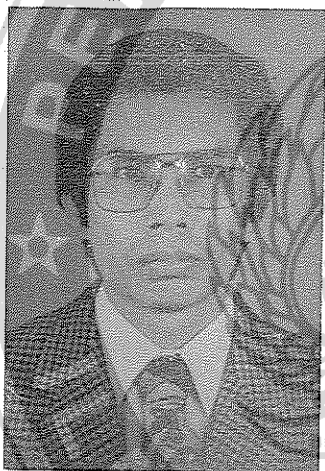


## THE ANALYSIS OF SECTION 301'S OF THE US TRADE POLICY IN INTERNATIONAL TRADE AND THE IMPACT TO GATT RULES.

(What can be learned as an Indonesian trader)

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*"Section 301" memberikan wewenang luas kepada Presiden AS untuk mengambil tindakan pembalasan terhadap praktek-praktek perdagangan negara asing yang dianggap merugikan AS. Kemampuan Section 301 ini antara lain berhasil membuka pasar bagi barang-barang Amerika di luar negeri. Umpamanya Jepang, yang akhirnya bersedia menerima penjualan alat-alat telekomunikasi, jeruk dan daging asal AS. Namun, ancaman Section 301 tidak selalu berhasil membuka pasar luar negeri. Sengketa kemudian diselesaikan dalam pertemuan-pertemuan GATT.*

### Introduction

The purpose of this paper is to analyze the implementation of Section 301's of Trade Act of 1974 of the U.S. Trade policy regarding international trade. Attention is focused on the case of Japanese semiconductors,<sup>1</sup> as a

<sup>1</sup> Japanese semiconductor targeting case.

(50 Fed. Reg. 28,866.). Since the mid-1970s Japanese industrial policy has shifted to a focus on high technology industries. The best known and most controversial case has been semiconductors. Semiconductor chips, complex electronic circuits etched at microscopic scale onto chips of silicon, are key components of many new products. Until the mid-1970s, the technology for making such chips was largely a U.S. monopoly.

Japan made deliberate effort to brake into this industry, with the government sponsoring joint research project at least initially providing a protected domestic market. In the late-1970s and early 1980s Japanese producers shocked their U.S. competitors by taking a dominant share of

test of the above Act of policy in international trade.<sup>2</sup>

Organization of this paper analysis as follows: Chapter I will focus on general information about the U.S Trade Act in International Trade. This chapter concerns the fact that any interested persons may file a petition to take action to demand that a foreign government to accede to their claims in international trade.

Chapter II will consider the previous information and focus on the analysis and implementation of section 301 of the U.S Trade Policy in international trade. This chapter is divided into the following parts:

A. When, why, how section 301 is used to bring action. In this part the right established by section 301 is discussed, in general. This chapter also deals with, when implementation of section 301 would appropriate, formal filing, political aspects, and the role of U.S trade representatives in considering section 301, including recommendations and suggestions.

B. Alternative actions can be taken related to section 301, such as retaliation, termination and suspension.

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the market for one kind of chips, random access memories (ram).

That Japan targeted semiconductors, and that the industry achieved a large market share, is known. What is hotly disputed is how much support the Japanese industry actually received, how decisive that support was, and whether the policy helped Japan and/or hurt the U.S.

We know that not much government money was provided; the subsidy component of the targeting was actually quite small. We also know that explicit home market protection, by tariffs and quotas, was mostly removed after the mid-1970s. Some would argue that, in fact, the Japanese semiconductor industry succeeded with little government help.

Others argue that more subtle government help was crucial.

The proponents of this view argue that joint research projects, which would have been blocked in the U.S by antitrust laws, were a highly effective way of improving the technology. They also argue that, in fact, the Japanese market was effectively closed through a tacit "buy-Japanese" policy discreetly encouraged by the government. As evidence they note that the U.S firms had a much smaller market share in Japan than either the U.S. or Europe.

Economist do not know which of this view is correct. It may be that Japanese don't know either. If we assume for the sake of argument that government policy was, in fact, crucial, was it good idea? As in the case of steel, the direct returns on Japan's investment in semiconductors have been quite low. Exact figures are not available, but it is generally believe that Japanese firms have earned a low rate of return on semiconductors since the late 1970s. So any gains from the encouragement of chips must be located in the technological externalities.

Now comes the great certainty. Unlike steel, semiconductor productions highly dynamic industries where knowledge is the main source of competitive advantages exactly the kind of sector where the external economy argument should. But where the externalities large enough to justify the cost? Nobody knows and this is a good debates between the U.S electronics firms, agree and disagree to the Japanese producers.

<sup>2</sup>As amended on 19 U.S.C. §§ 2411-2416 ( 1982 & Supp.III 1985), in particular 19 U.S.C

C. The role of U.S Government and the Petitioner. In this part attention is focused on the role of Department of Commerce, how to contact with section 301 and the expectation of section 301, and also the mechanism of GATT rules that must be followed related to international trade agreement.

D. Defending a section 301 case. In this part, as we can see the case of Japanese semiconductor in the area of International trade.

E. Section 301 and the problem of Jurisdiction.

Chapter III present the conclusions of this paper.

Section 301 of the Trade Act of 1974, like the antidumping<sup>3</sup> and countervailing duty laws,<sup>4</sup> is an unfair trade practice statute.<sup>5</sup> It is, however, unique because it is oriented toward exports and designated primarily to ensure fair and equitable access for U.S. products in foreign markets. Because most of the current reciprocity proposals are styled as amendments to section 301, it is important to have some sense of the content of that provision and its emergence as an important instrument in the U.S. trade policy.

Enforcement of section 301 has distinct juridical, political and economic objectives. From a juridical point of view, it is important that U.S. citizen perceive that section 301 protects their legal "rights." Its nonmechanical, discretionary nature should not detract from its legal significance.

Yet the right that is being protected seems to be combination of national and international norms. A U.S. citizens has no "rights" to demand that a foreign government permit access to its market by removal of tariff or non-tariff barriers to trade. Section 301 also has independent political significance. The range of actions available under section 301 is considerable and has been the focus of criticism. Critics charge that the

<sup>3</sup>Antidumping is the opposite meaning of dumping. Dumping is the most common price discrimination in international trade, a pricing practice in which a firm charges a lower price for exported goods than it does for the same goods sold domestically. Dumping is a controversial issue in trade policy, where it is widely regarded as an "unfair" practice and is subject to special rules and penalties.

Reciprocal dumping is another common form, it means the situation in which dumping leads to two-way trade and the same product. e.g., a semiconductor plant in country A might be shipping semiconductors to country B while a semiconductor in B is doing reverse, for the purpose of influencing price in the market. As a result is unfair trade.

<sup>4</sup>The countervailing duty laws is the law that focus on statute of regulatory activities in reducing the unfair activities in the area of international trade.

<sup>5</sup>Unfair trade practice statute is a regulatory system and more details in the activities of international trade business that covers the

authority could be used to erect barriers to trade in contradiction to U.S. international obligations.

Currently section 301 of the Trade Act of 1974, provides:

If the President determines that action by the United States is appropriate:

- (a) to enforce the rights of the United States under any trade agreement;
- (b) to respond to any act, policy, or practice of foreign country or instrumentality that
  - (i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
  - (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce; Where the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

Section 301 is unusual because it gives private individuals a statutory right to petition the foreign government to espouse their claims in the international arena, as it is mention in 19 U.S.C. § 2412 (a) (1982 & Supp. III 1985) provides that: " Any interest person may file a petition with the United States Trade Representative (U.S.T.R.)...requesting the President to take action under section 2411 of this title and setting forth the allegations in support of the request.

The Trade Representatives shall review the allegations in the petition and, not later than 45 days after the date on which he received the petition, shall determine whether to initiate an investigation.

*Hypothesis to be tested:*

- Section 301 is unique in that it provides an avenue for a private citizen to coerce a foreign government.
- Application of Section 301 does not achieve its economic objective.

*Methodology and testing:*

Section 301's provision against " unreasonable" foreign practices is analyzed to see whether the practices represents a significant departure from international legal norms (GATT). Use of Section 301 to achieve a more equitable world trading system, to the benefit of U.S. commerce, and whether the challenged practice distorts comparative advantage is analyzed.

Since enacted in 1975, section 301 of the Trade Act of 1974 allows the President to deny or modify the benefits of trade agreement concessions or to impose duties or other import restrictions on the products and services of any country that is found to be unjustifiably<sup>6</sup> or unreasonably<sup>7</sup> burdening or restricting U.S. commerce. Congress gave administration of the procedures to the Office of the Special Representative for Trade Negotiations (STR).<sup>8</sup>

The purpose of section 301 is quite clear in that the U.S. is to use this retaliatory authority vigorously as leverage to get other countries to eliminate unfair trade practices that affect U.S. commerce,<sup>9</sup> including both product exports and services.<sup>10</sup> The practices noted in the legislative history as unfair include discriminatory rules of origin, government procurement, licensing systems, quotas, exchange controls, restrictive business practices, discriminatory bilateral agreements, variable levies, border tax adjustments, discriminatory road taxes, horsepower taxes, other taxes which discriminate against imports,<sup>11</sup> certain product standards, and many other practices that were documented by the U.S. International Trade Commission (USITC),<sup>12</sup> and subsidies identified in their principal forms by the Senate Finance Committee.

Section 301 of the Trade Act of 1974<sup>13</sup> is the primary U.S. statute

<sup>6</sup>Senate Finance Committee, Report on Trade Reform Act of 1974, S. Rep. No. 1298, 93d Cong., 2d Sess., 163, U.S. Code Cong. & AD. News 7186, 7301.

<sup>7</sup>Unreasonable refers to restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or which otherwise discriminate against or burden U.S. Commerce.

<sup>8</sup>Trade Act of 1974, Pub. L. No. 93-618, § 306, 88 Stat. 1978, as added by Pub. L. No. 96-39, § 901 Stat. 144 (1979) and Codified as amended at 19 U.S.C. § 2416 (Supp. III 1979).

<sup>9</sup>1974 Senate Report, at 31.

<sup>10</sup>The term "U.S. commerce" includes U.S. services associated with international trade. (more details explanation see 1974 Senate Report at 165.

<sup>11</sup>Id. 1974 Senate Report, at 163-164, and U.S. Code Cong. & AD. News at 7302.

<sup>12</sup>U.S. Int'l Tariff Commission, Tariff Commission Pub. No. 665. Trade Barriers, pt. II (1974).

<sup>13</sup>Pub. L. No. 93-618, § 301, 88 Stat. 1978 (Codified as amended at 19 U.S.C. § 2411

providing authority for the President to take action against unfair trade practices of other governments which adversely affect U.S. commerce, either in goods or services. For the most part, the implementation of the statute has focused on attempts to eliminate the acts, practices, or policies of foreign governments which may affect imports into the United States as well as exports, and it contains special provisions for the treatment of violations of the Most Trading Nations (MTN) agreement on subsidies and countervailing duties.<sup>14</sup>

Section 301 is not a substitute for, nor an alternative to, other U.S. statutes that address specific unfair trade practices, such as the antidumping laws,<sup>15</sup> the others statute,<sup>16</sup> or, except under specifically provided procedures, the countervailing duty statute.<sup>17</sup> Unlike these statutes, a section 301 proceeding is not a proceeding act, and the flexibility provided the President and the United States Trade Representative (USTR) makes it a more political statute. Section 301 was shaped quite deliberately to give the Executive the tools to use diplomatic and economic pressure to achieve a more "equitable" world trading system, to the benefit of U.S. commerce.

## II. Analysis of Implementation of Section 301

### A. When, why, how section 301 is used to bring in action.

Section 301 of the Trade Act of 1974 was substantially rewritten and new sections 302 through 306 were added in the Trade Agreements Act of 1979.<sup>18</sup> Congress expanded the provisions of the 1974 Act creating new and more detailed procedural requirements and providing new responsibilities for the USTR.<sup>19</sup> The new Act reflects a change in the Congressional attitude toward the GATT dispute settlement procedures, with the caveat that the U.S. Government has a major responsibility to see that the new provisions

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<sup>14</sup>The Agreement on Interpretation and Application of Article VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter GATT).

<sup>15</sup>19 U.S.C. §1673 (Supp. III 1979).

<sup>16</sup>*Id.* At § 1337.

<sup>17</sup>*Id.* § 1303.

<sup>18</sup>Pub. L. No. 96-39, § 901, 93 Stat. 144.

<sup>19</sup>The name of STR was changed in Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,173, 93 Stat 1381, reprinted in the 19 U.S.C. §2171 note (Supp. III 1979)

work to the benefit of the U.S. The Senate Report on the bill's provisions notes.

The changes made in the MTN with respect to dispute settlement procedures offer possibilities of significantly improving the process and the results of international dispute settlement with respect to international trade issues. However, the results merely offer the possibility of improvement. The U.S. Government must take responsible and forceful action in the use of these procedures, and other countries must adhere to their spirit as well as their letter, if in fact they are to be of benefit to the United States and international trade.<sup>20</sup>

Section 301 sets forth the conditions which would require the President to take action. Sub-section (a) authorizes the President to take action if he "determines that action by the United States is appropriate (1) to enforce the rights of the United States under any trade agreement, or (2) to respond to any act, policy or practice of a foreign country or instrumentality that (A) is inconsistent with the provisions of or otherwise denies benefits to the United States under any trade agreement, or (B) is unjustifiable, unreasonable or discriminatory and burdens or restricts U.S. commerce."<sup>21</sup> The provision authorizes the President to take all appropriate and feasible action within his power to enforce these rights or to obtain the elimination of the foreign practice, act or policy on either a nondiscriminatory or discriminatory basis.<sup>22</sup>

Sub-section (b)<sup>23</sup> gives specific authorization for the President to deny or modify the benefits of trade agreement concessions or to impose duties or other import restrictions on the products of, or fees on the services of, the foreign government.

Once a determination has been made to take action, subsection (c)<sup>24</sup> defines the Presidential procedures. The President may take action on his

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<sup>20</sup>1979 Senate Report at 234.

<sup>21</sup>19 U.S.C. § 2411(a) (Supp. III 1979). The Definition of U.S. Commerce was also changed in 1979 Act.

<sup>22</sup>19 U.S.C. § 2411(a) (Supp. III 1979). Subsection (a) authorizes action "on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved."

<sup>23</sup>*Id.* at § 2411 (b).

<sup>24</sup>*Id.* at § 2411 (c).

own or in response to a petition filed by any interested party. If the President is taking action under his own motion, he must publish his determination and reasons in the Federal Register, and provide the opportunity for presentation of views before actually taking the action "unless he determines that expeditious action is required."<sup>25</sup>

If the determination results from a petition filed by an interested party, he must make his decision on what action to take, if any, within twenty-one days of receiving a recommendation on the petition from the USTR. The President must also publish this determination in the Federal Register.<sup>26</sup> Under the amended section 301, the President may take action on a nondiscriminatory basis or solely against the products and services of the foreign country which is found to be burdening or restricting U.S. commerce.<sup>27</sup> Congress repealed the override provision<sup>28</sup> on actions that are taken on a nondiscriminatory basis because it felt that under the new broadened and more detailed provisions of the amended act the provision was no longer necessary.<sup>29</sup> It is expected that actions will be on a discriminatory basis since the action is taken in retaliation for an act of a specific country.<sup>30</sup>

The Japanese semiconductor case was filed in the U.S under 50 Fed. Reg. 28,866. At that time this case was filed, the economist still argued about several economics term. The international trade lawyer has been considered only small parts of the case. As a result of this case the Japanese government put into sanctions, with quotas and additional tariffs to the Japanese product that trade to the U.S.

### 1. Conditions under which Section 301 would appropriate:

Actions brought under section 301 in the past provide a good cross-

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<sup>25</sup>Id. at § 2411 (c)(1).

<sup>26</sup>Id. at § 2411 (c)(2).

<sup>27</sup>Id. at § 2411 (a).

<sup>28</sup>It is also in the Trade Act of 1974, Pub. L. No. 93-618, § 302, 88 Stat. 1978 (repealed 1979).

<sup>29</sup>1979 Senate Report, at 236.

<sup>30</sup>1979 Senate Report, at 235.



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

Some of these cases involve the services sector, such as discriminatory cargo preference legislation and discriminatory insurance requirements of foreign governments, both in the shipping and non shipping areas.<sup>31</sup> Common complaints in product trade include practices such as those of the European Economic Community affecting U.S. agricultural exports: internal use regulations,<sup>32</sup> "minimum-import prices,"<sup>33</sup> third-country subsidization (which adversely affects U.S. exporters in third-country markets),<sup>34</sup> excessively high tariffs, and import and customs regulations.

Other common complaints by both manufacturing industries and agricultural producers include import formalities, advertising and marketing restrictions, and numerous other practices that violate, or appear to violate, national treatment provisions of international agreements.<sup>35</sup>

Again, the Japanese semiconductor case, many lawyers still question about the appropriate place to file petition. The Japanese government argued, that supporting the domestic producers are necessary to help the economic growth of the country.

## **2. Formal Filing of a Section 301 complaint.**

In many cases, more can be accomplished through the threat of filing a 301 complaint than might be accomplished through the actual filing of a complaint. This depends on the foreign government involved and the particular act or practice in question. Some governments, like Japanese government in the case of semiconductor, faced with a formal, public section

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<sup>31</sup>Docket No. 301-1.

<sup>32</sup>An internal use regulation is the requirement of the use of domestic products in, as an example, grain mixtures.

<sup>33</sup>Minimum import prices involve the assessment of an additional payment on imports that enter below a set minimum price.

<sup>34</sup>Example, EC subsidization of wheat flour exports to third World markets, Docket No. 301-6.

<sup>35</sup>Docket No. 301-12.

301 complaint, will become difficult to deal with or completely intransigent to show that they are not being "bullied" around by the U.S. Government.

Moreover, in many cases, though, an informal private discussion by the USTR with the foreign government, with either the implicit or the explicit threat of a formal public complaint, might lead to a satisfactory resolution of the complaint. This approach may be difficult to change the act, practice or policy which is the subject of the complaint.

Where a foreign government's trade policies may be difficult to change because they reflect domestic concerns in that country and pressures for protection of certain producers or industries, an informal and fairly substantial process between governments might drag on for some time.<sup>36</sup> The petitioner may finally have to file a formal complaint to show the "seriousness" of his concerns and to make sure that the USTR in fact is doing everything necessary to resolve a legitimate concern of the complainant.

In other cases, the proper approach may be to immediately bring a formal complaint and to press it vigorously with the hope that the foreign government, to avoid retaliatory action, will in fact respond by changing the act, practice or policy. Setting forth criteria under which each of these tactics should be used is difficult, but a careful study of the particular country involved will be important in determining how best to bring an effective 301 case.

### 3. Political aspects of Section 301.

In the Japanese semiconductor case, the year after the sanction has been stated, more and more discussions among the politicians about the precise rule has to be made. It was in 1979, the new amendment has been created. It was nine years after the case, and then in 1982 the new amendment was created. In 1985, the new supplement put into several articles.

The political considerations in bringing a 301 action are both domestic and international. Frequently, the domestic producer or industry bringing a complaint against a foreign government will expect the wholehearted support of interested Congressmen and at least some U.S. agencies.

However, international political considerations, which the USTR and other Executive Branch agencies must take into account, may convince a potential petitioner that a section 301 complaint will not produce the desired results. One obvious example would be bringing a 301 action against a

country in a sensitive political situation when, for valid foreign policy considerations, the Administration is not willing to take action against that nation at that particular time.

While theoretically the economic considerations of section 301 should be separate from those foreign policy considerations, in reality they are not separate, and indeed cannot be made so. Petitioners should be aware of this when preparing to bring a case under section 301. In many of these situations, however, an informal approach to the USTR may prompt the U.S. Government to make informal approaches to the other government in hopes that a potentially difficult case can be resolved before it becomes public.

Similarly, the U.S. Government may be able to use the "threat" of a 301 petition as leverage to get a foreign government to change a practice which the U.S. Government itself has not been successful in getting removed through purely diplomatic means.<sup>37</sup>

Another consideration in bringing a section 301 action is to consider the actual effect and impact of the foreign act, practice, or policy on domestic producers or manufacturers. Unfortunately, some cases brought in the past under section 301 have been geared to "principle" rather than to actual significant or even moderate damage to U.S. exporters.<sup>38</sup>

These particular cases are very difficult, if not impossible, to resolve successfully. In the international framework, getting the GATT to take action is difficult if the complaining country is not able to show anything more than negligible impact on its exporters.<sup>39</sup> Those types of cases also weaken the credibility of the U.S. Government's threats to take retaliatory action against exports of the allegedly sinful foreign country.

While many countries have policies on the books that in fact would be quite detrimental to U.S. exports, unless a petitioner can show a real connection with his own exports or real export potential, he should not bring the case.

Whether filing a formal petition immediately or making an informal

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<sup>37</sup>A difficult problem of hide export embargoes by Argentina, Brazil, and Uruguay was resolved by agreements negotiated before cases had to be filed.

<sup>38</sup>Exports wheat, the U.S. industry was thriving and exports had increased significantly. Docket 301-16.

<sup>39</sup>Involving exports of eggs to Canada. The U.S. was unable in the GATT working party

complaint, the first thing any potential petitioner should do is contact the USTR's office and speak to the Chairman of the Section 301 Committee about the case. This initial contact will be helpful not only to the potential petitioner but also to the USTR who may be able to get the foreign country to take some action alleviating the problem before a formal complaint is filed.

The Chairman of the Section 301 Committee should be helpful, depending upon who holds that position. Also, the petitioner should send a draft of his petition to the Section 301 Chairman before making a formal filing to make sure it conforms to both the procedural regulations and the substantive criteria of the law;

#### 4. Procedures after filing a complaint.

A petitioner may find the "Procedures for Complaints Received Pursuant to section 301 of the Trade Act," as amended in Title 15 of the Code of Federal Regulations (CFR).<sup>40</sup> Under these regulations, petitions may be submitted by any interested party, which is defined as a party who has a significant interest;

for example, a producer or a commercial importer or exporter, of a product which is affected either by the failure to grant rights to the United States under a trade agreement or by the act, policy or practice complained of; a trade association, a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production or wholesale distribution in the United States of a product so affected; or any person representing a significant economic interest affected by the act, practice or policy complained of.<sup>41</sup>

The petition must be submitted in twenty copies<sup>42</sup> and should contain the following information: (1) identification of the petitioner whose interested is affected; (2) identification of the rights of the United States being affected by the foreign government, with particular reference to that part of 301 considered relevant; (3) copies of the laws or regulations of the foreign government which is the subject of the petition; if copies are not available, the laws and regulations should be identified with as much detail as possible;

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<sup>40</sup>See 15 C.F.R. § 2006 (1981).

<sup>41</sup>Id. at § 2006.0(b).

(4) the identify of the foreign country which is the subject of the complaint; (5) identification of the product or service affected by the complaint of act, policy or practice; (6) information on the complained of act, policy or practice--that is, information showing how the restriction, act, policy, or practice violates or denies a U.S. right under a trade agreement or otherwise discriminates against, burdens, or restricts U.S. commerce, including specific information on volume of trade and the impact on the petitioner and on U.S. commerce; and (7) an indication of any other forms of relief sought by the complainant under any act.<sup>43</sup>

Petitioner must supply additional information if the assertion is that subsidy payments are having an adverse effect on sales of the U.S. product, either in U.S. or third-country markets. The required information includes the volume of trade in the goods or services involved, an estimate of the amount of the economic or other impact on petitioner and U.S. commerce, and a statement of the particular manner in which the subsidy is inconsistent with the trade agreement and burdens or restricts U.S. commerce.<sup>44</sup>

## **B. The alternative action can be made with section 301's.**

### **I. Retaliation.**

Since several chapter has been created to section 301, the new action under section 301 is retaliation. The U.S. can use retaliation to the Japanese government because of the case of Japanese semiconductor.

Hearings held under section 304<sup>45</sup> prior to the actual recommendation of what U.S. action to take against a country will probably involve a number of different interests. If the USTR is considering the recommendation of retaliatory action against the products or services of that other country, importers and users of those products in the United States and those with an interest in or affected by the service involved, in all probability, will complain, first, about the action being taken against this country in general, and second, more specifically about the product or service of interest to them being included on the list of possible retaliatory actions.

When this point in the case is reached, therefore, the petitioner should

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<sup>43</sup>Id. at § 2006.1.

<sup>44</sup>Id. at § 2006.1(f).

have a succinct but potent list of products or services that is aimed at hurting the exports of the foreign country in question but which will cause the least amount of negative political or economic pressure in the United States. To date, the United States has never taken any final retaliatory action under section 301 against any foreign government whose acts, practices, or policies have been the subject of a formal section 301 complaint.<sup>46</sup> However, a number of sufficiently close calls give some guidance as to how the system would work.

Three cases published in the Federal Register have made determinations of action and a list of possible items of exports from the foreign country that would be subject to retaliatory trade restricting actions by the U.S. Government should the act, practice, or policy not be significantly modified or eliminated.<sup>47</sup>

While the most logical type of retaliation would be on the products of the other country, section 301 authorizes other sanctions, such as the imposition of fees on the services of other countries or any actions which the President could take under any authority available to him to affect the errant country.<sup>48</sup> Generally, the view among policy-makers has been that the punishment should fit the crime where possible, and if the act, practice, or policy which has been determined to be unjustified or unreasonable is in the product area, the retaliation should also be in the product area.

Likewise, if the act, practice, or policy is in the service area, the retaliation should be in the service area.<sup>49</sup> Of course, taking action against the foreign country has always been the least preferred solution under section 301. The purpose of 301 is to lower the trade barrier of the other country, not to raise another trade barrier in the United States. Thus, the USTR has used section 301 and threats of action thereunder most effectively as leverage to get some movement from the other government on reducing its trade restricting actions.

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<sup>46</sup>19 U.S.C. § 2411 (Supp. III 1979).

<sup>47</sup>*Id.* at § 2414.

<sup>48</sup>19 U.S.C. § 2411(b) (Supp. III 1979).

<sup>49</sup>This is generally held view among international trade policy makers both in the U.S. and abroad. It also has practical advantages since services area not covered by the GATT, and therefore retaliation in the service area would not involved GATT scrutiny.

## 2. Termination and suspension.

Another action the United States can take under section 301 is the termination or suspension of a section 301 investigation.<sup>50</sup> A termination would follow a decision by the Section 301 Committee the allegations in the petition were not substantiated by the investigation.

On the other hand a suspension might well follow a tentative agreement with the foreign government that would lead to a partial or future reduction of the trade restricting actions of the other government. Technically, the suspension would keep section 301 in effect, as leverage to assure that the agreement is carried out.

Terminations or suspensions must be communicated to the complainant and be published in the Federal Register with a statement of reasons.<sup>51</sup> It is not clear about the solution to the Japanese semiconductor case because several firms in the U.S. already taken the advantages from semiconductor/chips from Japan.

The Computer company in the U.S. argued about the case, agree and disagree among them still not finished yet.

## 3. Personal petitioner and the US Government.

As is the case in other trade policy decisions in the federal government, the USTR is the coordinator and major policy director with respect to decisions under section 301.<sup>52</sup> However, certain decisions and recommendations are formulated first by an interagency task force--in this case, the Section 301 Committee chaired by an official from USTR--and are approved by the statutorily created trade policy structure<sup>53</sup> before going to the USTR and through him to the President.

All parties should always keep in mind that in most cases the Committee will arrive at its decision by consensus among the various interested departments and agencies, with some having more influence and interest than others, depending upon the particular issue in the petitioner's complaint.

The major agencies and departments involved in this process by

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<sup>50</sup>15 C.F.R. § 2006.6 (1981).

<sup>51</sup>*Id.*

<sup>52</sup>C.F.R. § 2171 (1976 & Supp. III 1979).

<sup>53</sup>19 U.S.C. § 1872 (Supp. III 1979).

Executive Order<sup>54</sup> include the USTR, the Departments of State, Commerce, Agriculture, Labor, Justice, Treasury, Interior, Transportation, Defense, and Energy, the Council of Economic Advisers, the Office of Management and Budget, and the National Security Council.

A representative of the International Trade Commission also sits as ex officio member of all staff level trade committees. In each department or agency, one or a few people are assigned to make departmental or agency recommendations on section 301 petitions; usually many of the same people will be members of the Section 301 Committee for several different cases.

At the same time, experts from particular departments may be called upon to handle any technical matters for a particular case.<sup>55</sup> Depending on its structure and the sensitivity of the case, White House officials at any or all levels of the decision-making process may be involved.

The Section 301 Committee will have several meetings throughout the course of its investigation, and if a consensus is reached among the agencies, the recommendation will go forward without too much further input from higher policy and political levels.

However, if there is disagreement among the agencies, particularly if a major agency does not agree with recommendations that other agencies are putting forward, the matter will likely be elevated by the Chairman to a higher level in the trade policy structure, perhaps the Deputy Assistant Secretary level in the different agencies or departments.

The case will get added attention from the senior levels in the Office of the Trade Representative and possibly from the USTR himself. In addition, cases involving the European Community and Japan usually generate senior level attention for both economic and political reasons. Cases involving large volumes of trade or particularly sensitive political or economic issues also will receive more and higher level attention.

The investigation itself should be thorough and extensive. While the unamended law did not clearly spell out the degree of investigation, the Congress was careful to make the point in the 1979 amendments that the investigation should cover all relevant issues, whether or not they all were contained in the petition.<sup>56</sup> The Senate Report notes:

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<sup>54</sup>Executive order No. 11846, 3 C.F.R. 971 (1971-1975 Compilation), reprinted in 19 U.S.C. § 2111 note (Supp. III 1979).

<sup>55</sup>As can be seen in Docket No. 301-1, & 301-14, & 301-18.

<sup>56</sup>1979 Senate Report at 228, H.R. Conf. Rep. No. 11, 96th Cong., 1st Sess. (1979).



In Investigations instituted under new section 302, it is expected that the scope of the investigation will comprehend all issues fairly raised by the allegations in the petition, and not be narrowly focused only on the accuracy of the allegations. What is instituted is an investigation, so that the [USTR] is expected to actively seek information on the issues raised and not passively await the provision of information to it. In this respect, the [USTR] should be able to request assistance of other agencies in investigating or pursuing a petition, and such assistance should be forthcoming.<sup>57</sup>

Before sending recommendations to the President or taking intermediate action, the higher policy levels in the Department and in the USTR must ratify any decisions to initiate dispute settlement mechanisms in the international forum or to make initial public determinations that may lead to retaliatory action.<sup>58</sup> Intermediate action, short of a recommended retaliatory action, might include a decision to go forward in dispute settlement in the international forum, tactics for that process, initiation of consultations with foreign governments, or a major jurisdictional or substantive determination on the merits of the petition.<sup>59</sup>

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

### **C. Bilateral mechanism with GATT rather than section 301.**

The typical case to Japanese semiconductor case has been brought to the GATT meetings. Most cases under '301 that involve product trade may end up in the GATT, either in bilateral GATT Articles XXII or XXIII consultations or in the formal dispute settlement panel mechanism of GATT Article XXIII.<sup>60</sup> The formal dispute settlement panel mechanism varies slightly under the new MTN trade agreements, depending upon the particular

<sup>57</sup>1979 Senate Report, at 238-39, U.S. Code Cong. & Ad. News at 624.

<sup>58</sup>See, Executive Order No. 11846, 3 C.F.R. 971 (1971-1975 compilation), reprinted in 19 U.S.C. § 2111 note (Supp. III 1979).

<sup>59</sup>All chairpersons are appointed by general counsel at the office of the USTR.

<sup>60</sup>GATT, at Arts. XXII and XXIII.

issue in dispute, but the general outline of the mechanism is the same as it has been since the GATT was founded in 1947.<sup>61</sup>

At the request of the complaining country, the GATT will establish a panel of objective experts, generally drawn from government representatives in Geneva not acting on behalf of their governments, who will investigate the complaint and report its findings and recommendations to the Contracting Parties of the GATT.<sup>62</sup> The recommendations may include the authorization of sanctions against an errant country not following the recommendations of the Contracting Parties.

In the past this process has had its ups and downs. In the early years, the process was perhaps more legalistically acceptable to the U.S. than it has become in later years. Under the expanded and clarified rules of the MTN, it is hoped that the orderliness and timeliness of these dispute settlement procedures will begin working more to the benefit of those countries bringing complaints to the GATT, including the United States. However, the GATT is an organization that runs on consensus and there will never be the kind of certainty of right and wrong or justice and injustice as one would expect in the U.S. court system. Likewise, the political and economic relationships and situations among countries weigh heavily, not only on GATT panel members but also on the Contracting Parties when making decisions about any particular complaint.

For that reason, frivolous cases should be kept out of the GATT process to the extent possible. Neither an independent panel of experts nor the Contracting Party when the complaint does not involve recognizable economic harm.

All through the GATT dispute settlement process, which is limited to representatives of governments, the petitioner should be kept informed by government representatives and should also be providing information and help to the U.S. officials presenting the case. Under the new law, the USTR has a greater obligation to take cases involving disputes under the GATT rules through the GATT dispute settlement mechanism if bilateral consultations are not successful.

Therefore, the petitioner has an even greater responsibility, as does the U.S. Government, to insure that the cases are well prepared, involve significant issues of dispute that result in economic harm and, once they are

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<sup>61</sup>*Id.* art. XXIII.

begun, are followed through vigorously and responsibly, not only in the international forum but in the internal U.S. forum as well.

#### **D. Defending a section 301 case.**

By looking the Japanese semiconductor case, the problem of jurisdiction become an important. The defense of section 301 petitions varies with the country and the issue involved. Since the complaint is brought against a foreign government's actions, the foreign government may or may not acknowledge the legitimacy of section 301 for that purpose and, for example, may or may not hire counsel to make representations to the USTR and other agencies.

More frequently, governments will make representations directly, through diplomatic channels. Some governments also reinforce these contacts with private representations to the USTR office or even, in some cases, the appearance of counsel at a public hearing.

The first objective of the foreign government is to demonstrate that the act, practice, or policy is not in violation of any international or bilateral agreement or is not otherwise burdening or restricting U.S. commerce. Failing that, the government may try to negotiate the minimum change necessary to get the petition withdrawn or terminated. Much of these discussions will be formal and informal consultations and negotiations between governments.

The foreign government always is more likely to get more private sector U.S. support for its position if a retaliation list is published. Then, the respondent can appeal to those who would be hurt by limits or duty increases on the foreign products or by fees added onto foreign services in the United States. If the USTR holds hearings on the proposed action, the majority of witnesses most likely will be those opposed to the action for economic reasons.

#### **E. Section 301 and the problem of Jurisdiction.**

Questions about what acts, practices, or policies of foreign governments are within the framework of section 301 have been raised since the 1974 Act, and continue to be raised even though clarifications were made in the 1979 Act.<sup>63</sup> The issues revolve around the definition of "U.S. commerce" as not only product trade but also U.S. services associated with international trade, such as actions affecting the U.S. insurance industry, air transport

industry, banking industry, or merchant shipping industry.<sup>64</sup>

However, this definition created problems; for example, some interpretations were attempted that would narrow the definition to U.S. service industries associated with product trade.<sup>65</sup> In the 1979 Act, Congress clarified the definition to include, but not be limited to, services associated with international trade whether or not such services are related to specific products.<sup>66</sup>

Congress added this provision specifically to take care of a problem that had arisen in the Canadian Broadcasting case, when representatives of Canadian interests maintained that the complained of tax law was not within the framework of section 301.<sup>67</sup> To clarify that problem and other potential problems, the Senate Finance Committee clearly noted that, "What is comprehended in the term commerce includes international trade and services as, for example, the provision of broadcasting, banking and insurance services across national boundaries."<sup>68</sup>

Even with these clarifications, significant problems in determining where to draw the line between trade related and an investment related problem in a foreign country still persist. Even in those cases that might seem quite clear, such as the Korean insurance case,<sup>69</sup> persons in the Administration who might not want to pursue a section 301 action have raised questions about the jurisdiction of section 301, claiming in that particular case, for example, that the insurance question in Korea was one of a "right of establishment" and therefore an investment issue rather than one of those trade issues intended to be covered by section 301.

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<sup>64</sup>The term "U.S. commerce" includes U.S. services associated with international trade.

<sup>65</sup>The allegation was made that in a case of television signal was not a service associated with a product in foreign commerce and therefore was not covered by section 301. Docket No. 301-15.

<sup>66</sup>1979 Senate Report, at 236, 1979 U.S. Code Cong. & Ad. News at 622.

<sup>67</sup>Docket No. 301-15.

<sup>68</sup>Docket No. 301-15.

<sup>69</sup>Docket No. 301-20, which was ultimately withdrawn by petitioner after assurances were given by the Korean government that the problem would be solved. Early in that case, some interest who did not want to pursue the case argued that the type of insurance problem presented by petitioner was not one involving international trade but was rather an investment

However, because the legislative history of the Act clearly uses insurance as an example of one of those issues covered, that particular argument is hard to maintain. In other cases, however, the line might be finer and certainly a number of investment and trade issues would be very close to the line.

Depending on whether the USTR interprets the act narrowly or broadly in those borderline cases, a petitioner may or may not get the USTR to take jurisdiction over his particular issue under section 301. Because of some ambiguity in the law, a question remains as to when and to what degree international conciliation, consultation, and dispute settlement must be entered into by the United States when an investigation is initiated under section 301. When the allegations concern matters falling within trade agreements, there must be "consultations" with the foreign government involved.<sup>70</sup>

While the law does not state that these consultations must be under the auspices of the GATT dispute settlement mechanism, that is a valid interpretation. Depending upon the USTR interpretation of that statute, cases could either quite quickly or more slowly get into the international formal dispute settlement forum. Tactically, for a petitioner's interests, each case will be different depending upon the country involved and the issue. In some cases, petitioner should push immediately for the formal dispute settlement mechanism; in others, informal bilateral consultations might be the best approach. While the statute requires the President to determine what action, if any, he will take under section 301 within twenty-one days of receiving a recommendation from the USTR, section 301 itself is quite broad as to what action that may be.<sup>71</sup> While he may take a specific action earlier noted, he shall, under 301(a), within twenty-one days of receiving a recommendation from the USTR,<sup>72</sup> section 301 itself is quite broad as to what action that may be. While he may take a specific action earlier noted, under 301(a), take "all appropriate and feasible action within this power to enforce..."<sup>73</sup>

This mean a number things short of actual trade retaliation, including a

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<sup>70</sup>19 U.S.C. § 2413 (Supp. III 1979).

<sup>71</sup>*Id.* at § 2411(c)(2).

<sup>72</sup>*Id.* at § 2411(b).

more consultation. The drafters of the amended section 301 did not intend that the President be required to retaliate.<sup>74</sup>

### III. Conclusion And Recommendation

The implementation of section 301 of the US Trade Law is not given a good solution. It must be considered in particular legal actions, in order to preserve the legal purposes to all nations, in particular of international trade law. There are several U.N. conventions has been created and most of the nations have been ratified, it could be the best solution to solve problem in such case Japanese semiconductor.

The terminology of the section 301 must be defined clearly in order to understand and easy to follow. The purposes of every chapters is complicated. Since the GATT Convention already accepted as an agreement to most of the nations, the procedures to coerce another government is better to follow the rule and GATT procedures. The Law of jurisdiction of one to another nations must be considered as the U.N. agreement in order to proceed the democracy and legal rights among nations. As an Indonesian trader, the best we can do is to avoid the dispute with the US.

<sup>74</sup>1979 Senate Report, at 240. 1979 U.S. Code Cong. & AD. News at 625-26.



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