3

Truth and Consequences

The factors driving increasing support for a more aggressive and more unilateral US trade policy in the 1980s were both long- and short-term. Dissatisfaction with US trade policy and performance built throughout the 1970s as interdependence and competitive pressures on the US economy grew and as the limitations of the General Agreement on Tariffs and Trade (GATT) became more evident. In the first half of the 1980s, unease turned to deep concern when macroeconomic imbalances resulted in unprecedented trade deficits and severe competitive pressures for US industry.

The first section of this chapter explores why some policymakers felt that aggressive unilateralism was not only necessary but was a justified response to these pressures. Next, we examine what policymakers in Congress and the administration in the 1970s and 1980s hoped aggressive unilateralism might achieve and what critics warned the consequences might be. The rest of the chapter explores the actual experience with section 301 since 1975 and what it reveals about the effectiveness and consequences of aggressive unilateralism.

Arguments for and against Aggressive Unilateralism

Many in Congress and industry in the 1980s felt that the United States faced an increasingly uneven playing field in international trade. They further believed that multilateral negotiations under the GATT, which

had been based on reciprocal reductions in protection, had resulted in different levels of protection, leaving US markets substantially more open than those in Europe and Japan. In addition, developing countries continued to receive "special and differential treatment," which allowed them to benefit from the tariff concessions of the industrialized countries while they kept their own economies relatively closed. Critics also pointed out that GATT rules—by ignoring foreign investment and services—failed to cover an increasing share of world trade that was especially important to American firms.

What Was Aggressive Unilateralism Expected to Achieve?

Advocates of aggressive unilateralism argued that the inequitable results of past multilateral trade talks justified the US demands for unilateral liberalization. Because past efforts to address these inequities through GATT negotiations and dispute settlement procedures had failed, they argued, the United States had no other alternative in enforcing its rights under trade agreements. Many countries heavily regulated trade in services, products incorporating intellectual property, and foreign investment—all of which had become increasingly important for the American economy. Because US markets tended to be relatively less regulated (except those relying on intellectual property, where more protection was the aim), the GATT's lack of rules governing these areas fed the growing perceptions of unfairness. Moreover, by the 1980s, as the US trade deficit ballooned, many in Congress and the business community became convinced that these inequities were important factors in declining US competitiveness. These advocates' chief aim was to open markets for US exporters. But if that could not be achieved, proponents were willing to correct perceived imbalances by retaliatory closure of the US market.

Policymakers in the Reagan and Bush administrations did not find all of the arguments convincing, but they saw their options as limited. US Trade Representative William Brock had been rebuffed in 1982 when he proposed multilateral trade negotiations to address GATT's weaknesses. At the same time, there was strong pressure for protection from import-competing industries that increasingly cited unfair practices abroad as a major source of their woes (Nivola 1993; Low 1993, chapter 4; Destler 1992, chapter 6). Export interests, an important component of the traditional antiprotection coalition, were demoralized by the impact of the overvalued dollar on their sales abroad and were relatively inactive in this period (Destler and Odell 1987, 41). Meanwhile, the trade deficit continued to rise, and the number and variety of trade-restricting proposals on Capitol Hill proliferated.

The administration felt it had to do something or risk Congress taking matters into its own hands. To address the trade deficit, the administration reached agreement with key trading partners for a coordinated dollar depreciation. To buy time while waiting for the exchange rate change to affect trade balances, the administration also adopted a more activis and aggressive trade policy using section 301.

Administration officials had several objectives in pursuing an aggressive 301 strategy. First, they hoped to placate Congress by opening foreign markets and increasing US exports. By focusing on exports, the administration hoped to mobilize export interests and at least partially offset the pro-protection lobbying from import-competing sectors. Second, administration officials used section 301 and the threat of even more congressionally mandated aggressive unilateralism to prod trading partners into agreeing on multilateral trade negotiations. The United States wanted both to strengthen dispute settlement procedures so that GATT rules could be more consistently enforced and to fortify and expand GATT rules in areas where they either did not exist or were too weak. US negotiators argued that significant reforms were needed if American support for GATT was to be maintained. And unless and until those reforms were in place, they argued, aggressive unilateralism was justified, both in cases where the GATT dispute settlement system had broken down—GATT legal scholar Robert Hudec's (1990b) "justified disobedience"—and where trading partners blocked negotiations on new rules.

As the decade wore on, the debate over the "Japan problem" also became more heated. The overall trade deficit followed the dollar down (with an 18- to 24-month lag), declining from a peak of $160 billion in 1987 to $115 billion in 1989. But because Japan's exports to the United States were roughly three times as large as its imports from the United States in the mid-1980s, US exports to Japan had to increase three times faster than US imports just to keep the trade deficit from growing (Bergsten and Noland 1993, 33). Thus, even though US exports to Japan grew faster in this period than total US exports, and much faster than US imports, the bilateral deficit with Japan seemed hardly to budge, declining only from $57 billion to $50 billion. This fed perceptions that Japan was different from other countries, won converts to this notion, and provided ammunition for those who argued that unseen, informal obstacles and exclusionary business practices in Japan were important barriers to US exports (see further discussion in chapter 2). Congress once again intensified the pressure on the administration to tackle these barriers.

The Warnings of the Critics

During the 1970s and 1980s, the critics of aggressive unilateralism rejected its underlying premises. They also expressed concerns about its possible consequences, both for global economic welfare and for the institutional framework that has governed international trade for nearly four decades.

First, the critics—and even some proponents who favored an aggressive unilateral strategy for other reasons—repeatedly pointed out that trade

policy cannot correct trade imbalances. For instance, if resources in an economy are fully employed, export promotion may affect the composition of a country's exports but is not likely to increase the level of exports. If Country A's economy is not at full employment, or if trade barriers in Country B raise that country's level of saving or reduce its domestic investment, trade policy may raise the level of Country A's exports. But with floating exchange rates, again there will be little impact on the trade balance because Country A's currency will appreciate, causing exports to decrease and imports to increase. Fundamentally, the trade balance is a macroeconomic phenomenon, determined by the balance between saving and investment by government, industry, and citizens, and it is usually not significantly affected by trade policy (see, e.g., Bergsten and Noland 1993, chapter 2). Many economists and others also argue that declining US competitiveness during the 1980s, to the extent they believed it was a problem, was due largely to domestic factors, such as the quality of education and the rate of investment, and that the trade deficits of the early and mid-1980s were largely a temporary phenomenon due to misaligned exchange rates.[1]

The second premise questioned by the critics is the utility of an aggressive unilateral strategy in negotiating market opening. They argued that such a strategy would be more likely to close markets than to open them. William R. Cline, for example, feared that trade tensions in the early 1980s were already so high that "a new approach of aggressive reciprocity by the United States could trigger counterretaliation at least as often as it would achieve foreign liberalization" (Cline 1982, 23). Critics felt that some of the support for an aggressive market-opening policy was disingenuous—that, in fact, some proponents hoped the negotiations would fail and that the United States would have to retaliate, thereby providing increased protection from imports. Even when intentions were honest, critics predicted that aggressive unilateralism would trigger trade wars because foreign governments would refuse to negotiate with a gun to their heads. The United States would then be forced to retaliate, which could cause additional market closure if the foreign government counterretaliated.

Even where this trade war scenario did not play out, critics charged that the dynamics of bilateral agreements reached under the threat of retaliation would tend to produce discriminatory results. First, they argued, it would usually be politically easier for the government in the targeted country to divert trade from other countries to the United States—keeping total imports steady—than it would be to genuinely liberalize and allow the level of total imports to increase. Second, as Nivola (1993, 13) asked, wouldn't targeted countries, "under the threat of retribution, reason that the safest way to ease bilateral tensions was to grease the wheels that squeaked the loudest?" Thus, in Bhagwati's words (1990, 36), "The game is set up . . . in terms of implicit pro-trade diversion bias rules that all parties recognize as political realities."

Critics also rejected the "altruistic rationales" offered for aggressive unilateralism. J. Michael Finger (1991), for example, dismisses the "export politics" argument for aggressive unilateralism, arguing that it actually reduces the incentive of export-oriented interests to oppose protectionist measures. If US exporters previously had supported reductions in US trade barriers as the "price" of market opening abroad, with an aggressively wielded section 301 US exporters could achieve liberalization of foreign markets without having to support reciprocal liberalization of US barriers. Thus the critics feared that section 301 tilted the domestic political balance against removing US trade barriers through broad multilateral negotiations under the GATT.

Finally, and most fundamentally, critics argued that whatever market opening occurred would inevitably be at the expense of the international trading system. Bhagwati (1990, 32–36) dismissed the notion that "the 301 weapon was necessary or instrumental" in launching the Uruguay Round or in keeping it going and even expressed concern that 301 might "undermine efforts to make the Uruguay Round successful." Moreover, despite the weaknesses of the GATT dispute settlement process—which has resulted in only one authorized retaliation in more than 40 years of GATT history (Hudec 1975)—Bhagwati rejected Hudec's "justified disobedience" argument for some cases of aggressive unilateralism. Bhagwati argues that willful disregard of GATT rules breeds cynicism and undermines the long-term sustainability of the system by replacing "the rule of law by the law of the jungle. . . ." Even Hudec pointed to the hypocrisy of the US position, given its own poor record of complying with GATT panel findings against it only after lengthy delays if at all (Hudec 1990b and 1993). Some critics have derided US claims of benign intent in using section 301 to reform the GATT as akin to a US military officer's explanation during the Vietnam War that "we had to destroy the village in order to save it."

The Truth about Section 301 and Market Opening

Before addressing the concerns of critics who believe US unilateralism threatens the international trading system, it seems worthwhile to examine whether the section 301 approach has in fact achieved market opening. The last half of the chapter then addresses the concerns of those who believe that the negative cumulative and systemic effects of aggressive unilateralism outweigh any of the case-by-case results.

1. The debate over American competitiveness—both its definition and its trend—has been extensive and wide-ranging (see, e.g., Competitiveness Policy Council 1992).

Section 301 is just one tool among several available to American trade policymakers for opening markets. But the experience with section 301 since 1975 provides a convenient data base for analyzing at least some of the effects of aggressive unilateralism. First, it provides a reasonably large sample of cases. Second, there is a large, public, and relatively accessible archive for these cases. The US Trade Representative's office has public files on all investigations conducted. These files contain, at a minimum, the petition filed (if applicable) and all *Federal Register* notices regarding actions taken. (USTR also provides a list of all section 301 investigations, briefly summarizing the status of each and any action taken.) The appendix contains brief summaries of each of the 91 cases investigated under section 301 since it went into effect on 1 January 1975 (except the ones that are the subject of detailed case studies in Part II). The table in the appendix summarizes our assessment of the outcomes in each of these cases.

Many of the trade policy experts we interviewed for this project argued that 301 should be regarded as a "residual" instrument—one that is only used when other less formal, less public, perhaps less confrontational means have failed. Thus, by examining only petitions accepted by USTR, the sample may be biased toward the toughest cases. In many more cases, a mere threat by USTR to accept a petition or initiate an investigation may have been sufficient to effect changes in foreign trade policies. Moreover, the ever-present, implicit threat that a country could be the target of US trade retaliation may deter governments from adopting foreign trade policies that otherwise would be the source of disputes.

It is difficult to assess many of these arguments, especially those involving cases of successful deterrence, where the effects of US policies are often unobservable. From a few of the cases that are observable, however, it is not clear that examining only formal 301 investigations necessarily lowers the success rate for US negotiators substantially. For example, USTR twice rejected petitions from the Rice Millers Association—in 1986 and 1988—to investigate the Japanese rice import ban because USTR believed bilateral negotiations would almost certainly fail. These reservations about the potential for drawing conclusions from the set of formal investigations undoubtedly have validity. But we do not believe they negate the utility of this effort. Given the prominence of section 301 as a trade policy tool, it is still useful to draw even narrow conclusions about whether and when retaliatory threats using this tool are effective.

The Experience with Section 301

There is no typical section 301 case. The countries targeted range from Japan to Norway, and the sectors involved range from beef and corn to footwear to insurance and computer software. Table 3.1 shows the distribution of cases by target country and by broad sectoral categories. Just 10 countries (counting the European Union as one) account for 76 of the 84 cases included in the table.[2] Interestingly, the European Union rather than Japan is by far the most frequent target, and not surprisingly agricultural disputes have dominated the US trade agenda with Europe. Just under a quarter of the total number of 301 cases have involved US-EU agricultural disputes, while 40 percent overall have involved disputes over agriculture. A third of the cases sought access for manufactured goods, while the remainder addressed the "new" areas of services and intellectual property.

It is interesting that Mexico, the fourth largest US export market, has never been the subject of a 301 investigation, though it was placed on the priority watch list released in May 1989 under the special 301 provisions of the 1988 Trade Act regarding intellectual property protection. (Mexico was removed from the list the following year.) Argentina, on the other hand, has been a surprisingly frequent target of 301, given that it is a relatively small market for US goods, but three of the five cases against Argentina involved services or intellectual property issues.

Table 3.2 shows the increasing importance accorded intellectual property protection in recent years. In contrast, services trade—the other major "new area" negotiated in the Uruguay Round—has been the subject of investigations less often in recent years than in the late 1970s. The prominence of agriculture on the 301 agenda is consistent across the period studied.

Table 3.2 also provides evidence of the more aggressive trade policy adopted in the second Reagan administration. The number of 301 investigations increased 50 percent in the 1985–89 period relative to the previous five-year period, with intellectual property cases alone accounting for 40 percent of the increase. Even more striking is the sharp increase in the proportion of cases involving public or explicit threats, which include USTR-initiated cases. USTR-initiated cases occurred in two waves—one in 1985–86, when the Reagan administration was trying to influence the debate in Congress over the omnibus trade bill, and the other (with an interim pause) in 1989–1991, when the Bush administration had to implement the super 301 and special 301 provisions included in the 1988 Trade Act.

2. Two of the 91 cases—involving imports of subsidized Canadian softwood lumber (nos. 58 and 87)—are excluded from this analysis because section 301 was used only for administrative purposes, not as a negotiating tool. Six more (nos. 27–31 and 33) are counted as one case because they had the same petitioner and involved the same products and issues. Those six complaints, regarding allegedly subsidized steel imports from six European countries, were eventually shifted into a section 201 (escape clause) investigation at the order of the president. The products in the six steel complaints ultimately were wrapped into the "voluntary" export restraint program installed in 1984.

Table 3.1 Section 301 cases by country and type of product, 1975–June 1994

Target country/region	Number of cases initiated[b]	Manufactures[c]	Agriculture-related[d]	Services	Intellectual property
World					
Total	**84**	**29.5**	**35**	**10**	**9.5**
Public threats[a]	41	12.5	13	7	8.5
European Union					
Total	22.5	2.5	19	1	0
Public threats	9	0	9	0	0
Japan					
Total	12.5	7.5	4	1	0
Public threats	8	6	1	1	0
Korea					
Total	8	2	3	2	1
Public threats	4	0	1	2	1
Taiwan					
Total	7	4	2	0	1
Public threats	3	1	1	0	1
Canada					
Total	6	4	1	1	0
Public threats	3	2	0	1	0
Brazil					
Total	6	2.5	1	0	2.5
Public threats	4	1.5	0	0	2.5
Argentina					
Total	5	1	1	2	1
Public threats	2	1	0	1	0
India					
Total	4	1	1	1	1
Public threats	3	1	0	1	1
Thailand					
Total	3	0	1	0	2
Public threats	3	0	1	0	2
China					
Total	2	1	0	0	1
Public threats	2	1	0	0	1
Other[e]	8	4	2	2	0

a. Public or explicit threats include initiation of an investigation by USTR; publication of a presidential determination that an actionable policy or practice exists, including a definite date for taking action, publication of a retaliation "hit list," or imposition of retaliation.

b. Excludes two cases involving Canadian exports of softwood lumber. Includes six steel cases against Austria, France, Italy, Sweden, the United Kingdom, and Belgium that were eventually transferred to a section 201 case, counted here as one case and included under "other"; another case, alleging the 1976 EC-Japan steel agreement burdened US commerce, is split between the European Community and Japan.

c. Includes case brought over Taiwan's customs valuation system, the super 301 case against Brazil for its import licensing system, the super 301 case against India for restrictions on foreign investment, and the general case against China in 1991–92. The Brazilian informatics case, which involved both market-access issues and intellectual property concerns, is split between the manufactures and IP categories.

d. In addition to raw agricultural products, includes processed food and other agricultural and natural resource–based products *if* the issue arises from a subsidy to or protection for processors to offset the high cost of protected agricultural inputs—e.g., pasta, wine, tobacco products.

e. "Other" includes Guatemala, Indonesia, Portugal, and Spain prior to EC accession, and Norway, named in one case each, and those countries named in the steel cases referred to in footnote b, counted as one.

The sharp drop in cases after 1989 is notable. It could be explained by US negotiators' desire to focus on concluding the Uruguay Round. Also, US firms may have hoped that the Uruguay Round end game would produce results without the expense of a USTR petition. It will be interesting to see whether the pace of petitions or USTR-initiated cases picks up again following implementation of the Uruguay Round agreement.

Methodology

Of 91 investigations initiated from 1975 through June 1994, 19 have been excluded for various reasons, leaving 72 cases to be analyzed.[3] The sample includes the six investigations that resulted from the spring 1989 super 301 designations, which are treated here the same as all other section 301 cases. The assessments of these cases are based on information from the US Trade Representative's public files supplemented by press reports, interviews, surveys of US government officials, petitioners, their counsels, and others involved in the cases, as well as examination of trade data.[4]

A "successful" case is defined here as one in which US negotiating objectives—that is, improved market access for US exporters of goods and services, reduced export subsidies by the European Union and others, and improved protection for intellectual property rights (IPR)—were at least partially achieved. For purposes of this discussion, we do not pass judgment on the validity of the negotiators' objectives. It should be noted, however, that USTR has generally been conscientious in using section 301 to reduce obstacles to trade and has avoided any temptation to use it as a protectionist tool. For example, the Reagan administration refused

3. As in tables 3.1 and 3.2, the six cases regarding alleged unfair practices with respect to steel exports from six European countries (nos. 27-31 and 33) and the two Canadian softwood lumber cases (nos. 58 and 87) are excluded. In addition, as of June 1994, four cases were either pending or too recently concluded to make trustworthy assessments about the outcome: EC meat packing (case no. 301-83), Chinese trade barriers (301-88), and Taiwanese and Brazilian intellectual property protection (301-89 and 301-91). Four other cases are also excluded because the president issued a formal determination that the practices alleged in the complaints were not actionable under section 301: EC-Japan steel arrangement (301-10), Taiwanese barriers to footwear exports (301-38), EC satellite launching subsidies (301-46), and Indonesian pencil slat subsidies (301-90). Another case, Swiss product marking standards (301-21), is left out because no determination was made, and the investigation resulted in a change in US, not foreign, law. Case no. 32, Canadian subsidies for subway railcars, was handled as a countervailing duty case. Finally, one case, Korean steel wire subsidies (301-39) is excluded because the petition was withdrawn before any formal determination was made, and the outcome could not be determined.

4. We mailed copies of the case summaries from the appendix to either the petitioning firm or group, or to its legal counsel, and to each chair of the interagency committee on section 301 since 1975. We received responses from either the petitioner or its counsel in 32 of the 72 cases and heard from or talked to five former 301 committee chairs. We also solicited comments on the detailed case studies from both American and foreign officials involved and interviewed a number of people involved in these cases as well.

Table 3.2 Change in volume and product distribution of 301 cases over four periods, 1975–93

Target country by period	Total number of cases	Manufactures[b]	Agriculture[c]	Services	Intellectual property
1975–79					
Total	**21**	**5**	**11**	**5**	**0**
Public threats[a]	5	1	2	2	0
European Community					
Total	8.5	0.5	8	0	0
Public threats	2	0	2	0	0
Japan					
Total	4.5	2.5	2	0	0
Public threats	1	1	0	0	0
Other[d]					
Total	8	2	1	5	0
Public threats	2	0	0	2	0
1980–84					
Total	**21**[e]	**11**	**8**	**2**	**0**
Public threats	5	2	2	1	0
European Community					
Total	6	1	4[f]	1	0
Public threats	2	0	2	0	0
Japan					
Total	1	1	0	0	0
Public threats	1	1	0	0	0
Taiwan	3	2	1	0	0
Other[g]					
Total	11	7	3	1	0
Public threats	2	1	0	1	0
1985–89					
Total	**31**	**10.5**	**14**	**3**	**3.5**
Public threats	23	8.5	8	3	3.5
European Community					
Total	6	1	5	0	0
Public threats	4	0	4	0	0
Japan					
Total	7	4	2	1	0
Public threats	6	4	1	1	0
Korea					
Total	5	0	3	1	1
Public threats	3	0	1	1	1
Brazil					
Total	3	1.5	0	0	1.5
Public threats	3	1.5	0	0	1.5
India					
Total	3	1	1	1	0
Public threats	2	1	0	1	0
Others[h]					
Total	7	3	3	0	1
Public threats	4	2	2	0	0
1990–93					
Total	**11**	**3**	**2**	**0**	**6**
Public threats	9	2	1	0	6
European Community					
Total	2	0	2	0	0
Public threats	1	0	1	0	0
Thailand					
Total	2	0	0	0	2
Public threats	2	0	0	0	2
Other					
Total	7	3	0	0	4[i]
Public threats	6	2	0	0	4

a. Public or explicit threats include initiation of an investigation by USTR; publication of a presidential determination that an actionable policy or practice exists, including a definite date for taking action, publication of a retaliation "hit list," or imposition of retaliation.

b. Includes case brought over Taiwan's customs valuation system, the super 301 case against Brazil for its import licensing system, the super 301 case against India for restrictions on foreign investment, and the general case against China in 1991–92. The Brazilian informatics case, which involved both market-access issues and intellectual property concerns, is split between the manufactures and IP categories.

c. In addition to raw agricultural products, includes processed food and other agricultural and natural resource–based products *if* the issue arises from a subsidy to or protection for processors to offset the high cost of protected agricultural inputs—e.g., pasta, wine, tobacco products.

d. Includes two against Canada and one each against Argentina, Korea, and Taiwan.

e. Includes six steel cases against several European countries that were eventually transferred to section 201 case, counted as one here under "other."

f. All filed in 1981.

g. Includes two each for Argentina, Brazil, Canada, and Korea.

h. Includes two each for Argentina and Taiwan.

i. Special 301 designations of India, China, Taiwan, and Brazil.

to use 301 to limit imports of steel from several European countries, ordering the US International Trade Commission (ITC) to open a section 201 (escape clause) case instead. Although the steel industry did eventually win protection, following an affirmative finding by the ITC, the principle of reserving the 301 remedy primarily for tackling barriers to US exports was preserved.

In our view, and in contrast to that of some other observers, conclusion of an agreement is not sufficient to call an outcome a negotiating success.[5]

5. Sykes (1992), for example, concludes that 58 of the 83 section 301 cases he examined were successful (70 percent). But in several of the cases he has defined as successes, we have found that the agreements were not stable and have concluded that they cannot be considered as having successful outcomes.

If a case recurs because the agreement was not implemented to US satisfaction, or if it was circumvented in some other way, it is classified as a failure (and called here a "nominal success"). We divided the cases into four categories, illustrated by the following examples:

- Failures are exemplified by three cases challenging EC export subsidies to no avail—barley (case no. 301-5), wheat flour (301-6), and sugar (301-22).
- Nominal successes are cases in which an agreement was reached but not implemented to US satisfaction. These are exemplified, again, by three cases challenging EC efforts to support its agricultural sector—in this case, processed fruit and vegetable producers. USTR challenged border measures restricting imports of canned fruit and vegetable products in the late 1970s—minimum import prices and licensing requirements in 301-4 and an arbitrary method for calculating the sugar content of canned fruit in 301-7. The Community then replaced these measures with production subsidies, which the US negotiators challenged in case 301-26. Negotiations produced an agreement in 1985 on reducing subsidies, the implementation of which the United States challenged in 1989 (case 301-71, which finally appears to be working). Another example is case 301-72, in which the Thai government agreed to remove a GATT-illegal ban on imports of cigarettes but replaced it with a GATT-legal tariff.
- Partial successes are illustrated by two cases challenging Japan's quotas on leather and leather footwear imports (301-13 and 301-36), which Japan converted to tariff rate quotas but was unwilling to significantly liberalize. Instead, Japan offered compensation to US negotiators, lowering tariffs on other imports valued at more than $230 million.
- Successful cases are exemplified by Japan's decision to eliminate its tariff on cigarettes and liberalize marketing regulations, which increased US exports manyfold (301-50), and Brazil's decision to do away with its import licensing system (301-73).

The last case, addressing Brazilian quantitative import restrictions, illustrates one of the many hazards in this exercise. In a previous Institute for International Economics study of foreign policy sanctions, the authors counted as successes only those cases in which there was a positive policy outcome *and* sanctions made at least a modest contribution to the outcome (Hufbauer, Schott, and Elliott 1990). The Brazilian import licensing case is an example of how the failure to make that distinction could inflate the success rate. For the sample studied here, however, it appears to be a distinction without a difference because the Brazilian case is the only one of that type we found.

The hazards in drawing often subtle distinctions between marginal failures and marginal successes are even greater. In drawing the line between success and failure in a particular case, we also occasionally had to draw fairly arbitrary lines between cases. Our assessment of the Japanese semiconductor case (301-48) is one with which many observers will no doubt disagree. The US-Japan semiconductor agreement did increase the sales of US firms, and it did contribute to an increase in foreign market share in Japan, from less than 10 percent in 1986–87 to just over 14 percent by the time the agreement expired in 1991 (see table A.11). But the stated objective of the agreement was a 20 percent foreign market share, and USTR, supported by the petitioners, refused to lift the retaliatory sanctions imposed against Japan in 1987 until a new agreement was signed in 1991.[6] Thus we classify case no. 301-48, encompassing the first semiconductor agreement, as a failure based on the decision to keep the retaliation in place. The second agreement, backed by the threat to reimpose retaliatory duties, appears to have been more successful in satisfying the petitioners' and US negotiators' demands, but it does not appear in our data base because a second 301 case was not filed.

An example just on the other side of the success/failure divide is the Japanese construction case. In the 1988 Trade Act, Congress required USTR to initiate an investigation of discriminatory Japanese government practices in awarding contracts for public construction projects. Building on the Major Projects Arrangement (MPA), concluded in March 1988, USTR negotiated an agreement in 1991 that expanded the list of projects that would be eligible for the special bidding procedures outlined in the MPA. Two years later, however, US negotiators revisited the issue, threatening sanctions but never initiating a 301 investigation, and eventually negotiated an agreement that fundamentally changed the Japanese system for awarding construction contracts above a certain threshold. Although the 1991 agreement might be considered only a "nominal" success, since it was reopened, we concluded that it was a partial success because US firms did increase their involvement in the public Japanese market and because the new agreement seems to have expanded the old agreement rather than simply seeking its enforcement. The two middle columns of table 3.3 list the cases that were closest to the narrow line dividing success and failure and highlight those where the judgments were particularly difficult.

A final caveat: it must be emphasized that this definition of success is a narrow one. For example, the outcome in some cases was improved

6. USTR imposed retaliatory duties on $165 million in imports from Japan in April 1987, even though the agreement had been in place for less than a year, because of the Japanese government's "apparent failure . . . to fulfill its obligations" under the agreement, including the understanding that "the expected improvement in access by foreign-based semiconductor producers would be gradual and steady over the period of the agreement" (*Federal Register*, 31 March 1987, 10275).

Table 3.3 Difficulties in classifying section 301 cases that are marginal failures or successes[a]

Nominal successes[b]	Marginal nominal successes[b]	Marginal partial successes	Partial successes
Guatemala, shipping	Japan, cigars	Canada, fish	EC, egg products
EC, canned food	Japan, pipe tobacco	Taiwan, misc.	EC, citrus
EC, canned food	Korea, insurance	Taiwan, beer, wine, tobacco	Japan, leather
EC, animal feed	EC, poultry	Japan, supercomputers	EC, pasta
USSR, insurance	Japan, semiconductors	Japan, construction	Brazil, footwear
EC, wheat			Japan, footwear
Argentina, insurance			Korea, footwear
EC, canned food			Brazil, soybeans
Korea, IPR			Taiwan, rice
EC, meat			Argentina, air couriers
Brazil, IPR			Taiwan, films
EC, soybeans			Brazil, IPR
Argentina, IPR			Argentina, soybeans
Thailand, cigarettes			India, almonds
Norway, toll equipment			Korea, cigarettes
Canada, beer			Korea, beef
Thailand, IPR			Korea, wine
Thailand, IPR			EC, canned fruit
India, IPR			Japan, wood products
China, IPR			EC, enlargement

IPR = intellectual property rights

a. Explanations of nominal and partial success are found in the text.

b. We classify these cases as failures.

access for specific US firms; success in these cases does not necessarily mean the market as a whole was liberalized; market shares may only have been reallocated to benefit US firms at the expense of third parties. In such cases, the result might not be considered a success for US trade policy more broadly defined—improving global welfare or strengthening the liberal multilateral trade system. These are among the issues discussed below.

Section 301 Outcomes: Market Opening or Market Closing?

Section 301 appears to have been a reasonably effective tool of American trade policy, especially when compared with the use of economic sanctions as a tool to achieve noneconomic foreign policy goals. Based on the evidence at hand, we conclude that US negotiating objectives were at least partially achieved about half the time (35 of 72 cases), as compared

Table 3.4 Market-opening results in section 301 cases

Period	Number of successes	Number of failures	Success ratio (percentage of total)
1975–92	35	37	48.6
Case resolved:			
Before September 1985	9	20	31.0
After September 1985	26	17	60.5
Case resolved in:			
1975–79	3	4	42.9
1980–84	3	14	17.6
1985–88	16	5	76.2
1989–92	13	14	48.1
Excluding IPR cases	12	8	60.0

IPR = intellectual property rights

with only about one success in every three foreign policy sanction cases (41 of 120) (Hufbauer, Schott, and Elliott 1990, 93).[7]

Like the US experience with foreign policy sanctions, the success rate has not been stable over the period in which 301 has been employed. But in stark contrast to the foreign policy sanctions, the success rate for section 301 increased over time, nearly doubling after announcement of the president's trade policy action plan in September 1985, from 31 to 60 percent (table 3.4).[8] Given the efforts by Congress over the years to make 301 stronger and more effective, it is interesting to break the results down further, into periods defined by trade laws: the Trade Act of 1974 (1975–79), the Trade Agreements Act of 1979 (1980–84), the Trade and Tariff Act of 1984 (1985–88), and the Omnibus Trade and Competitiveness Act of 1988 (1989–92).

Table 3.4 shows that section 301 had its greatest rate of success prior to passage of the 1988 Trade Act, with its super 301 provisions. In fact, regular 301 as implemented from 1985 through 1988 had a slightly higher success rate, 76 percent, than did super 301, 67 percent (four of six cases—or five of eight, 63 percent, if the preemptive negotiations with South Korea and Taiwan are included; see chapter 12).

Bhagwati (1990, 35) and others worried, however, that "since [section 301] reflects clout and concentrated pressure from the United States, there is a strong likelihood that the targets of the 301 actions will satisfy American demands by diverting trade from other countries (with less political

7. These results are higher than those of Patrick Low (1993, 88–89) who found only a 35 percent success rate for section 301 cases. Since Low did not publish his case-by-case assessments we could not determine the source of the difference.

8. There were 81 US foreign policy sanction episodes from World War I through 1990. In the period prior to 1973, the success rate in these cases was just over 50 percent (18 of 35); since then it is only 17 percent (8 of 46) (Hufbauer, Schott, and Elliott 1990, 108).

clout) to the United States, satisfying the strong at the expense of the weak."

In fact, there is very little evidence of discriminatory outcomes in the cases covered by GATT rules. Taiwan, which was not a GATT member at the time, is frequently charged with discriminating in favor of US exporters when negotiating trade deals. The South Korean government actually published lists in the mid-1980s showing exactly which imports and in what amounts they were going to divert to US exporters from other suppliers, mainly Japanese, in order to reduce tensions.[9] But we found no 301 cases involving potential or actual GATT violations where the US demanded discriminatory treatment and none where the formal agreements were on anything other than a most-favored nation (MFN) basis. One reason may be that competing exporters have learned to defend themselves. For example, when the United States filed GATT complaints against South Korean and Japanese restrictions on beef imports, Australia quickly filed parallel complaints to ensure that its interests were protected. In cases for which comparable data are available, there is very little evidence that US exporters have gained market share at the expense of exporters from other countries (see appendix).

The only cases we have been able to identify where US negotiators acquiesced in explicitly discriminatory agreements were in an area where there was no MFN requirement under GATT rules: the IPR agreements with South Korea and China, which provided retroactive patent and copyright protection only for US firms. US officials insist these provisions were inserted over their objections. Even in these cases, however, prospective protection was available to all comers. Moreover, the discrimination was temporary; within a year or two, the Europeans and Japanese were able to negotiate agreements providing similar retroactive protection to their firms. Less explicit discrimination in favor of US firms also appears to have accompanied the reluctant opening by Korea of its insurance market in the early and mid-1980s. Again, over time, as Korea expanded the number of foreign insurance firms allowed to operate there, some were from countries other than the United States.

Finally, contrary to the fears of many, the more aggressive use of section 301 did not result in any major trade wars. The United States retaliated in 15 of 91 section 301 investigations as of April 1994, and only two targets counterretaliated: the European Union (twice) and Canada (once). But in one case, involving Spanish and Portuguese accession to the Community in 1986, the US retaliation was nonbinding, as was EC "counterretaliation." In two other cases, involving Japanese quotas on leather and footwear, the United States raised tariffs on $24 million worth of Japanese leather goods as part of a negotiated compensation package that also lowered Japanese tariffs on $236 million of imports of interest to the United States. In five other cases, the retaliation was lifted after a short time as part of negotiated resolutions of the disputes. Table 3.5 lists the section 301 cases where retaliation occurred.

9. This trade diversification effort actually had a dual purpose. South Korea was running a large bilateral deficit with Japan that it also wanted to reduce.

Table 3.5 US retaliation under section 301

USTR case number	Target country	Issue	Form of retaliation
6	EC	Export subsidies on wheat flour	Instituted retaliatory export subsidies (EEP); no resolution.
11, 25	EC	Tariff preferences on citrus, export subsidies for pasta	Increased tariffs on EC pasta in retaliation for tariff preferences on citrus, also to offset pasta subsidies. EC counterretaliated. Retaliations were lifted when agreement was reached.
13, 36	Japan	Quotas on leather and footwear	Increased tariff on Japanese leather products as part of negotiated compensation agreement.
15	Canada	Border broadcasting/ advertising	Passed mirror legislation; no resolution.
24	Argentina	Bilateral agreement on hides	Withdrew tariff concession; no resolution.
48	Japan	Barriers to semiconductor exports	Increased tariffs; lifted when new agreement was signed in 1991.
54[a]	EC	Accession of Spain and Portugal	Announced nonbinding quotas on EC exports. EC counter-retaliated with similarly nonbinding restrictions on US exports. No commercial impact. Both retaliations were lifted when agreement was reached.
61	Brazil	Patent protection for pharmaceuticals	Increased tariffs; retaliation was lifted when agreement was reached (though agreement has not been implemented to date).
62[a]	EC	Ban on hormone-treated beef	Increased tariffs; no resolution.
80	Canada	Provincial restrictions on beer sales	Increased tariffs. Canada counterretaliated. Both retaliations were lifted when agreement was reached.
82	Thailand	Copyrights	Some GSP privileges withdrawn.
84	Thailand	Patent protection	Some GSP privileges withdrawn.
85[a]	India	General intellectual property	Some GSP privileges withdrawn.

a. Indicates case was initiated by USTR.

In sum, section 301 only seldom resulted in trade-diverting agreements or trade retaliation and no agreement at all. Even rarer were 301-sparked trade wars. And 301 does appear to have resulted in some market opening, usually modest, in half the cases overall and three-fifths since 1985. It is impossible to quantify precisely the amount US exports may have increased because of section 301. Even a rough, order-of-magnitude estimate is difficult to make. Nearly two-thirds of the cases studied (46 of 72) involved total exports to the target country of the product in question of no more than $100 million; 16 involved exports of less than $10 million. The total value of US exports in the successful cases in the year after they were concluded was roughly $4 billion (in current dollars).

One of the biggest gains was US exports of cigarettes to Japan, which ballooned from less than $50 million to more than $1 billion by 1990. Close behind was a $750 million increase in exports of beef to Japan (from $350 million to $1,100 million).[10] Adjusting for the rapid growth of the Japanese market, US sales of semiconductors in Japan also increased by almost $1 billion annually by the end of the agreement negotiated under section 301.[11] Other relatively large export gains were $100 million each in increased exports of cigarettes to South Korea and Taiwan and $100 million in increased exports of beef to South Korea. US industry has predicted that it might increase sales of wood products to Japan by $750 million as a result of the super 301 agreement. To date, however, the gains have been far more modest. The market-access agreement signed with China in 1992 might eventually be worth several hundred million dollars a year if fully implemented. Thus, a reasonable estimate of the increase in US exports due to section 301 might be $4 billion to $5 billion annually as of the early 1990s. This compares with an estimated $30 billion to $40 billion increase in US exports as a result of the Uruguay Round agreements (Schott 1994).

Consequences of Section 301 for the International Trading System

Many defenders of section 301 believe that those who focus on narrow, market-opening results miss the forest for the trees. These usually reluctant proponents contend that the trading system in the early 1980s was close to being broken and that, in the words of Robert Hudec (1990b), US disobedience was "justified" to keep the multilateral system from collapsing completely. Defenders also argue that US aggressive unilateralism was an important factor in launching the Uruguay Round and expanding its agenda to include agriculture, intellectual property, investment, and services, and that it was essential in restraining Congress from passing even more protectionist or Japan-bashing legislation. Critics reject these "altruistic" arguments made in defense of aggressive unilateralism (Bhagwati 1990, 30–33).

The obvious problem in evaluating these arguments is that the counterfactual cannot be observed: we cannot know what would have happened to the trading system in the absence of aggressive unilateralism. Here is what we do know:

- Congress did not pass sector-specific protectionist legislation.
- The Uruguay Round was launched in September 1986 with an expanded agenda.
- Dispute settlement reforms were part of the "early harvest" approved at the round's mid-term review in December 1988.
- The Uruguay Round did not collapse when USTR implemented super 301 in 1989–90.
- The round was successfully concluded, albeit three years later than planned.

Before we discuss the broader context of US trade policy, it is useful to assess the credibility of the US commitment to GATT reform in light of its own behavior. There are two sources of evidence for this analysis. First, how did USTR use 301? Was there any attempt to uphold the spirit, if not the letter, of GATT rules? Second, how did the United States respond when it was the subject of GATT complaints?

Section 301 and GATT Rules

Table 3.6 suggests that the use of section 301 has been neither as aggressive nor as unilateral as the number and volume of the condemnations would suggest. When the US Trade Representative has been aggressive and unilateral, it has often been in agriculture, where GATT rules were especially weak. USTR has been quite restrained with respect to trade in manufactures, where GATT rules are the most effective. USTR has been the most aggressive and unilateral where GATT rules do not apply at all.

In 11 of 22 cases in which a GATT panel was established, the United States acted unilaterally, either issuing a formal finding of unfairness, publishing a hit list, or actually retaliating (table 3.6). But each time the action either accompanied a GATT ruling or followed what Hudec has called "general legal breakdown." While unauthorized retaliation is clearly GATT-illegal, Hudec (1990b, 121) argues:

> The obligation not to retaliate without GATT authority presumes that GATT will be able to rule on the disputed legal claim, and, later, on the request to retaliate. If GATT is, in fact, unable to rule, the complainant may be free to resort to "self-help" in some circumstances.

10. This case was not a 301 but was negotiated in conjuction with 301-66, Japanese citrus.

11. For reasons peculiar to this case, the agreement focused on sales of foreign firms rather than exports; see Tyson (1992, chapter 4) for details.

Table 3.6 Section 301: how aggressive, how unilateral?[a]

	GATT panel established	Potentially GATT-applicable but no panel: Agricultural products	Potentially GATT-applicable but no panel: Manufactured products	GATT not applicable
Retaliation imposed or publicly threatened	11	4	1	16
No public threat	11	11	10	8

a. Based on the data base described earlier in chapter 3.

Similarly, Chayes and Chayes (1993) argue that the defense of disobedience as a necessary evil "is based on the simple judgment that there are cases where the damage to the legal system caused by inaction in the face of deadlock will exceed the damage caused by some disobedient act trying to force a correction."

In 6 of the 11 cases involving GATT panels, the United States imposed retaliation, subsequently lifted in three. Hudec has noted that retaliation in the Japanese leather cases (nos. 13 and 36) probably would have been approved by GATT had it been asked to do so.[12] Moreover, in these cases increased US tariffs on Japanese exports of leather goods were a minor part of a much larger negotiated package of compensatory tariff cuts by Japan ($24 million out of a total compensation package worth an estimated $236 million). Hudec also suggests that US retaliation in three other cases—involving subsidized EC wheat flour (301-6) and pasta exports (301-25) and EC tariff preferences on citrus (301-11) that discriminated against US exports—was probably justified because they were examples of "legal breakdown" in the GATT. In these cases, the GATT dispute settlement process either was not allowed to operate—as in the pasta and citrus panels, where the European Community blocked progress at various stages—or was not able to come to a judgment, as in the wheat flour case.[13]

There were only five cases potentially subject to GATT rules that provoked US moves toward retaliation in the absence of GATT dispute settlement procedures. (A case is defined here as potentially "GATTable" if it involves a GATT member and trade in goods—whether agricultural, industrial inputs, or manufactured.) Of those, four involved disputes with Europe over agriculture. Only one of these cases involved manufactured exports to a GATT contracting party: the Japanese semiconductors case (301-48). But in the other 21 potentially "GATTable" cases that were not taken before the GATT, the United States took no unilateral action, other than initiating the investigation.

Critics here and abroad are not so concerned about US retaliation without authorization in cases where there are valid complaints about GATT violations. They may not like it, but they usually recognize, like Hudec, that the system was not functioning effectively in the 1980s. What really enrages foreign governments is when the United States unilaterally determines that a foreign practice that violates no international agreement is "unreasonable," demands unilateral concessions, and unilaterally retaliates if the foreign government does not capitulate. In other words, the rest of the world does not appreciate it when the United States appoints itself judge, jury, and executioner.

Indeed, US negotiators have been aggressive in pursuing unilateral liberalization in areas not covered by GATT rules, either retaliating or threatening to do so in 16 of 24 cases involving non-GATT members or non-GATT issues. Even here, however, in only one of three cases in which section 301 retaliation was imposed did the retaliation violate US GATT obligations. In the Argentine hides case (301-24), the United States abrogated a bilateral agreement with Argentina when the Reagan administration concluded that Argentina was not fulfilling its commitments.[14] And, in the Canadian border broadcasting case (301-15), US retaliation was in the form of mirror legislation limiting the tax deductibility of advertising on Canadian stations by US firms. This legislation did not violate any GATT obligation, since services were not then covered.

The one clearly GATT-illegal retaliation in this area was the United States' raising of tariffs on $39 million worth of imports from Brazil after negotiations to change Brazil's policy on patent protection for pharmaceuticals failed (chapter 8). There were three other retaliatory actions in areas not covered by GATT rules, all involving the withdrawal of some Generalized System of Preferences (GSP) benefits from Thailand (two cases) and India for their lack of intellectual property protection.[15]

12. A GATT panel ruled against Japan's quantitative restrictions (QRs) on raw leather in 1984. At a council meeting in July 1985, the United States asked for a ruling on Japan's QRs on leather footwear, which were part of the same program, based on the previous panel report. When the US request was rejected, a separate panel was appointed to consider the issue but was not convened before a settlement was reached.

13. US retaliation in the recent Canadian beer case (301-80) followed multiple GATT rulings against Canada's provincial restrictions on the sale of imported beer, wine, and liquor. Retaliation in this case cannot be blamed on international legal breakdown since Canada accepted the rulings. Instead, the retaliation was triggered by actions at the provincial level in Canada that the United States claimed undermined the integrity of the agreement.

14. The retaliation involved raising the US tariff from the zero level negotiated bilaterally back to the level bound in GATT negotiations and thus did not violate US GATT obligations.

15. Most observers regard GSP as a privilege granted by the United States to developing countries that can be adjusted or withdrawn at US discretion without violating the GATT. Hudec argues, however, that the enabling clause, through which GATT gives permission for GSP, requires that the preferences be nondiscriminatory for all developing-country markets (personal communication, 7 July 1994).

This record suggests that USTR was aware of the potential systemic costs of violating the United States' existing GATT obligations in the course of trying to extend GATT rules in new areas and that USTR therefore exercised some restraint. In contrast, US behavior as a defendant in GATT disputes, unfortunately, tends to undermine the credibility of the US commitment to GATT reform.

In the context of developing his argument for "justified disobedience," Hudec emphasized that the credibility of US assertions that it is indeed concerned with strengthening the GATT, rather than simply seeking unilateral trade concessions from countries targeted under section 301, depended on its overall behavior. If US unilateralism is not to "spread cynicism" throughout the system regarding the value of GATT commitments (Bhagwati 1990, 35), it must be implemented in a broader context of support for the international system. One element of that support is the willingness of the United States to submit to the international law it is purportedly seeking to reform. In Hudec's view (1990b, 137–38), justified disobedience requires that

> . . . governments acting out of a concern to improve GATT law must necessarily respect that law as fully as possible, even when disobeying it. Accordingly, they must accept the power of the legal process to judge their disobedient behavior, and must accept the consequences imposed by law. In plain terms, the disobedient government must accept a panel proceeding promptly, cooperate in a prompt decision, abstain from blocking the decision, and accept a fair measure of retaliation without trying to punish the plaintiff.

Although US negotiators must be given credit for pushing hard to get the Uruguay Round started, to broaden its agenda, and to strengthen GATT rules, much US behavior in the GATT during the 1980s does not satisfy Hudec's criteria for credible justified disobedience. Hudec has extensively analyzed GATT dispute settlement in the 1970s and 1980s and concluded that, contrary to its self-projected white-knight image, the United States was among the worst offenders in the 1980s in terms of failing to comply with GATT dispute settlement procedures.

Among other things, Hudec found that "the United States is currently the worst offender, or tied for worst . . . [in] . . . blocking panels, blocking Council approval, and blocking retaliation authority" (1992, 33). He also concluded that the United States was responsible for by far the largest number of "negative outcomes" in dispute settlement proceedings. It refused to take remedial action in four cases where GATT panels had ruled for the other party. It imposed GATT-illegal retaliation in another five cases and, despite a legitimate GATT complaint by the victim, removed the retaliation only after arm twisting forced the victim to accede to US demands. Thus, the United States responded negatively to fully half (9 of 18) of the valid complaints brought against it in the 1980s. This record represents nearly two-thirds of all such negative outcomes in the 1980s. And finally, in cases it has lost, the United States has routinely delayed taking remedial action within the section 301 deadlines it expects of others (Hudec 1992, annex 3).

In defense of US negotiators, they did not control the outcomes in all of these cases. Three involved challenges to US retaliation in section 301 cases: Japanese semiconductors (discussions in several GATT Council meetings, but no panel requested by Japan), Brazilian intellectual property rights policy, and the EC hormone-fed beef ban, where each party blocked the other's request for a panel (see appendix). But other cases were political dynamite—such as the challenge by the Sandinista government in Nicaragua when the United States eliminated its sugar quota—or challenged US procedures in administrative trade cases that required legislative change to rectify. The need to pass legislation in order to remove the objectionable practice is another reason that US responses in some cases were so drawn out. Nevertheless, US credibility in its GATT reform campaign would have been considerably enhanced had it done as it wished others to do.

Domestic Politics, the Uruguay Round, and the Effects of Aggressive Unilateralism

The political and economic context in the 1980s must be kept in mind when evaluating the impact of section 301 on the international system. Defenders of 301 argue that aggressive unilateralism was necessary to enforce and strengthen GATT rules as part of the effort to fend off protection at home. Recall first that the GATT dispute settlement system was in severe disarray in the late 1970s and early 1980s (Hudec 1993, chapter 8). And second, the limited coverage of GATT rules made it seem increasingly irrelevant to large segments of the US business community and to many members of Congress. Given the unwillingness of America's trading partners in the first half of the decade to initiate a new multilateral round of trade negotiations to address these issues, US negotiators felt they had no choice but to negotiate the issues bilaterally, in some cases imposing a unilateral solution.

Observing that increased "enforcement" of international agreements is not without cost, Chayes and Chayes (1993, 203) argue that "[t]he US deployment of [section 301] against violators of GATT obligations reflects a unilateral political decision (1) that existing levels of compliance were not acceptable and (2) to pay the costs of additional enforcement." A situation that Chayes and Chayes believe may produce this political commitment is fear that "the tipping point [toward regime collapse] is close, so that enhanced compliance would be necessary for regime preservation" (202).

Several observers have pointed to the contentious 1982 GATT ministerial meeting as symbolic of the erosion of the international trading system,

perhaps close to this "tipping point." Former Australian Ambassador to the GATT Alan Oxley (1990) called the 1982 ministerial "the nadir of the GATT." Similarly, Hudec has interpreted the ministerial—and in particular the refusal of the other parties to even consider the US proposal to negotiate rules in the new areas of services, investment, and intellectual property—as an important impetus for increased US unilateralism. Hudec (1990b, 130) observed that the US goal of market opening in these new areas:

> was often pursued in a fairly arrogant manner, but before condemning the entire operation it is worth asking . . . [h]ow long would it have taken to persuade governments to accept the proposed Uruguay Round agenda? Indeed, what would happen to the Uruguay Round today if the threat of bilateral retaliation were removed entirely?

Observers as knowledgeable as former GATT head Arthur Dunkel have reportedly credited US unilateralism with saving the GATT, at least temporarily. Bhagwati (1993, 25) says that Dunkel "is supposed to have remarked [that] the best thing that the United States did for the GATT was to start down the 301 and Super 301 road, thus unifying an outraged and alarmed world behind the trading regime."

After President Reagan embraced a more aggressive, export-oriented trade policy in September 1985, it was another year before the Uruguay Round was finally launched. At the same time he adopted the activist trade policy, Reagan also directed Treasury Secretary James Baker to coordinate a depreciation of the dollar with key US trading partners. While recognizing that exchange rates and macroeconomic policy were the key to reducing the US trade deficit and that multilateral negotiations were the preferable forum for trade liberalization, the administration also recognized that those policies take time to work. Aggressive unilateralism helped the administration buy time until the dollar depreciation could affect the trade balance in 1987. In his thorough and careful analysis of US trade policy, I. M. Destler (1992, 131) characterized this "damage-limitation effort" as "at least a qualified success" in ensuring that the trade bill that finally passed in 1988 was one the administration could live with: "In the most unfavorable trade-political climate since 1930, [USTR] Yeutter and his aides had gotten the negotiating authority they needed [to complete the Uruguay Round], and had managed to neutralize—or modify—the most restrictive provisions."

Many critics, however, worried that the administration won the battle but lost the war. J. Michael Finger, for example, argues that section 301 fundamentally changed the internal US politics of multilateral trade negotiations. He suggests (1991, 20) that the more aggressive use of section 301 reduced US exporters' enthusiasm for the Uruguay Round because they no longer needed to support reciprocal reductions in US trade barriers as the quid pro quo for better access to foreign markets:

> The menace . . . of "301" is not that it serves US export interests but that it unchains them from the necessity to oppose US import-competing interests. It arms the US negotiator not with the authority to remove US import restrictions, but with the threat to impose new ones.

Thus, some fear that aggressive unilateralism may have been so successful that many traditional supporters of the GATT system—multinational corporations and other export interests—now feel they have an alternative that may even be preferable to the long, tedious negotiating rounds that typically precede multilateral liberalization.

Given the vigorous lobbying that most of American business is doing to ensure ratification of the Uruguay Round, this criticism seems overblown. There is one potential area for concern, however. Among the strongest proponents of aggressive unilateralism in the 1980s were the pharmaceutical, audiovisual, software, and chemical companies, which desperately wanted patent and copyright protection for their products. Intellectual property was included in the recent GATT agreement, but many of these companies believe the new rules are inadequate. It is possible they will continue to appeal to USTR to use section 301 to push some countries to move further and faster than GATT requires, possibly in violation of the new dispute settlement rules. If the ongoing sectoral market-access negotiations on services do not produce results, some services providers could take a similar tack.

In addition to expanding the agenda to services, investment, and intellectual property, US unilateralism also spurred heightened interest in strengthened GATT dispute settlement procedures. Ambassador Oxley (1990, 85) argued that "[o]ne of the primary interests of the European Community in the Uruguay Round was to secure greater commitment from the United States to use GATT procedures to handle trade disputes rather than resorting to unilateral action under its own trade legislation."

The dispute settlement area seems to be the clearest case of US pressure for reform having an impact on the GATT. US critics of the dispute settlement procedures noted that they permitted countries to delay or block establishment of panels to hear complaints and allowed defendants to block adoption of panel findings and the plaintiffs' requests for authority to retaliate.[16] In response to US and others' complaints, there were various procedural reforms, culminating in the 1988 Montreal Midterm Agreement, that speeded up the early stages of the process but did not resolve the problem of the defendants' veto over adoption of panel findings or authorization to retaliate (Hudec 1993, 231–33).

US negotiators continued to press for far-reaching reform, and by 1991 the parties reached an "understanding" that ". . . converted the GATT

16. For a wide-ranging summary of views and an assessment that "the most obvious and difficult issue facing the GATT is its members' lack of political will to cooperate on GATT matters," see US International Trade Commission (1985, 82).

dispute settlement procedure into a thoroughly automatic conveyer belt that took a legal claim from complaint to retaliation without any need to obtain the defendant's consent at any stage" (Hudec 1993, 237). Hudec attributes the dramatic reform in dispute settlement to the fact that:

> The United States had apparently made a convincing case that the US Congress would continue to insist on its new, bellicose, "take-the-law-into-your-own-hands" legal policy unless and until GATT had a legal enforcement procedure that met US standards of effectiveness. Governments [that] preferred a more cautious, more voluntary adjudication system had apparently persuaded themselves that the risk of unchecked US legal aggression was a greater danger that an excessively demanding GATT legal system.

Hudec and some other international law scholars fear that the GATT system and its members may not be ready for the new dispute settlement procedures. There are legitimate doubts about whether the more powerful traders, particularly the European Union and the United States, are truly prepared to subject themselves to the new discipline. There are also concerns about how well a strong dispute settlement system can adjudicate fights over the GATT's still relatively poorly defined trade rules, particularly those governing the new areas of services, investment, and intellectual property.

Overall, it seems fair to credit US leadership—including through unilateralism—with at least a modest role in preventing the collapse of the GATT dispute settlement system in the early 1980s and in prodding US trading partners into agreeing to initiate the Uruguay Round in 1986. To borrow a phrase from French economist Patrick Messerlin (as quoted in Finger and Nogues 1987, 713), one can characterize aggressive unilateralism's impact on the round this way: the United States viewed section 301 as a way to force GATT reform; the rest of the world viewed GATT reform as a way of restraining American use of section 301.[17]

A special meeting of GATT contracting parties was held in February 1989 to discuss unilateralism, with most of the discussion focusing on criticism of US policy. The United States defended itself by arguing that it "believed in the GATT multilateral process and was first among countries trying to strengthen it. [The United States] had been forced to act unilaterally because GATT was not strong enough, nor comprehensive enough, to do the job" (Hudec 1993, 230). Although the new rules negotiated in the Uruguay Round are far from perfect, further progress could be severely undermined if the Clinton administration misreads the lessons of the past. Aggressive unilateralism should continue to be a last resort, and it should continue to be clearly linked to further strengthening of the multilateral regime. Otherwise, America's trading partners will view it simply as a bully that has forsaken global leadership to pursue narrow sectoral interests at the expense of global welfare—and its own.

The dangers of this path can be seen in the vociferous worldwide condemnation of US policy toward Japan in 1994 when US aggressive unilateralism was front and center, rather than being part of a broader trade policy pushing for both multilateral and minilateral *reciprocal* trade liberalization, as in 1993. Ultimately, whether these reform efforts pay off in the long run will depend on whether the United States ultimately embraces—for itself, as well as for others—the reforms for which it fought so hard. We return to these issues in chapter 13.

17. Messerlin was referring to different US and non-American views on the purpose of the GATT subsidies code: the United States viewed the code as a way of restraining foreign subsidies; the rest of the world viewed the code as a way of restraining US countervailing duty actions.

4

When and How Does Section 301 Open Markets?

In chapter 3 we concluded that section 301 had been a reasonably effective market-opening tool in the latter half of the 1980s. In this chapter, we consider some of the factors that contributed to its success. The first part of the chapter uses the data base of section 301 cases described in chapter 3 to draw general and suggestive conclusions about when section 301 is more or less likely to result in market opening. We use a historical approach that is shaped by bargaining theory. We study the pattern of variation across cases with different characteristics and outcomes in order to identify elements that contribute to success or failure. We have not tried to build from scratch a theoretical framework for analyzing the use of threats in trade negotiations. To do that and then to use it to evaluate section 301 would require knowing the counterfactual in each case: what would have happened in the absence of the threat? We believe there is much to learn from a straightforward categorization and cross-tabulation of the cases with respect to behavioral and other criteria. The final section discusses insights from the detailed case studies found in part II that could not be captured by the more formal testing of hypotheses in the first part of the chapter.

Insights from Bargaining Theory

Many trade negotiations involve an effort by all parties to realize joint gains by cooperating in lowering trade barriers. The Uruguay Round of

multilateral trade negotiations under the General Agreement on Tariffs and Trade and the North American Free Trade Agreement are two prominent recent examples. The United States has not abandoned its commitment to cooperative bargaining, as demonstrated by its role in bringing the Uruguay Round to a successful close. But, as described chapters 1 and 2, the growing belief that past negotiations had resulted in a playing field tilted against the United States led to pressures in the 1980s to seek unilateral liberalization from US trading partners. John Odell (1993, 233) describes a distributive bargaining process as one in which

> . . . one state seeks actions by another without giving up anything in return, the other either maneuvers to minimize its concessions or counterattacks, and neither makes much effort to formulate new joint-gain arrangements.

Since the United States does not offer reciprocal market-opening concessions when it engages in distributive bargaining, its leverage derives from the threat, implicit or explicit, to close its own market to the target country's exports. The critical elements in the success or failure of these negotiations are, on one side, the value that the target country places on maintaining access to the US market and, on the other, the credibility of the US threat to retaliate. Threats typically "succeed" when the perceived economic and political costs to the target of complying with a demand are lower than the perceived costs of defiance.[1]

The direct costs of defiance for the target depend on the likely size of any US retaliation and the probability that it would actually be imposed if negotiations were to break down. Other, less tangible costs are the potential impact of the dispute on the country's overall relationship with the United States and, if the targeted trade barrier is a GATT violation, the effects of continued defiance on the credibility of the international trading system. The United States may also have concerns about these intangibles, which could undermine its credibility to retaliate in some cases.

The direct economic costs of compliance consist primarily of adjustment costs that would be borne by import-competing sectors if trade barriers are liberalized. US negotiators often argue, as do economists, that the net effect even of unilateral liberalization should in most cases be a welfare gain for the liberalizing country.[2] While negotiators on the other side of the table may privately concede the intellectual validity of this argument, they still must bring home an agreement that their domestic constituencies can ratify. As discussed at length in the trade literature, the perceived political costs of liberalization often determine the outcomes of these debates, while economic logic may be largely irrelevant.

John McMillan (1990, 213) has used game-theoretic models to analyze 301-type negotiations and to identify conditions that, at the margin, can "shift the terms of agreement in the United States' favor." He concluded:

> This shift will be larger (a) the greater the harm to the targeted country from having its access to the U.S. market limited; (b) the smaller the targeted country's ability to harm the U.S. in retaliation; (c) the smaller the costs within the targeted country of complying with the U.S. demands; and (d) the greater the benefit to the United States—in the U.S. negotiators' perception—from the demanded liberalization.

These conditions set the general parameters for analyzing the efficacy of threats in trade negotiations, but as McMillan illustrates, the outcome in any given case relies heavily on each party's perception of the weight that the other side places on various outcomes. Since information is not perfect, interests often are not clearly defined, and the possibility of miscalculation or bluffs always exists, most analyses go on to examine the underlying factors that affect perceptions of cost and benefit, as well as negotiating tactics that might be used to enhance or undermine the credibility of a threat to retaliate.

The tactical mechanisms analyzed in the literature often follow Schelling (1960) in focusing on the role of commitment in making a threat credible (see Sykes 1990; Dixit 1987; Mann 1987). These analyses suggest that the more negotiators can either tie their own hands with respect to retaliating, or convince a negotiating partner that their hands are so tied, the more credible the threat to retaliate will be. The desire to enhance the credibility of US trade negotiators has been an important motivation behind many of the congressional amendments restricting presidential discretion under section 301. Among the tactical mechanisms adopted by Congress to enhance the credibility of section 301 threats are the setting of deadlines and the identification of circumstances that "shall" result in retaliation if satisfactory resolution of trade disputes cannot be achieved through negotiation.

Analyses of these tactics often assume that states act as rational, unitary actors. There is a burgeoning literature, however, on how domestic politics and divisions within countries can affect bargaining outcomes and, in turn, how international negotiations influence domestic political alignments to one party or the other's advantage.[3] John Odell (1993, 255) has formulated two key hypotheses regarding how domestic political configurations can affect bargaining outcomes:

1. Analyses of the elements of this calculus may be found in Cline (1982), McMillan (1990), Sykes (1990), and Oye (1992).

2. As discussed in chapter 8, improved protection of imported intellectual property may not improve the welfare of poorer less developed countries, which may be one factor explaining the low success rate in these cases.

3. See the cases in Evans, Jacobson, and Putnam, eds. (1993), especially the ones by Odell and Krauss; Schoppa (1993); and Mayer (1992).

> The greater the internal opposition to carrying out a threat within the threatening nation itself, the lower the credibility, and the less likely the target capital will be to comply. Within the target nation, the greater the net internal political cost of compliance for the executive, relative to net internal political cost of no-agreement, the less likely the target government will be to accept agreement on the terms demanded.

In other words, the more united are interests in the threatening country and the more divided are interests in the targeted country, the more likely it is that the *demandeur* will get a more favorable agreement.

As argued in much of the recent literature on what Putnam has dubbed "two-level games," analyses that focus primarily either on the state as the central actor in international relations or on the role of domestic politics in influencing diplomacy will likely produce less-than-satisfying results. Putnam, Odell, and others in this genre are seeking to build a theory that integrates both approaches. We have culled from this literature hypotheses that appear to be particularly relevant to the section 301 experience. The following hypotheses will be examined here:

- The more concentrated the costs of the demanded policy change in the targeted country and the more diffuse the benefits, the less likely agreement will be (Evans 1993, 412–14). This hypothesis leads one to expect that, if an organized constituency already exists in the target country that would benefit from the policy change demanded, then the benefits may also be concentrated, and agreement will be more likely than otherwise.
- If a constituency in favor of change does not already exist in the target country, threats identifying potential targets of retaliation may spur previously inactive interest groups to enter the debate, tilting the political balance toward agreement.
- The more politicized the issue in the target country, the more likely it is that groups that do not care if the outcome is no agreement will enter the debate and constrain negotiators' flexibility (Putnam 1993, 446).
- Side payments may be used to buy off domestic groups that otherwise would oppose the agreement (Mayer 1992, 806–17).

Lessons from the Broad Survey of Section 301 Cases

The 72 cases described in chapter 3 constitute the data base used for the broad survey of section 301 results. Many of the hypotheses discussed above, particularly those dealing with domestic politics, could not feasibly be tested against all 72 cases in the data base. Those not included here are discussed in the section that follows, where lessons are drawn from the detailed case studies in part II of the book. We begin with McMillan's general conditions as to when section 301 is likely to be most effective and then identify a few tactical, political, or other variables that might be expected to affect bargaining outcomes in section 301 negotiations.

In the previous Institute for International Economics study of foreign policy sanctions, the first—and most obvious—variable identified as being potentially important in determining outcomes was the difficulty of the goal: the more difficult the goal, the less likely one would be to expect a positive outcome. In a statistical analysis of the foreign policy sanctions data base, Elliott and Uimonen (1993, 406) confirmed this hypothesis: the variable representing the difficulty of the sanctioner's goal in each case was significant at the 95 percent confidence level and had the expected sign. Attempts to define a similar variable in this study failed to find any consistent patterns in the data, however. This may be because, as some observers argue, only the hard cases ever become section 301 investigations (see the discussion in chapter 3). It may also be that we simply did not hit upon an illuminating definition. Additional research on this question would be useful.

As noted by McMillan (1990), each party's bargaining strategy will also be affected by its perceived vulnerability to retaliation or counterretaliation. In what follows, the target country's vulnerability to US retaliation is represented by the share of the target's GNP that is accounted for by exports to the United States. It is expected that the higher this ratio, the higher the odds of a successful outcome for US negotiators.

Since most US trading partners invoke public retaliatory threats in trade negotiations far less often than has the United States in recent years, the willingness of a country to respond aggressively to US threats seemed to us an important component in measuring US vulnerability to counterretaliation. Japan is a large country and one with which the United States trades extensively. But it rarely threatens to retaliate, rarely even raises GATT challenges to US behavior, and has never come close to actually retaliating. Therefore, a simple continuous variable, such as the size of the target or the proportion of US trade conducted with the target, did not seem adequate to capture US negotiators' likely *perceptions* regarding US vulnerability to counterretaliation. Instead, in this study, we use a dummy variable that is set equal to 1 if the target has ever retaliated against the United States in a trade dispute and 0 otherwise.

The choice of this variable is based on the assumption that these are the only targets to which the United States attaches a positive probability of counterretaliation. In this sample, as it turns out, the dummy is positive only for three targets: the European Union, which is the only US trading partner to counterretaliate in the context of a section 301 case; Canada, which has "retaliated" (taken "compensatory withdrawal" of concessions granted to the United States) in the context of escape clause cases (as has the Union); and China, which counterretaliated in a dispute over textile

quotas. All three also regularly threaten to counterretaliate in trade disputes with the United States.

Defining variables to represent McMillan's other two conditions—concerning the relative values that each negotiator places on various outcomes—is much harder since the task would require extensive knowledge about political coalitions in each of the 72 cases. Circumstances affecting the costs of compliance in the target will be explored in the section examining the detailed case studies. From the perspective of the United States, one variable that might be used to proxy for the value to US negotiators of getting an agreement is the bilateral trade balance with the target country. The hypothesis here is that the larger the US bilateral trade deficit with a country, the greater will be political pressure from Congress and the private sector to attack trade barriers aggressively in that country. This might allow negotiators to more plausibly argue that their hands are tied with respect to what constitutes an acceptable outcome and thereby make retaliatory threats more credible.

Tactics also can enhance a negotiator's credibility and increase bargaining leverage. For example, failure to carry out a public threat can have worse consequences for a negotiator's reputation, thus weakening her effectiveness in future negotiations, than not carrying out an implicit or private threat. In the 301 context, announcement of a presidential finding of an unfair practice, with a specific deadline for action, ties the negotiators to some degree and may make the previously implicit threat more credible. On the other hand, as Kenneth Oye (1992) and others have pointed out, making a threat public may also raise the perceived costs of compliance for the targeted government if it fears setting a precedent for future negotiations. Thus in some cases, implicit threats, including the threat to initiate a 301 investigation, may be as effective or even more so than public threats. Unfortunately, private and implicit threats often are unobservable and thus cannot be consistently measured or systematically modeled.

The US Trade Representative's initiation of section 301 investigations (relevant only since 1985) might also have a credibility-enhancing effect by signaling that USTR places a high priority on a case. In the debate over the omnibus trade bill in 1987 and 1988, the Reagan administration argued that making USTR initiation of some cases mandatory would lessen the impact of self-initiation since such cases "currently had clout because they were extraordinary" and signaled to target governments "that the administration meant business" (Bello and Holmer 1990, 83–85). Essentially, making a threat public raises the costs to US negotiators of backing down, because it affects their credibility in future negotiations and may increase the probability that a threat will be carried out if a satisfactory bargain is not struck.

Another of the hypotheses discussed above regarding domestic politics had to do with ways of increasing political participation by groups in the target country that may support the US position in the negotiations. This could be done positively—for example, by publicizing the fact that Japanese consumers pay much higher prices for food as a result of the government's agricultural trade policies—or negatively, by identifying explicitly the products that will be retaliated against if no agreement is reached. An explicit threat makes it clear who will pay the costs of retaliation and raises the costs of defiance for the target country government if those sectors become politically mobilized.

The hypotheses regarding the role of threats in enhancing a negotiator's credibility are tested by creating a dummy variable set equal to 1 if USTR or the president issues a formal finding that an unfair practice exists (with a deadline for action), publishes a retaliation "hit list," or initiates a case; otherwise it is 0. The negative version of the "participation expansion" hypothesis will also be tested separately by creating a dummy variable that takes the value 1 if a retaliation "hit list" was published in a case, and 0 otherwise. The positive version of the "participation expansion" hypothesis is analyzed in the section examining lessons from the detailed case studies (see also Schoppa 1993).

A GATT panel finding of noncompliance with international rules is another means by which a negotiator can try to influence the target country's calculations of the costs and benefits of various outcomes. By adding international opprobrium to unilateral US condemnation or by damaging the country's reputation for abiding by its commitments, a negative GATT ruling can increase the costs of defiance. Use of the GATT dispute settlement process might also lower the costs of compliance by providing domestic political cover for the target country government, allowing a change in policy to be interpreted as fulfilling its international obligations rather than as caving in to US pressure. To test the hypothesis that GATT rules make a difference in determining outcomes, we compare cases in which a GATT panel ruled against a targeted government, at least in part, with those where there was no ruling.

Finally, it might be expected that the likelihood of a negotiated agreement resulting in genuine market opening would be affected by the type of trade barrier being discussed. Traditional border measures—tariffs and import and export quotas on goods—may be relatively easier to negotiate because they are more transparent, objectives are easier to define, and because such barriers are more likely to be clearly GATT-illegal. Transparency may also make agreements to eliminate or reduce such barriers easier to monitor and enforce. Other types of barriers—subsidies, state trading, technical standards—may be less transparent and their impact harder to measure, perhaps leading to agreements that are more difficult to enforce. To test this hypothesis, another dummy variable was created, scored as a 1 if the trade barrier in dispute was a tariff or an import or export quota and 0 otherwise.

General Results

To briefly reiterate the results presented in chapter 3, we concluded that US negotiating objectives were at least partially achieved 49 percent of the time overall (in 35 of 72 section 301 cases). Between September 1985 and the end of 1992, 60 percent of all cases resolved resulted in achievement of some or all of the US negotiating objectives (26 of 43) compared with just under a third from 1975 through the first half of 1985 (9 of 29). The general results with regard to the factors contributing to a successful section 301 negotiation are presented here. The next section discusses the results for the more recent period and possible factors contributing to the increased effectiveness of section 301 since announcement of President Reagan's Trade Policy Action Plan in September 1985.

In addition to doing simple tabulations to see which of these variables appear to be correlated with success, we also used the probit regression technique to establish the relative importance of the independent variables in determining successful outcomes.[4] The results suggest that a successful outcome is more likely the more dependent the target country is on the US market, the larger the US bilateral deficit with the target is, and the more transparent the targeted trade barrier is. There is some evidence that success is less likely if the target has a record of counterretaliating against US exports in trade disputes, but the result is not statistically significant. Surprisingly, neither public nor explicit threats, as we have defined them, appear to affect outcomes in section 301 cases. The cross-tabulations are contained in table 4.1; table 4.2 summarizes the regression results.

The results suggest that vulnerability of the target to US trade retaliation, as measured by its dependence on the US market for its exports, is an important factor in explaining outcomes. The average target-country export dependence in successful cases was 7.5 percent of GNP versus 4.3 percent in failures (table 4.1). In the regression analysis, the coefficient for this variable (TXDEP) was significant at the 95 percent level and robust (model 1 in table 4.2). It is not clear whether US concerns about possible counterretaliation played much of a role in these cases. Table 4.1 shows that cases that targeted the European Community, Canada, or China (countries that have counterretaliated against the United States) generated positive results only about 35 percent of the time, as compared with a success rate of 57 percent in all other cases. But the coefficient for the dummy variable used to represent US counterretaliation concerns (COUNTER), while negative as expected, is not statistically significant.

4. The probit technique was chosen because it is more appropriate than ordinary least-squares regression for equations with a dichotomous dependent variable such as success/failure. See Bayard and Elliott (1992) for an amplified discussion of why we chose this technique and Pindyck and Rubinfeld (1981, 274–87) for a detailed description of the probit technique.

Table 4.1 Characteristics of section 301 successes and failures
(number of cases, unless otherwise noted)

	Number of successes (35 cases)	Number of failures (37 cases)	Successes as a percentage of total number of cases
Average target export dependence (target country exports to US as a percentage of target's GNP)	7.5	4.3	
US counterretaliation concern (cases involving EC, Canada, China)	9	17	35
No counterretaliation concern	26	20	57
US bilateral trade deficit with target	$15 billion	$2 billion	
Border measure targeted	19	6	76
Other barriers targeted	16	31	34
Public or explicit threat[a]	20	18	53
USTR-initiated	13	6	68
Other public threats	5	4	56
Retaliation imposed[b]	2	10	17
No known threat	15	19	44
GATT ruling against target	7	6	54
Excluding the EC	5	2	71
No GATT panel convened	24	27	47
GATT not applicable	11	15	42
GATT case involving a border measure	10	3	77
GATT case involving other types of barriers	1	7	13
Cases ending:			
Before September 1985	9	20	31
After September 1985	26	17	60
Other			
Target's exports to US as percent of total			
Greater than 30 percent	20	6	77
Less than 30 percent	15	31	33
Average US exports to target	$110 million	$224 million	
US exports to target			
Less than $10 million	8	10	44
Between $10 million and $100 million	16	12	57
Between $100 million and $1 billion	11	12	48
Greater than $1 billion	0	3	0

a. Subcategories do not add to this total because of overlap among the categories of types of threats.

b. Failures include partial withdrawal of GSP benefits in three intellectual property cases.

Table 4.2 Probit regression results

Independent variable	Model 1 Coefficient	Model 1 Standard error	Model 1 T-statistic[a]	Model 2 Coefficient	Model 2 Standard error	Model 2 T-statistic[a]	Model 3 Coefficient	Model 3 Standard error	Model 3 T-statistic[a]
Constant	−0.95	0.35	−2.69*	−0.83	0.37	−2.22*	−0.53	0.43	−1.24
TXDEP	5.08	3.05	1.67**	6.35	3.06	2.08*	6.28	3.22	1.95**
COUNTER	−0.14	0.42	−0.33	0.02	0.46	0.05	0.09	0.46	0.18
TBAL	−0.000055	0.000017	−3.36*	−0.000040	0.000015	−2.62*	−0.000004	0.000002	−2.72*
HITLIST	−0.83	0.46	−1.83**						
TPAP				−1.06	0.46	−2.31*	−1.42	0.53	−2.68*
TBILL							−0.73	0.50	−1.46***
RULING	−0.43	0.58	−0.74	−1.06	0.62	−1.71*	−1.18	0.63	−1.87**
BORDER	1.70	0.45	3.74*	2.09	0.52	4.05*	2.21	0.54	4.10*
Log likelihood			−30.28			−29.10			−27.99
Percentage of cases correctly predicted			82			83			83

TBAL = US trade balance with the target
COUNTER = 1 if target has retaliated against US in a trade dispute, 0 otherwise
HITLIST = 1 if retaliation hit list issued in case, 0 otherwise
TPAP = 1 if case ended before September 1985, 0 otherwise
TBILL = 1 if case initiated after August 1988, 0 otherwise
TXDEP = target's exports to US as a percentage of GNP
RULING = 1 if case involved a GATT panel ruling, 0 otherwise
BORDER = 1 if there is a border measure affecting goods (import and export quotas, and tariffs), 0 otherwise

a. Using a one-tailed t-test, * indicates significance at the 99 percent level, ** at the 95 percent level, and *** indicates significance at the 90 percent level.

The size of the bilateral trade balance between the United States and the target country turns out to have strong explanatory power in this analysis. The average US bilateral trade balance in successes was -$15 billion in successes and -$2 billion in failures.[5] The regression analysis confirms that the more negative the US trade balance with a target, the more likely a successful outcome. The coefficient on this variable (TBAL) is significant at the 99 percent level and robust.

The simple tabulation in table 4.1 and the regression results reported in table 4.2 also strongly support the hypothesis that transparent border measures are the more likely type of barrier to be liberalized as a result of section 301 negotiations. Seventy-six percent of cases targeting border measures were successfully resolved versus only 34 percent of other types of cases. The regression results for this variable (BORDER) are also statistically significant (at the 99 percent level) and robust.

The variables we defined to represent the use of threats to enhance credibility or to tilt the political balance in the target country performed less well than expected. The success rate for all cases involving public or explicit threats is barely above 50 percent, as compared with 44 percent when there was no known threat. The variable representing threats generally (including USTR initiation, formal determinations with deadlines, or hit lists) was not close to being significant in the regression analysis, and that result is not even reported in table 4.2. The HITLIST variable was significant at the 95 percent level but unexpectedly had a negative sign.

Cases initiated by USTR did have a somewhat higher success rate: 68 percent versus 40 percent for other cases (table 4.1). So we created a third dummy variable to indicate USTR-initiated cases (INITIATE). Since USTR initiation has only been relevant since 1985, we had to split the sample at that point to run regressions using the INITIATE variable. The sign is positive as expected in this model, but the coefficient is still not significant and the results are not reported in table 4.2.

Closer inspection of the data, however, reveals a few nuances that are worth noting. First, contrary to what might be expected, USTR has not tried to enhance its reputation or popularity with Congress by picking easy cases that it knew it could win. Five of the six USTR-initiated cases that ended in failure involved nontraditional issues—intellectual property, services, or investment—that are anything but easy to negotiate, as demonstrated in the Uruguay Round, but which have been high congressional and private-sector priorities (also see chapter 8 on intellectual property). Second, USTR initiation does appear to have been helpful in negotiations with the European Community. USTR initiation made little difference in non-EC cases. Strikingly, however, the success rate for cases targeting the Community increased from 25 percent to 75 percent if a

5. If Japan is excluded from this calculation, the absolute value of the difference is smaller but the relative difference is even greater: −$6 billion in successes and -$77 million in failures.

case was initiated by USTR. Given the cumbersome EU decision-making process, especially with regard to the Common Agricultural Policy (CAP), it may be that high-profile actions such as USTR initiation are necessary to capture policymakers' attention.

Unexpectedly, GATT procedures do not appear to add much leverage: the success rate for cases in which a GATT panel ruled against a target's policies (54 percent) was not significantly different from that for cases in which there was no GATT ruling or GATT rules were not applicable (47 percent). But there is still evidence of some deference to GATT rules in these cases. In every case where a GATT panel found a violation or evidence of nullification and impairment, changes in the offending policy were made. In almost half, however, the target country replaced the illegal trade barrier with another type of barrier or disagreed with the US interpretation of what had been agreed.

Two other aspects of these cases should be noted. First, many GATT rules are not clearly defined. Second, many of these cases attempted to attack EC policies under CAP, reform of which many observers believed would only come about through negotiation, not through legal adjudication (Paarlberg 1986). The success rate for cases involving GATT panels that also targeted border measures is significantly higher (77 percent) than in cases where the panel had to grapple with less transparent barriers (34 percent). Unfortunately, there is no way of determining whether the strong performance of the BORDER variable is due primarily to the transparency of the barrier or to the greater clarity of GATT rules in those cases.

There is also a stronger positive correlation between GATT dispute settlement procedures and success if the European Community is excluded. Cases with GATT rulings, other than those involving the Community, were successful 71 percent of the time (vs. 54 percent overall). Cases involving GATT rulings against the European Community ultimately were judged to be failures on five of eight occasions. Each time the Community changed the offending practice, but it exploited ambiguities in GATT or the bilateral agreements to continue to protect its agricultural producers and processors.

Section 301 since the 1985 Trade Policy Action Plan

Though only a third of section 301 cases were satisfactorily resolved from 1975 to September 1985, three-fifths have been at least partially successful since then. Some observers have speculated that this is because USTR began accepting and initiating more "easy," winnable cases. Consistent with that theory, table 4.3 shows a decrease in the proportion of cases targeting the European Community since 1985 and an increase in the number of cases involving countries against which the United States had the most success even before 1985: Japan, Korea, and Taiwan.

Table 4.3 Effectiveness of section 301 before and after September 1985

	1975–September 1985 (29 cases)		Since September 1985 (43 cases)		Percent change in	
	Percentage of total in each category	Successes/ total in category	Percentage of total in each category	Successes/ total in category	Proportion of cases in each category	Success rate
By target						
EC	34	1/10	23	6/10	−32.6	500
Japan, Korea, Taiwan	28	5/8	37	14/16	34.9	40
Other countries	38	3/11	40	6/17	4.2	29
Tactics						
Public threats	14	0/4	79	20/34	473.3	n.a.
GATT panels	24	2/7	33	9/14	34.9	125
Other						
Border measures	41	7/12	30	12/13	−26.9	58
US share of total target exports greater than 30 percent	28	5/8	42	15/18	51.7	33

n.a. = not applicable

A number of US trade officials we interviewed noted that USTR exercised more careful screening of prospective cases and consulted more closely with potential industry petitioners after 1985. The so-called P-list, which lists section 301 petitions withdrawn or rejected by USTR before any investigation is initiated, supports the notion that USTR screened cases more rigorously after 1985. From 1980 through 1984, only four petitions were filed and then withdrawn or rejected. From September 1985 through 1990, petitioners withdrew 16 petitions, and USTR declined to initiate investigations in seven more. The proportion of petitions filed that USTR accepted declined from 85 percent in the early 1980s to 60 percent in the latter half of the decade. A number of experienced trade negotiators believe that this informal screening improved the quality and timing of cases and thus increased the likelihood of success, not just in cases involving "easy" targets, but overall. It should be noted that the success rate after 1985 rose for all targets and actually rose the most for cases involving the European Community (table 4.3). After all, there is a difference between weeding out "bad" cases and accepting only "easy" cases.

Table 4.3 also provides evidence of the increased aggressiveness in prosecuting 301 cases after 1985. The proportion of cases involving public or explicit threats increased by 65 percentage points. The success rate for cases involving threats also jumped sharply, from zero in the earlier period to 59 percent after 1985. But the success rate for cases with no public threat was even higher—67 percent after 1985 (up from 34 percent). Thus both success rates and the use of public threats increased sharply after announcement of President Reagan's Trade Policy Action Plan (TPAP), but there is little statistical evidence of a causal relationship between public threats and success.

An alternative hypothesis is that, while individual public threats were not significant in determining outcomes, there was a general change in USTR's attitude toward section 301 and the tactics used that improved credibility and contributed to an increase in the odds of obtaining a successful outcome. To test whether the Trade Policy Action Plan, which launched USTR's more aggressive tactics, is correlated with the increased effectiveness of section 301, another dummy variable was created. TPAP is set equal to 1 if a case was concluded before September 1985 and 0 otherwise; a negative coefficient is expected for this variable.[6] As shown in table 4.2 (model 2), the coefficient for TPAP is negative as expected and is significant at the 99 percent confidence level.

6. The end date of cases is used for TPAP because several lengthy cases that had been initiated in the late 1970s and early 1980s were concluded only after adoption of the more aggressive strategy in the fall of 1985. In fact, three of those cases—exports to Japan of leather and nonrubber footwear and exports of canned fruit to the European Community—were resolved as part of the action plan, when President Reagan ordered USTR to prepare retaliation hit lists if the cases were not resolved before 1 December of that year.

As shown in table 3.4, however, the effectiveness of section 301 was greatest in 1985–88 and actually declined in the years following passage of the 1988 Trade Act. Another dummy variable, TBILL—set equal to 1 if the case was initiated after the signing of the congressional trade bill in August 1988 and 0 otherwise—was added to model 2. As expected from the results in table 3.4, the coefficient for TBILL is negative. It is also significant at the 90 percent confidence level, but the result is not robust.[7] Nevertheless, these results suggest that, contrary to conventional wisdom, the provisions of the 1988 Trade Act, including super 301, did not improve the chances of achieving a successful outcome relative to the administrative and attitudinal changes adopted in 1985. Whether the decline in effectiveness is reversed probably depends in part on the type of case investigated in the future. As noted in table 3.4, the success rate is a quite respectable 60 percent if cases targeting inadequate protection for intellectual property rights are excluded.

Lessons from the Detailed Case Studies

Two key hypotheses regarding the role of domestic politics in international negotiations have been developed at length in Odell (1993) through studies of the Brazil informatics policy (301-49) and EC enlargement (301-54) cases. The first says that the more united US negotiators and their political supporters, the more credible retaliatory threats will be, and the higher the chances of a successful outcome. The second says that the higher the political costs of compliance in the target country, the lower the likelihood of getting a satisfactory agreement. A subsidiary hypothesis is that when a constituency exists in the target country that would benefit from the policy change demanded, the costs of compliance for the target government will be lower to the extent that sector engages in lobbying activity that partly or wholly offsets the lobbying of the sector that expects to lose from the policy change.

When there is no constituency favoring change for its own reasons, then retaliatory threats by the demanding country to mobilize previously uninvolved sectors in the target country may become more important. There is always a risk, however, that such threats will backfire and so politicize the issue that the target government finds it impossible to conclude an acceptable agreement. Finally, side payments to buy off the constituencies that will suffer from the policy change may also be useful in facilitating an agreement.

Aside from the explicit retaliatory threat hypothesis, the information requirements were simply too extensive to allow us to test the other

7. TBILL and TPAP are negatively correlated, and if TPAP is dropped, the sign on the coefficient for TBILL is still negative but is insignificantly different from zero.

domestic-politics hypotheses against all 72 cases in the section 301 data base. But the detailed case studies in part II, along with the case studies by Odell and another on the Japanese semiconductor case (Krauss 1993), do provide support for some of these hypotheses.[8] The cases are arrayed in table 4.4 according to outcome and the general political conditions identified by Odell regarding unity of purpose in both the *demandeur* and target countries.

Table 4.4 supports the hypothesis that a concentrated and vocal constituency for change in the target country improves the odds for US negotiators: all four of the cases where that was true were mostly successful. In the Japanese satellites and financial services cases, the US side was divided to some degree because US firms that had successfully penetrated the Japanese market feared possible retribution if US negotiators pushed too hard for further liberalization (US firms may also have feared losing excess profits gained from operating in a protected market). These divisions were offset, however, by divisions on the Japanese side: NTT, NHK, and other satellite users balked at the government's desire to develop an indigenous satellite production capability because of the greater expense and lower reliability of domestically made satellites, while Japanese security firms opposed the big Japanese banks' efforts to keep the government bond market largely to themselves in the Schumer amendment case (see chapters 5 and 11).

The importance of a strong pro-change constituency in the target country is also illustrated by recent developments in India and Korea. As described in chapter 6, India refused to make any concessions on its foreign investment and insurance barriers when it was designated a super 301 priority in 1989. In South Korea, support for liberalization, outside of the technocratic elite that negotiated the agreement in 1989 to avoid super 301 designation, was both narrow and shallow, and it quickly collapsed when economic conditions soured in 1990. In recent years, however, both countries have elected leaders committed to change who have either undertaken or are trying to implement significant liberalization (particularly in the investment area), without the super 301 sword hanging over their heads. As in Brazil following Fernando Collor de Mello's election in 1990, it is simply easier to push on an open door (chapter 6).

Not surprisingly, no agreement at all was reached in the two cases where there was no sympathetic constituency in the target and the US side was divided. Odell's (1993) study of the Brazilian informatics policy case illustrates how a unified position in favor of retaliation in the demanding country can tilt an outcome in US negotiators' favor. Odell divides

8. The oilseeds dispute with the European Union (chapter 9) does not appear in the table because it is complicated by the linkages to the broader agricultural deal in the Uruguay Round.

Table 4.4 Role of political factors in outcomes of 15 case studies

Political factor	Success	Partial success	Nominal success	No agreement
Pro-change constituency in target				
United US position	Brazil super 301 EC banking directive			
Divided US position	Japanese satellites Schumer amendment			
No or weak pro-change constituency in target				
United US position	Japanese beef and citrus EC enlargement	Brazil informatics II Japanese supercomputers Japanese wood products Taiwan super 301	Korea super 301 Brazil pharmaceuticals Japanese semiconductors	Indian insurance
Divided US position				Indian investment Brazil informatics I

this case into two phases. In the first phase (Informatics I in table 4.4), US computer and software firms were divided as to the wisdom of retaliation; as in the Schumer and satellite cases, firms that were already in Brazil opposed the US government position. Brazilian negotiators were aware of this division and refused to make any concessions. In the second phase (Informatics II), US industry came together in support of retaliation, and some modest concessions were garnered from Brazil (thus advancing the case from an outcome of failure to one of partial success; see table 4.4).

Most of the cases fall in the area where there was no organized or only a weak pro-change constituency in the target country but the American side was united. In these cases, with no help from a target country constituency that would benefit from change and that was organized and able to lobby for it, the implicit or explicit threat of American retaliation might be expected to play a larger role. Yet, as in the earlier empirical work, there is scant correlation between the presence or absence of public or explicit threats and the outcomes in these cases.

The US announcement of specific retaliation accompanied by tight deadlines for implementation appears to have contributed to success (without retaliation) in the EC enlargement case. Publication of a specific retaliation hit list, in conjunction with changing private-sector views, may also have contributed to a successful outcome in the second phase of the Brazilian informatics case. But the imposition of retaliation did not move the Brazilian government to change its pharmaceutical patent policy, an issue that often becomes quite politicized (chapter 8). In the Japanese semiconductor case, not only was there no vocal constituency in Japan in favor of liberalization, the main constituency injured by compliance with US demands was often the same group that had to implement the agreement: vertically integrated Japanese firms that both produce and use semiconductors. The US market share did improve following the imposition of sanctions in 1987, but it did not reach the demanded 20 percent level until after the original agreement had expired, and then only after additional threats of retaliation.

The hypothesis in Mayer (1992) that side payments can facilitate agreement also helps to explain the outcomes in the EC enlargement and Japanese beef and citrus cases. In addition to lobbying from sectors fearing possible retaliation in those cases, side payments were provided by the target country governments to ensure that those agreements could be ratified. Side payments of a sort were also provided in the Japanese supercomputer case, where increased government procurement budgets allowed Japanese firms to increase prices (and profits) and still win contracts. The American Forest Products Association has also alleged (in a submission to USTR calling for closer monitoring of the 1990 agreement) that the Japanese government has increased subsidies to the wood products sector, but the data are not definitive on that question.

By contrast, there is no evidence that side payments were even considered in any of the cases in which there was no target-country constituency in favor of change and US negotiators achieved no or only illusory success. All of these cases were highly politicized in the target countries. Thus the governments either chose the no-agreement option, because the political costs of compliance were too high, or miscalculated and concluded an agreement that it was subsequently unable to ratify—whether formally, as in the Brazil pharmaceuticals case, where legislation has not passed the Brazilian Congress, or informally, as in the Japanese semiconductors case, where grudging cooperation from private firms fell short of US expectations.

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Index