble, *International Law* 495-98 (1991). For an extensive discussion and critique of dispute resolution under GATT, see Jackson, supra note 2, at 59-69; Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 *Minn. L. Rev.* 461, 503-07 (1975). Much like this Article, Hudec has recently argues that some degree of "justified disobedience" is desirable when GATT dispute resolution is inadequate to produce adherence to GATT principles.

See Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *Aggressive Unilateralism*, supra note 8, at 113. (29)A contracting party can generally block acceptance by refusing to join a consensus decision to accept a working party or panel report. See Jackson, supra note 2, at 59-69. (30)In a 1952 decision, the Netherlands was permitted to impose an restriction on U.S. exports of wheat flour due to U.S. import restraints on Dutch dairy products. *GATT*, 1 *Supp. B.I.S.D.* 32, 64 (1953). See Jackson, supra note 2, at 63-64. (31)See John J. Jackson, *World Trade and the Law of GATT* 180-87 (1969). (32)The existence of such opportunities to gain political advantage through reciprocal concessions provides the conventional interest group explanation for GATT and other trade-liberalizing undertakings. See, e.g., Robert E. Baldwin, *Trade Policy in a Changing World Economy* 137, 144-47 (1988); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 *U. Chi. L. Rev.* 255 (1991). (33)See, e.g., Anatol Rapoport, *Prisoner's Dilemma*, in *The New Palgrave: Game Theory*

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

199 (John Eatwell et al. eds., 1989). The simultaneous moves assumption is not essential to the proposition that threat strategies can induce parties to comply. (34)See, e.g., id.; Eric Rasmusen, *Games and Information* 91-94 (1990); David M. Kreps, *A Course in Microeconomic Theory* 503-06 (1990). This result is a special case of the "Folk Theorem," which holds that for a large class of infinite horizon repeated games (including the Prisoner's Dilemma) with sufficiently low discounting of the future, "any combination of actions observed in any finite number of repetitions is the unique of some subgame perfect equilibrium." Rasmusen, *supra*, at 92; see also Kreps, *supra*. In other words, a multiplicity of equilibria exists that are Nash (each player's strategy is at least weakly best given the strategy of the other) and perfect (roughly, each player's threats are credible, so that the other player expects threatened punishments to be carried out). (35)For a game with a fixed ending, cheating is "inevitable" on the final play because it yields the maximum payoff to each player in that period regardless of what the other player does--a threat of future sanction cannot influence behavior. Consequently, the threat of future sanction cannot influence play in the next to last period either, or in the next-to-next to last, and so forth--by the logic of "backward induction" the game is said to "unravel" and cheating becomes the dominant strategy in every period of play. A similar problem arises with heavy discounting because the threat of future sanction becomes insufficient to wipe out gains from cheating in the current period. See Rasmusen, *supra* note 34, at 91-94. (36)Id. at 118-19. (37)See id. at 92-93; see also Roger B. Myerson, *Game Theory: Analysis of Conflict* 331 (1991). (38)See Rasmusen, *supra* note 34, at 91-94; Kreps, *supra* note 34, at 507-08. (39)Interestingly, the experimental work also suggests that cooperation can emerge in the finite game. See Rapaport, *supra* note 33, at 201. (40) [F]requencies of cooperative choices in iterated plays vary as expected with the payoffs associated with the outcomes. The larger the rewards associated with reciprocated cooperation or the larger the punishments associated with double defection, the more frequent are the cooperative choices. The larger the punishment associated with unreciprocated cooperation, the more frequent are the defecting choices, and so on. Id. (41)A leading work on the "tit for tat" strategy is Robert Axelrod, *The Evolution of Cooperation* (1984). For cautions, see Rapaport, *supra* note 33, at 202; Rasmusen, *supra* note 34, at 91-92, 119-20. (42)See Drew Fudenberg & Jean Tirole, *Game Theory* 174-81 (1991). (43)See *supra* notes 26-31 and accompanying text. (44)See Sykes, *supra* note 32, at 276-77. (45)In an instance when  $c > V$ , the seller would prefer to pay  $V - p$  rather than incur the loss from performance of  $p - c$ . The loss  $p - c$  is smaller than  $V - p$ , by contrast, when  $c < V$ . See, e.g., Steven Shavell, *Damage Measures for Breach of*

*Contract*, 11 *Bell J. Econ.* 466 (1980). (46)See Posner, *supra* note 22, at 117-19 (some courts prefer damage remedy over specific performance because of the ease of entering one judgment compared to monitoring the completion of a party's performance); Alan Schwartz, *The Case for Specific Performance*, 89 *Yale L.J.* 271 (1979) (specific performance is both efficient and preferable to damages). (47)See Sykes, *supra* note 32, at 281, for a formal model. (48)Interestingly, a rough correspondence may arise between this notion of politically "efficient breach" in GATT and efficiency from a societal standpoint. If the officials negotiating a trade agreement anticipate that they can breach the agreement ex post when breach is efficient, their expected gains from the agreement increase ex ante. In turn, they will become more willing to enter such agreements, and trade liberalization will occur to a somewhat greater extent. As long as the costs of additional protective measures ex post do not exceed the benefits of a greater number of concessions ex ante, the overall costs of protection will decline. For further elaboration of this argument, and the caveats that apply, see Sykes, *supra* note 32, at 278-89. (49)GATT, *supra* note 1, arts. XIX, XXVIII. (50)Id. art. XXVIII(4)(d). (51)See id. art. XIX(3)(a). (52)Trade statistics are usually available, and the parties can ordinarily determine with reasonable confidence to what extent a new trade restriction has affected trade flows. (53)See *supra* note 47 and accompanying text. (54)See, e.g., Rasmusen, *supra* note 34, at 91. Rasmusen explains the way in which mutual use of the "grim" strategy--one player cooperates with the other player as long as the other player cooperates, but responds to a single period of non-cooperation--sustains cooperation as a perfect equilibrium in the repeated game. Id. The analogue here might be a strategy that permanently revoked all GATT concessions to any party found to have violated GATT obligations. (55)Council Regulation 2641/84 of 17 September 1984 on the Strengthening of the Common Commercial Policy with Regard in Particular Against Illicit Commercial Practices, 1984 O.J. (L 252). For a general discussion of this statute, see Jackson, *supra* note 2, at 73-74. The Community's measure was adopted in 1984, and is modeled fairly closely on Section 301. For a detail description of its provisions, see Ivo Van Bael & Jean Francois Bellis, *Antidumping and Other Trade Protection Laws of the EEC* 331-64 (2d ed. 1990); Partan, *supra* note 20, at 333. (56)See 19 U.S.C. [section] 2411(a)(1) (1988)" (a) Mandatory action (1) If the United States Trade Representative determines under section 2414(a)(1) of this title that-- (A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country-- (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct that Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. (57)Id. [section] 2411(d)(4)(A) ("An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States."). (58)It is well established under GATT that a signatory can cause "nullification or impairment" of benefits owing to another signatory through actions which on their face are consistent with GATT, but nevertheless frustrate expectations.

See GATT supra note 1, art. XXIII. The classic illustration is the introduction of a subsidy to domestic producers after the subsidizing country has negotiated a tariff ceiling or "binding" applicable to competing imports--even though the GATT does not explicitly restrict the ability to signatories to use domestic subsidies, the introduction of a new subsidy after a tariff negotiation can disadvantage trading partner just as seriously as an illegal tariff increase and frustrate the expectations developed in the course of the negotiations. See Jackson supra note 31, at 376-78. (59)For an extended discussion of the 1988 amendments to these provisions, emphasizing a number of details and considered here, see Sykes, supra note 32, at 303. (60)See 19 U.S.C. [section] 2412(a). (61)Id. [section] 2412(b). (62)Id. [section] 2413(a)(1). (63)Id. [section] 2413(a)(2). (64)Id. [section] 2414(a)(1)(A). (65)Id. [section] 2414(a)(1)(B). The eighteen-month time limit, however, still applies even though formal dispute resolution procedures under the applicable trade agreement may not have concluded. See id. Extensions may be granted at the request of the petitioner under [section] 2412(a) or a majority of representatives of the domestic industry that would benefit from the action under [section] 2412(b)(1) or [section] 2414(a)(3)(B). Section 2415(a)(2)(A)(ii) provides that an extension may be granted: if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action. This requirement was inserted in 1988, and is discussed in Kenneth J. Ashman, *The Omnibus Trade and Competitiveness Act of 1988: The Section 301 Amendments--Insignificant Changes from Prior Law?*, 7 B.U. Int'l L.J. 115, 137-38 (1989). When a determination to take action has been made, the action is to be implemented within 30 days, although USTR has

fairly broad discretion to extend this period by 180 days in most cases. See 19 U.S.C. [section] 2415(a); see also Ashman supra, at 138-39. The eighteen-month limit, however, does not apply to actions relating to intellectual property protection brought under 19 U.S.C. [section] 2412(b)(2)(A). For those actions, a six-month limit on the length of the investigation applies, id. [section] 2414(a)(3)(A), unless USTR provides an express explanation for delay. Id. [section] 2414(a)(3)(B). (66)19 U.S.C. [section] 2411(c)(1)(C). (67)See supra notes 27-31 and accompanying text. (68)See supra note 29 and accompanying text. (69)Acceding to U.S. demands regarding trade concessions is often perceived as "caving in" by foreign constituencies and can impose significant political costs on leaders perceived as weak in the face of U.S. demands. See e.g., *PMA Slams Thai Government's Patent Protection*, Pharm. Bus. News, Feb. 15, 1991; *Thai Pharmaceutical Patent Problem Reaches Impasse*, Pharm. Bus. News, Feb. 16, 1990. (70)See GATT, supra note 1, art. XIX. For a discussion of uses of the escape clause, see generally Sykes, supra note 32; Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 Harv. L. Rev. 547, 579-99 (1987) (discussing the serious injury and substantial cause standards). (71)See GATT, supra note 1, art. XII. (72)Id. art. XVIII. (73)Id. art. XXI. (74)Id. art. XX(j). (75)Id. art. XX(b). (76)Id. art. XI. (77)Id. art. XVI. (78)Id. (79)See infra note 144. (80)See supra Section I(C)(3). (81)See supra text accompanying notes 29-30. (82)19 U.S.C. [section] 2414(a)(2). This aspect of the statute has been criticized extensively for its possible GATT illegality. (83)This window of opportunity for modification of the practices in question has been curtailed for actions brought under id. [section] 2412(b)(2)(A), see supra note 65, and it is unclear what effect the six-month deadline will have on negotiation of settlement in those cases. (84)Id. [section] 2411(c). (85)Id. [section] 2411(a)(3). (86)Sanctions may be stayed if, for instance: there is an agreement by the foreign country to end or to phase out the practice in question; it is impossible for the foreign country to achieve the results desired; there is an agreement to provide compensatory trade benefits to the United States; or, when the action would have an adverse impact upon the U.S. economy out of proportion to its benefits. 19 U.S.C. [section] 2411(a)(2). (87)See generally infra, Appendix. (88)See supra note 50 and accompanying text. (89)See supra note 28 and accompanying text. (90)See GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations S.1-S.23* (Dec. 20, 1991) (on file with Law and Policy and International Business). (91)Id. para. 4. (92)Id. para. 18. (93)Id. para. 15. (94)Id. para. 20. (95)The generally accepted consensus is that the draft agreement faces considerable hurdles in Geneva. See Francis Williams, *GATT: Pact With Power to Fuel*

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

Worldwide Boom, *Fin. Times*, Jan. 31, 1992, [section] I, at 4; Martin Wolf, *The GATT Makes Its Last Stand*, *Fin. Times*, Jan. 20, 1992, [section] I, at 10. (96)19 U.S.C. [section] 2411(b). (97)John H. Barton & Bart S. Fisher, *International Trade and Investment* 25-26 (1986). (98)See, e.g., Avinash Dixit & Victor Norman, *Theory of International Trade* 150-52 (1980); Jagdish N. Bhagwati & T. N. Srinivasan, *Lectures on International Trade* 174-84 (1983). The analysis of monopoly power in trade is in fact somewhat more complicated than the analysis of domestic monopsony, because it requires consideration of the exchange rate fluctuations that attend changes in the level of protection. Optimal tariff theory underlies a recent effort to explain a number of historical trade wars. See generally John A. Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (1987). It also underlies the discussion in Section I pertaining to minimization of the costs of sanctions to the U.S. economy by using tariffs on goods with a low import supply elasticity. See *supra* Section I(c)(4). (99)One recent paper, for example, considers an important class of problems of direct interest here--whether a threat of sanctions that are costly to the country that employs them (if used) can induce another country to take actions that disadvantage it. Jonathan Eaton & Maxim Engers, *Sanctions* (NBER Working Paper No. 3399, July 1990). Their model rules out all possibility of retaliatory sanctions for simplicity sake and assumes an infinite horizon to avoid unraveling due to the dominant strategies in the final period. In the simultaneous moves game, the conclusion is that the "Folk Theorem" applies--any outcome that strictly Pareto dominates the "worst case" individually rational outcome for both players is a possible equilibrium. *Id.* at 6-9. For the target of sanctions, this "worst case" scenario in the model involves maximum sanctions and no capitulation. For the country that threatens sanctions, this "worst case scenario" involves no capitulation by the target and no sanctions. Thus, from the perspective of the country that threatens sanctions, the opportunity to improve upon the equilibrium in which no sanctions are utilized and no capitulation occurs is clearly present, and any equilibrium other than that one will represent improvement. Hence, in equilibrium, the threat of sanctions cannot hurt the nation that employs the threat and can surely benefit it. An important implication of the Folk Theorem in this model is that sanctions which are costly to the employing country can nevertheless be credible threats. It is worth incurring a finite cost in the current period to secure the long term benefits of changing the behavior of the target of sanctions. A similar conclusion emerges from the authors' analysis of an alternating moves game, with strategies restricted, for simplicity, to "Markov" strategies.

*Id.* at 29. Clearly, however, the rather optimistic picture of

sanctions in the Eaton & Engers model depends significantly on the assumption that the target of sanctions has no possibility of retaliation. As the authors put it in their conclusion, "[i]f both parties can take actions with external benefits and impose punishments then many more possibilities emerge." *Id.* at 30. (100)Most studies of past sanctions policies focus on the use of economic sanctions to achieve political ends. A recent survey can be found in Michael P. Malloy, *Economic Sanctions and U.S. Trade* (1990). By and large, commentary on the use of sanctions for such purposes suggests that sanctions are often ineffective. See Gary C. Hufbauer & Jeffrey J. Schott, *Economic Sanctions in Support of Foreign Policy Goals* 74-76 (1983); Gary C. Hufbauer & Jeffrey J. Schott, *Economic Sanctions Reconsidered: History and Current Policy* 79 (1985). (101)Of course, if interest group politics determines the choice of the sanction rather than a thoughtful economic analysis, then the economic costs of the sanction to the large country can be increased considerably. (102)Bhagwati makes much the same point. See Jagdish Bhagwati, *Protectionism* 124 (1988) (discussing the fact that the United States traditionally takes upper hand in bilateral trade negotiations with weaker countries). (103)See generally Thomas C. Schelling, *The Strategy of Conflict* 21-52 (1960). (104)104 See GATT, *supra* note 1, arts. I, XIII. (105)*Id.* arts. XII, XVIII. (106)*Id.* art. XXIV. (107)*Id.* (108)GATT requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.* art. I. (109)"Bilateralism" involves any preferential reduction of trade barriers between two countries. (110)For a discussion of the welfare economics of preferential tariffs, see Bhagwati & Srinivasan, *supra* note 98, at 271-90. (111)The alternative, of course, is to insist that concessions be applied on a most-favored-nation basis, but such concessions often will be more costly to the importing nation politically, and thus will be more difficult to obtain. See Baldwin, *supra* note 32, at 250-53, 256-59. (112)A change in trade policy would be permissible if the trading partner was not a party to GATT, or if the protective trade measure implemented was not covered by GATT. Since GATT only applies to trade in goods, there are few regulations covering barriers to service exports. See Alan C. Swan & John F. Murphy, *Cases and Materials on the Regulation of International Business and Economic Relations* 222 (1991). Furthermore, GATT only covers "bound" tariffs on which the contracting parties commit either not to raise the existing rate or to lower the existing rate to a specified level and keep the tariff at that level. *Id.* at 229. "Unbound" tariffs, by definition, are not included in the tariff schedules

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

annexed to GATT. As a result, there is no GATT provision which would prevent a country from raising an unbound tariff by as much as it desired. See GATT, supra note 1, art. II. (113)See supra notes 33-41 and accompanying text. (114)See supra notes 38-40 and accompanying text. (115)See supra note 98. (116)Sanctions thus have the qualities of the "tit for tat" strategy that Axelrod finds so congenial to efforts at sustaining implicit cooperation. See Axelrod, supra note 41, at 57-63. (117)An argument might be made that any increase in protection not prohibited by an existing agreement ought to be viewed as implicitly authorized by existing agreements. The difficulty with such an argument is that many matters of commercial significance have never been addressed in the course of international negotiations, probably due to their modest importance historically. The fact that GATT, only within the past few years, has undertaken to bring trade in services within its coverage does not establish that, prior to such agreements, signatories implicitly agree to let each other pursue policy they want in the service area. Rather, the lack of any agreement covering services likely reflects the fact that the transaction costs of negotiating a services agreement have been high in relation to the value of such an agreement. See Nigel Grimwade, *International Trade: New Patterns of Trade and Investment* 405-06 (1989). (118)See supra notes 71-79 and accompanying text. (119)See, e.g., GATT, *European Economic Community--Subsidies on Exports of Wheat Flour*, 31 *Supp. B.I.S.D* 263, para. 17 (1985), reprinted in part in John H. Jackson & William J. Davey, *Legal Problems of International Economic Relations* 735 (2d ed. 1986) (dispute panel unable to determine whether export subsidies by EC provided its exporters with more than an "equitable share" of world trade in wheat flour). (120)See Sykes, supra note 32, at 287 (discussing "unforeseen development" and "effect of obligations incurred" language in Article XIX which have, for all intents and purposes, been read out of that Article). (121)See GATT, supra note 1, art. XVI(3). (122)If a developing country Article XVIII under dubious circumstances, the United States has no opportunity to do the same because it is not a developing country. *Id.* art XVIII (infant industry protection). (123)See U.S.I.T.C., *Harmonized Tariff Schedule of the United States* (1990) [hereinafter *Harmonized Tariff Schedule*]. A list of GSP beneficiary countries entitled to further preferences in accordance with the Caribbean Basin Initiative, may be found in *id.* General Notes, at 2-11. Statutory authority for a Generalized System of Preferences may be found in 19 U.S.C. [section] (1988). GSP affords duty free or reduced duty treatment to over 4000 products from 135 countries. See U.S.I.T.C., *Operation of the Trade Agreements Program* 149 (1989). The present beneficiary nations include several major U.S. trading partners, such as Mexico, Brazil, and Argentina.

(124)See *Harmonized Tariff Schedule*, supra note 123, at 10-11; see also 19 U.S.C. [section] 2463(c). (125)See GATT, supra note 1, art. XII. (126)See Peter Winship, *Book Review*, 81 *Am. J. Int'l L.* 545, 546 (1987) (reviewing Natan Elkin, *Droit et Pratique des Preferences Generalisees* (1985)). (127)See GATT, supra note 1, art. XVIII. (128)See generally John H. Jackson, *The World Trading System* 275-81 (1989). (129)*Id.* at 277. (130)See, e.g. Suthipon Thaveechaiyagarn, *Current Developments: Section 301 Cigarette Case Against Thailand - A Thai Perspective*, 21 *Law & Pol'y Int'l Bus.* 367 (1990). (131)Rudiger W. Dornbusch, *Policy Options for Freer Trader: The Case for Bilateralism*, in *An American Trade Strategy: Options for the 1990s* at 106, 124 (Robert Z. Lawrence & Charles L. Schultz eds., 1990). (132)See *id.* at 124. (133)*Id.* (134)See supra notes 112-17 and accompanying text. (135)See Keith Bradsher, *As U.S. Urges Free Markets, Its Trade Barriers Are Many*, *N.Y. Times*, Feb. 7, 1992, at A1. (136)19 U.S.C. [section] 2411(b) (1988). (137)*Id.* [section] 2411(d)(3)(A). (138)*Id.* [section] 2411(d)(3)(B). (139)*Id.* [section] 2411(d)(4)(B). "National treatment" requires the foreign government in question to afford the same benefits and opportunities to the United States as are afforded to domestic nationals. *Id.* (140)*Id.* [section] 2411(d)(5). (141)A similar argument has been made in the past. See, e.g., Patricia L. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 *Yale L.J.* 1122 (1987). (142)See *EC/Japan Steel Diversion to U.S.* (301-10), 43 *Fed. Reg.* 3962 (USTR 1978) (final admin. review); *EC Pasta Export Subsidies* (301-25), 51 *Fed. Reg.* 30,146 (USTR 1986) (final admin. review); *Austria, France, Italy, Sweden, U.K., and Belgium Specialty Steel Subsidies* (301-27 to 31, 33), *Fed. Reg.* 33,233 (USTR 1983); *Canada Railcar Export Subsidies* (301-32), 47 *Fed. Reg.* 42,059 (USTR 1982) (final admin. review); *Canada Raw Fish Export Controls* (301-55), 53 *Fed. Reg.* 33,207 (USTR 1989) (final admin. review); *Canada Softwood Lumber* (3301-87), 56 *Fed. Reg.* 58,944 (USTR 1991). (143)Another de facto countervailing duty case under Section 301 was initiated in 1991 regarding Canadian softwood imports. See *Canada Softwood Lumber* (301-87), 56 *Fed. Reg.* 58,944 (USTR 1991). (144)See *Canada Egg Quotas* (301-2), 41 *Fed. Reg.* 9430 (USTR 1976) (final admin. review); *EC Levies on Egg Albumin* (301-3), 45 *Fed. Reg.* 48,758 (USTR 1980) (final admin. review); *EC Minimum Import Price & License Practices, Canned Fruits* (301-4), 44 *Fed. Reg.* 1504 (USTR 1979) (final admin. review); *EC Export Subsidies on Malt* (301-5), 40 *Fed. Reg.* 41,558 (USTR 1980) (final admin. review); *EC Export Subsidies on Wheat Flour* (301-6), 45 *Fed. Reg.* 51,169 (USTR 1983) (subject to Uruguay Round negotiations); *EC Variable Levy on Sugar Added* (301-7),

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

45 Fed. Reg. 41,254 (USTR 1980) (final admin. review); EC Soybean (301-8), 44 Fed. Reg. 1504 (USTR 1979) (final admin. review); EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988) (final admin. review); Japan Silk Import Policies (301-12), 43 Fed. Reg. 8876 (USTR 1978) (final admin. review); Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986) (settlement reached); EC Wheat Export Subsidies (301-16), 45 Fed. Reg. 49,428 (USTR 1980) (investigation settled by adoption of Tokyo Round Subsidies Code); Japan Cigars (301-17), 46 Fed. Reg. 1389 (USTR 1981) (final admin. review); Argentina Marine Insurance (301-18), 45 Fed. Reg. 49,732 (USTR 1980) (investigation suspended); Japan Pipe Tobacco (301-19), 46 Fed. Reg. 1388 (USTR 1981) (final admin. review); Japan Surplus Rice Sales (no initiation) (USTR 1980) (petition available at the Office of the United States Trade Representative); EC Sugar Export Subsidies (301-22), 47 Fed. Reg. 28,361 (USTR 1987) (addressed in Uruguay Round negotiations); EC Poultry Export Subsidies (301-23), 47 Fed. Reg. 30,699 (USTR 1982) (addressed in Uruguay Round negotiations); Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982) (final admin. review); EC Canned Fruit Production (301-26), 54 Fed. Reg. 41,708 (USTR 1989) (final admin. review); Canada Front End Loaders Duty Remission (301-34), 47 Fed. Reg. 51,029 (USTR 1982) (bilateral consultations continuing); Brazil Non-rubber Footwear Import Restrictions (301-35), 47 Fed. Reg. 56,428 (USTR 1982) (case remains open); Japan Non-rubber Footwear Import Restrictions (301-36), 51 Fed. Reg. 9435 (USTR 1986) (case remains open); Korea Non-rubber Footwear Import Restrictions (301-37), 51 Fed. Reg. 56,428 (USTR 1985) (case remains open); ROC Non-rubber Footwear Import Restrictions (301-38), 48 Fed. Reg. 56,561 (USTR 1983) (petition dismissed); Korea Wire Rope Subsidies (301-39), 48 Fed. Reg. 55,790 (USTR 1983) (final admin. review); Brazil Soybean Oil and Meal Subsidies (301-40), 49 Fed. Reg. 5915 (USTR 1984) (final admin. review); Portugal Soybean Oil and Meal Subsidies (301-41), 49 Fed. Reg. 5915 (USTR 1984) (final admin. review); Spain Soybean Oil and Meal Subsidies (301-42), 49 Fed. Reg. 5915 (USTR 1984) (final admin. review); ROC Rice Export Subsidies (301-43), 49 Fed. Reg. 10,761 (USTR 1984) (final admin. review); EC Fertilizer Standards (301-47), 49 Fed. Reg. 39,937 (USTR 1984) (consultations continuing); Japan Semiconductors (301-48), 52 Fed. Reg. 43,146 (USTR 1987) (agreement reached, but compliance questioned); EC Enlargement (301-54), 56 Fed. Reg. 30,945 (USTR 1991) (final admin. review); Canada Raw Fish Export Controls (301-55), 53 Fed. Reg. 33,207 (USTR 1989) (final admin. review); India Almond Tariffs and Licensing Policy (301-59), 53 Fed. Reg. 21,757 (USTR 1988) (final admin. review); EC Third Country Meat Directive (301-60), 56 Fed. Reg. 1663 (USTR 1987) (final

admin. review); EC Meat Hormones (301-62), 55 Fed. Reg. 20,376 (USTR 1990) (interim market access agreement); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990) (final admin. review); Japan Citrus Quotas (301-66), 53 Fed. Reg. 25,714 (USTR 1988) (final admin. review); EC Copper Scrap Export Restrictions (301-70), 55 Fed. Reg. 7859 (USTR 1990) (final admin. review); EC Canned Fruit (301-71), 54 Fed. Reg. 41,708 (USTR 1989) (final admin. review); Thailand Cigarettes (301-72), 55 Fed. Reg. 49,724 (USTR 1990) (final admin. review); Brazil Import Licensing (301-73), 55 Fed. Reg. 22,876 (USTR 1990) (final admin. review); Norway Toll Equipment (301-79), 55 Fed. Reg. 19,692 (USTR 1990) (final admin. review); Canada Import Restriction Beer (301-80), 57 Fed. Reg. 308 (USTR 1991) (final admin. review); EC Enlargement (301-81), 55 Fed. Reg. 53,376 (USTR 1990) (final admin. review); EC Third Country Meat Directive (301-83), 56 Fed. Reg. 1663 (USTR 1991); PRC Market Access Barriers (301-88), 57 Fed. Reg. 3084 (USTR 1991). (145)See Canada Egg Quotas (301-2), 41 Fed. Reg. 26,758 (USTR 1976); EC Levies on Egg Albumin (301-3), 45 Fed. Reg. 48,758 (USTR 1980); EC Minimum Import Price & License Practices, Canned Fruits (301-5), 40 Fed. Reg. 41,558 (USTR 1980); EC Export Subsidies on Malt (301-83), 56 Fed. Reg. 41,558 (USTR 1980); EC Export Subsidies on Wheat Flour (301-6), 45 Fed. Reg. 51,169 (USTR 1983); EC Variable Levy on Sugar Added (301-7), 45 Fed. Reg. 41,254 (USTR 1980); EC Soybean (301-8), 44 Fed. Reg. 1504 (USTR 1979); EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988); EC Wheat Export Subsidies (301-16), 45 Fed. Reg. 49,428 (USTR 1980); Japan Pipe Tobacco (301-19), 46 Fed. Reg. 1388 (USTR 1981); EC Sugar Export Subsidies (301-22), 47 Fed. Reg. 28,361 (USTR 1987); EC Poultry Export Subsidies (301-23), 47 Fed. Reg. 30,699 (USTR 1984); Brazil Soybean Oil and Meal Subsidies (301-40), 49 Fed. Reg. 5915 (USTR 1984); Portugal Soybean Oil and Meal Subsidies (301-41), 49 Fed. Reg. 5915 (USTR 1984); Spain Soybean Oil and Meal Subsidies (301-42), 49 Fed. Reg. 5915 (USTR 1984); ROC Rice Export Subsidies (301-43), 49 Fed. Reg. 10,761 (USTR 1984); EC Enlargement (301-54), 56 Fed. Reg. 30,945 (USTR 1991); EC Third Country Meat Directive (301-60), 56 Fed. Reg. 1663 (USTR 1987); EC Meat Hormones (301-62), 55 Fed. Reg. 20,376 (USTR 1990); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990); Japan Citrus Quotas (301-66), 53 Fed. Reg. 25,714 (USTR 1988); EC Canned Fruit (301-71), 54 Fed. Reg. 41,708 (USTR 1989); Brazil Import Licensing (301-73), 55 Fed. Reg. 22,876 (USTR 1990); EC Third Country Meat Directive (301-83), 56 Fed. Reg. 1663 (USTR 1991). (146)See Argentina Marine Insurance (301-18), 45 Fed. Reg. 49,732 (USTR 1980); Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982); Brazil Non-rubber Footwear Import

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

Restrictions (301-35), 47 Fed. Reg. 56,428 (USTR 1985); Korea Non-rubber Footwear Import Restrictions (301-37), 51 Fed. Reg. 9435 (USTR 1985); Taiwan Non-rubber Import Restrictions (301-38), 48 Fed. Reg. 56,561 (USTR 1983) (petition dismissed); Korea Wire Rope Subsidies (301-39), 48 Fed. Reg. 55,790 (USTR 1983); Brazil Soybean Oil and Meal Subsidies (301-40), 49 Fed. Reg. 5915 (USTR 1984); Portugal Soybean Oil and Meal Subsidies (301-41), 49 Fed. Reg. 5915 (USTR 1984); ROC Rice Export Subsidies (301-43), 49 Fed. Reg. 10,761 (USTR 1984); India Almond Tariffs and Licensing Policy (301-59), 53 Fed. Reg. 21,757 (USTR 1988); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990); Thailand Cigarettes (301-72), 55 Fed. Reg. 49,724 (USTR 1990); Brazil Import Licensing (301-73), 55 Fed. Reg. 22,876 (USTR 1990). (147)EC Wheat Export Subsidies (301-16), 45 Fed. Reg. 49,428 (USTR 1980) (settled by adoption of Tokyo Round Subsidies Code). (148)Taiwan Non-rubber Footwear Import Restrictions (301-38), 48 Fed. Reg. 56,561 (USTR 1983) (petition dismissed as meritless). (149)EC Third Country Meat Directive (301-60), 56 Fed. Reg. 1663 (USTR 1987) (U.S. plants modified to meet EC inspection requirements). (150)Argentina Hides (301-24), 47 Fed.

Reg. 53,989 (USTR 1982) (cancellation of U.S.-Argentina Hides Agreement). (151)See EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988); Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986); Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982); Japan Non-rubber Footwear Import Restrictions (301-36), 51 Fed. Reg. 9435 (USTR 1985); Japan Semiconductors (301-48), 52 Fed. Reg. 43,146 (USTR 1987) (agreement reached, but compliance questioned); EC Enlargement (301-54), 56 Fed. Reg. 30,945 (USTR 1991); EC Meat Hormones (301-62), 55 Fed. Reg. 1663 (interim market access agreement). (152)See EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988) (sanctions lifted); EC Enlargement (301-54), 56 Fed. Reg. 30,945 (USTR 1991). (153)See Japan Leather (301-13), 51 Fed. Reg. 9435 (USTR 1986) (sanction remains in place); Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982) (sanction remains in place after cancellation of U.S.-Argentina Hides Agreement); Japan Non-rubber Footwear Import Restrictions (301-36), 51 Fed. Reg. 9435 (USTR 1985) (sanction in place); Japan Semiconductors (301-48), 52 Fed. Reg. 43,146 (USTR 1987); EC Meat Hormones (301-62), 55 Fed. Reg. 20,376 (USTR 1990); Canada Import Restrictions on Beer (301-80), 57 Fed. Reg. 308 (USTR 1991). (154)See Japan Semiconductors (301-48), 52 Fed. Reg. 43,146 (USTR 1987) (agreement reached, but compliance questioned); EC Meat Hormones (301-62), 55 Fed. Reg. 20,376 (USTR 1990) (some duties suspended by compromise); Canada

Import Restrictions on Beer (301-80), 57 Fed. Reg. 308 (USTR 1991). (155)No claim is made here, or elsewhere in this section, of any "statistical significance." Small sample problems plainly abound. (156)Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982) (retaliation against GSP beneficiary). (157)EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988); EC Enlargement (301-54), 56 Fed. Reg. 30,945 (USTR 1987); EC Meat Hormones (301-62), 55 Fed. Reg. 20,376 (USTR 1990) (interim market access agreement). (158)See Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986); Japan Non-rubber Footwear Import Restrictions (301-36), 51 Fed. Reg. 9435 (USTR 1985); Japan Semiconductors (301-48), 52 Fed. Reg. 43,146 (USTR 1987). (159)See EC Soybean (301-8), 44 Fed. Reg. 1504 (USTR 1979); EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988); Japan Silk Import Policies (301-12), 43 Fed. Reg. 8876 (USTR 1978); Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986); EC Subsidies on Canned Fruit (301-26), 54 Fed. Reg. 41,708 (USTR 1989); Canada Raw Fish Export Controls (301-55), 53 Fed. Reg. 33,207 (USTR 1989); EC Soybean Processing Subsidies (301-63), 55 Fed. Reg. 4294 (USTR 1990); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990); Thailand Cigarettes (301-72), 55 Fed. Reg. 49,724 (USTR 1990); Canada Import Restrictions on Beer (301-80), 57 Fed. Reg. 308 (USTR 1991). (160)Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986). (161)ROC Non-rubber Footwear Import Restrictions (301-39), 48 Fed. Reg. 55,790 (USTR 1983). (162)See Brazil Non-rubber Footwear Import Restrictions (301-35), 47 Fed. Reg. 56,428 (USTR 1985); Korea Non-rubber Footwear Import Restrictions (301-37), 47 Fed. Reg. 56,428 (USTR 1985); Korea Wire Rope Subsidies (301-39), 48 Fed. Reg. 55,790 (USTR 1983); Brazil Soybean Oil and Meal Subsidies (301-40), 49 Fed. Reg. 5915 (USTR 1984); Portugal Soybean Oil and Meal Subsidies (301-41), 49 Fed. Reg. 5915 (USTR 1984); ROC Rice Export Subsidies (301-43), 49 Fed. Reg. 10,761 (USTR 1984); India Almond Tariffs and Licensing Policy (301-59), 53 Fed. Reg. 21,757 (USTR 1988); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990); Thailand Cigarettes (301-72), 55 Fed. Reg. 49,724 (USTR 1990); Brazil Import Licensing (301-73), 55 Fed. Reg. 22,876 (USTR 1990). (163)Argentina Marine Insurance (301-18), 45 Fed. Reg. 49,732 (USTR 1980); Argentina Hides (301-24), 47 Fed. Reg. 53,989 (USTR 1982). (164)See EC Soybean (301-8), 44 Fed. Reg. 1504 (USTR 1979); EC Citrus Preferences (301-11), 50 Fed. Reg. 30,146 (USTR 1988); Japan Leather Quotas (301-13), 51 Fed. Reg. 9435 (USTR 1986); EC Subsidies on Canned Fruit (301-26), 54 Fed. Reg. 41,708 (USTR 1989); Korea Beef Licensing (301-65), 55 Fed. Reg. 20,376 (USTR 1990); Thailand Cigarettes (301-72), 55 Fed. Reg. 49,724

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

(USTR 1990); Canada Import Restrictions on Beer (301-80), 57 Fed. Reg. 308 (USTR 1991). (165)See Guatemala Shipping Practices (301-1), 41 Fed. Reg. 9430 (USTR 1976) (final admin. review); ROC Tariffs on Home Appliances (301-9), 42 Fed. Reg. 61,103 (USTR 1976) (final admin. review); USSR Marine Insurance (301-14), 45 Fed. Reg. 49,428 (USTR 1979) (suspension remains in effect); Canada Broadcasting Deduction (301-15), 45 Fed. Reg. 51,173 (USTR 1980) (mirror image legislation--Trade & Tariff Act of 1984--remains in effect); Korea Insurance (301-20), 45 Fed. Reg. 85,539 (USTR 1980) (final admin. review); Switzerland Eyeglass Frames (301-21), 45 Fed. Reg. 81,703 (USTR 1980) (final admin. review); Venezuela Dried Prunes (no initiation) (USTR 1980) (petition available at the Office of the United States Trade Representative); Argentina Air Courier Restrictions (301-44), 49 Fed. Reg. 45,733 (USTR 1984) (1989 agreement provides for non-discriminatory treatment of foreign air couriers in Argentina); ROC Films (301-45), 49 Fed. Reg. 18,056 (USTR 1984) (final admin. review); EC Subsidies of Satellite Launching (301-46), 50 Fed. Reg. 29,631 (USTR 1985) (final admin. review); Brazil Informatics (301-49), 54 Fed. Reg. 43,880 (USTR 1989) (final admin. review); Japan Cigarette Import Restrictions (301-50), 51 Fed. Reg. 35,995 (USTR 1986) (final admin. review); Korea Insurance (301-51), 51 Fed. Reg. 29,443 (USTR 1986) (amendment clarified in 1988 to allow some Korean firms to participate in joint ventures); Korea Intellectual Property Rights (301-52), 51 Fed. Reg. 29,445 (USTR 1986) (final admin. review); Argentina Soybean Differential Export Taxes (301-53), 52 Fed. Reg. 18,685 (USTR 1988) (final admin. review); ROC Customs Valuation (301-56), 51 Fed. Reg. 37,528 (USTR 1986) (final admin. review); ROC Restrictions on Beer, Wine, Tobacco (301-57), 51 Fed. Reg. 44,958 (USTR 1986) (final admin. review); ROC Export Performance Requirements (307-01), 51 Fed. Reg. 41,558 (USTR 1986) (final admin. review); Brazil Pharmaceutical Patents (301-61), 55 Fed. Reg. 27,324 (USTR 1990) (final admin. review); Korea Cigarettes (301-64), 53 Fed. Reg. 20,406 (USTR 1988) (final admin. review); Korea Wine Tariffs (301-67), 54 Fed. Reg. 4099 (USTR 1989) (final admin. review); Argentina Pharmaceutical Patents (301-68), 6 Int'l Trade Rep. (BNA) No. 38, at 1226 (Sept. 17, 1989) (successful termination); Korea Motion Picture Distribution Restrictions (no initiation) 5 Int'l Trade Rep. (BNA) No. 43, at 1444 (Nov. 2, 1988) (agreement to eliminate discriminatory practices); Japan Construction Service Barriers (301-69), 56 Fed. Reg. 37,934 (USTR 1991) (final admin. review); Japan Satellites (301-74), 55 Fed. Reg. 25,764 (USTR 1990) (investigation suspended); Japan Supercomputers (301-75), 55 Fed. Reg. 25,761 (USTR 1990) (investigation suspended); Japan Forest Products (301-76), 55 Fed. Reg. 25,763 (USTR 1990) (investigation

suspended); India Investment Restrictions (301-77), Fed. Reg. 25,765 (USTR 1990) (final admin. review); India Barriers to Insurance Sales (301-78), 55 Fed. Reg. 25,766 (USTR 1990) (final admin. review); Thailand Copyright Enforcement (301-82), 56 Fed. Reg. 67,114 (USTR 1991) (agreement to improve intellectual property protection); Japan Barriers to Sale of Transformers (no initiation) 7 Int'l Trade Rep. (BNA) No. 38, at 1467 (Sept. 26, 1990) (accord reached and petition withdrawn); ROC Barriers to Distilled Spirits (no initiation) 8 Int'l Trade Rep. (BNA) No. 3, at 89 (Jan. 16, 1991) (market opening accord, petition withdrawn); Thailand Patent Protection (301-84), 9 Int'l Trade Rep.

(BNA) No. 2, at 64 (Jan. 8, 1982) (successful termination); India Intellectual Property (301-85), 56 Fed. Reg. 61,447 (USTR 1991) (investigation extended); PRC Intellectual Property (301-86), 57 Fed. Reg. 3084 (USTR 1991) (final admin. review). (166)See Guatemala Shipping Practices (301-1), 41 Fed. Reg. 9430 (USTR 1976); ROC Tariffs on Home Appliances (301-9), 42 Fed. Reg. 61,103 (USTR 1976); USSR Marine Insurance (301-14), 45 Fed. Reg. 49,428 (USTR 1979); Korea Insurance (301-20), 45 Fed. Reg. 85,539 (USTR 1980); Venezuela Dry Prunes (no initiation) (USTR 1980); Argentina Air Courier Restrictions (301-44), 49 Fed. Reg. 45,733 (USTR 1984); Brazil Informatics (301-49), 54 Fed. Reg. 43,880 (USTR 1989); Japan Cigarette Import Restrictions (301-50), 51 Fed. Reg. 35,995 (USTR 1986); Korea Insurance (301-51), 51 Fed. Reg. 29,443 (USTR 1986); Korea Intellectual Property Rights (301-52), 51 Fed. Reg. 29,445 (USTR 1986); Argentina Soybean Differential Export Taxes (301-53), 53 Fed. Reg. 18,685 (USTR 1988); ROC Customs Valuation (301-56), 51 Fed. Reg. 37,528 (USTR 1986); ROC Restrictions on Beer, Wine, Tobacco (301-57), 51 Fed. Reg. 44,958 (USTR 1986); ROC Export Performance Requirements (307-1), 55 Fed. Reg. 41,558 (USTR 1986); Brazil Pharmaceutical Patents (301-61), 55 Fed. Reg. 27,324 (USTR 1990); Korea Cigarettes (301-64), 53 Fed. Reg. 20,406 (USTR 1988); Korea Wine Tariffs (301-67), 54 Fed. Reg. 4099 (USTR 1989); Argentina Pharmaceutical Patents (301-68), 6 Int'l Trade Rep. (BNA) No. 38, at 1226; Korea Motion Picture Distribution Restrictions (no initiation) 5 Int'l Trade Rep. (BNA) No. 43, at 1444 (Nov. 2, 1988); Japan Construction Service Barriers (301-69) 56 Fed. Reg. 37,934 (USTR 1991); Japan Satellites (301-74), 55 Fed. Reg. 25,764 (USTR 1990); Japan Supercomputers (301-75), 55 Fed. Reg. 25,764 (USTR 1990); Japan Forest Products (301-76), 55 Fed. Reg. 25,763 (USTR 1990); Thailand Copyright Enforcement (301-82), 56 Fed. Reg. 67,114 (USTR 1991); Japan Barriers to Sale of Transformers (no initiation) 7 Int'l Trade Rep. (BNA) No. 38, at 1467 (Sept. 26, 1990); ROC Barriers to Distilled Spirits (no initiation) 8 Int'l Trade Rep.

## Constructive unilateral threats in international commercial relations: the limited case for section 301.

(BNA) No. 3, at 89 (Jan. 16, 1991); PRC Intellectual Property (301-86), 57 Fed. Reg. 3084 (USTR 1991). (167)EC Subsidies of Satellite Launching (301-46), 50 Fed. Reg. 29,631 (USTR 1985). (168)ROC Films (301-45), 49 Fed. Reg. 18,056 (USTR 1984). (169)See India Investment Restrictions (301-77), 55 Fed. Reg. 25,765 (USTR 1990); India Barriers to Insurance Sales (301-78), 55 Fed. Reg. 25,766 (USTR 1990) (to be settled by Uruguay Round negotiations). (170)Switzerland Eyeglass Frames (301-21), 45 Fed. Reg. 81,703 (USTR 1980). (171)Thailand Patent Protection (301-84), 9 Int'l Trade Rep. (BNA) N. 2, at 64 (Jan. 8, 1982) (open); India Intellectual Property (301-85), 56 Fed. Reg. 61,447 (USTR 1991) (investigation extended). (172)Canada Broadcasting Deduction (301-15), 45 Fed. Reg. 51,173 (USTR 1980). The President determined on August 1, 1980, that the most appropriate was legislation to mirror in U.S. law the Canadian practice. See Trade and Tariff Act of 1984, Pub. L. No. 98-573, [section] 232. (173)Brazil Pharmaceutical Patents (301-61), 55 Fed. Reg. 27,324 (USTR 1988) (tariffs held in place for two years). (174)See Guatemala Shipping Practices (301-1), 41 Fed. Reg. 9430 (USTR 1976); ROC Tariffs on Home Appliances (301-9), 42 Fed. Reg. 61,103 (USTR 1976); Korea Insurance (301-20), 45 Fed. Reg. 85,539 (USTR 1980); Venezuela Dried Prunes (no initiation) (USTR 1980); Argentina Air Courier Restrictions (301-44), 49 Fed. Reg. 45,733 (USTR 1984); Brazil Informatics (301-49), 54 Fed. Reg. 43,880 (USTR 1989); Korea Insurance (301-51), 51 Fed. Reg. 29,443 (USTR 1986); Korea Intellectual Property Rights (301-52) (51 Fed. Reg. 29,445 (USTR 1986); Argentina Soybean Differential Export Taxes (301-53), 52 Fed. Reg. 18,685 (USTR 1988); ROC Customs Valuation Practices (301-56), 51 Fed. Reg. 37,528 (USTR 1986); ROC Restrictions on Beer, Wine, Tobacco (301-57), 51 Fed. Reg. 44,958 (USTR 1986); Brazil Pharmaceutical Patents (301-61), 55 Fed. Reg. 27,324 (USTR 1988); Korea Cigarettes (301-64), 53 Fed. Reg. 20,406 (USTR 1988); Argentina Pharmaceutical Patents (301-68), 6 Int'l Trade Rep. (BNA) No. 38, at 1226; Korea Motion Picture Distribution Restrictions (no initiation) 5 Int'l Trade Rep. (BNA) No. 43, at 1444 (Nov. 2, 1988); Thailand Copyright Enforcement (301-82), 56 Fed. Reg. 67,114 (USTR 1991); PRC Intellectual Property Protection (301-86), 57 Fed. Reg. 3084 (USTR 1991). (175)ROC Films (301-45), 49 Fed. Reg. 18,056 (USTR 1984). (176)India Investment Restrictions (301-77), 55 Fed. 25,765 (USTR 1990); India Barriers to Insurance Sales (301-78), 55 Fed. Reg. 25,766 (USTR 1990). (177)Thailand Patent Protection (301-84), 9 Int'l Trade Rep. (BNA) No. 2, at 64 (Jan. 8, 1982); India Intellectual Property (301-85), 56 Fed. Reg. 3084 (USTR 1991). (178)See supra note 16. (179)See supra note 20. Alan O. Sykes Professor of Law, University of Chicago. I have received thoughtful comments on earlier drafts from

Ian Ayres, Abram Chayes, Gary Horlick, Louis Kaplan, Mark Ramseyer, Eric Rasmusen, Alan Schwartz, and from participants in workshops at Georgetown, Harvard, and Yale Universities. I thank the Scaife Foundation for financial support.