Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301

Alan O. Sykes
"MANDATORY" RETALIATION FOR BREACH OF TRADE AGREEMENTS: SOME THOUGHTS ON THE STRATEGIC DESIGN OF SECTION 301

Alan O. Sykes*

INTRODUCTION

Sections 301-310 of the Trade Act of 1974 (Section 301) authorize the United States Trade Representative (USTR) to negotiate for the elimination of foreign practices which, among other things, violate international trade agreements with the United States. Following 1988 amendments to the law, measured retaliation against such practices is “mandatory” when negotiations are unsuccessful.

Of all the US international trade statutes, perhaps none elicits greater international condemnation than Section 301. The 1988 amendments, in particular, brought forth what the press termed a “fusillade of censure” from foreign trade policy officials. One Canadian official, for example, characterized Section 301 as a “threat to the central viability of the multilateral trade system.”

Despite these condemnations, Section 301 has more potential to promote the economic interests of the United States and its trading partners than most other US trade statutes. In large part, US trade laws provide for measures which protect domestic producers from foreign competition. These laws almost invariably generate economic costs that exceed their benefits in the United States and in the trading community as a whole.

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* Professor of Law, University of Chicago Law School. I am grateful to the Lynde and Harry Bradley Foundation for Financial Support.


4 The U.S. Tariff Schedules, for example, represent bald and economically wasteful protection for special interest groups. See P. KENEN, THE INTERNATIONAL ECONOMY
By contrast, the overwhelming majority of Section 301 cases involve complaints about foreign government practices that impede US exports. These cases result in protectionist action only when "retaliation" becomes necessary, and ideally that outcome is avoided in favor of the discontinuance of the practices under investigation. Successful actions under Section 301, therefore, can increase the national economic welfare of the United States by increasing the producer surplus earned on export sales. Successful actions also increase worldwide economic welfare in many cases, and even the target country's economic welfare, because the level of protection worldwide diminishes.

This paper takes a closer look at the economics of Section 301, with a particular emphasis on the new "mandatory retaliation" provisions. Although it is too early for any empirical assessment of their success or failure, the strategic choices embodied in these provisions afford an opportunity

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Much the same may be said of the "escape clause" under U.S. law. See R. Lawrence & R. Litan, Saving Free Trade (1986); Sykes, Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations 58 U. Chi. L. Rev. 255 (1991) [hereinafter Protectionism].

5 Of the 56 Section 301 cases initiated as of August 1986, only eleven involved complaints about unfair imports. See Phillips, The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?, 22 Vand. J. Transnat'l L. 491, 560 (1989) (appendix providing history of cases to date).

6 Public choice theory provides ready explanation for the coexistence of inefficient protectionist statutes and potentially efficient statutes such as Section 301. The public choice literature suggests that producer interests are fairly well-served by trade policy, while consumer interests are usually ignored because they are poorly represented in the political process. See, e.g., Baldwin, The Political Economy of Protectionism, in IMPORT COMPETITION AND RESPONSE 263 (J. Bhagwati ed. 1982). Laws to promote exports such as Section 301, however, need not seriously impair U.S. consumer interests. To be sure, Section 301 may yield protectionist measures in retaliation for practices abroad, and such retaliation can disadvantage consumers. But exporters do not gain directly from the use of retaliatory measures, only from threats of retaliation that induce foreign governments to remove their impediments to U.S. exports. Actual retaliation, by contrast, reflects a failure of the threat to achieve its export-promotion objectives. The interests of U.S. exporters and consumers, therefore, are convergent to a considerable extent, and the absence of meaningful consumer participation in the policy formulation process is less likely to cause inefficiency.

for theoretical discussion. The analysis draws upon rudiments of "noncooperative" game theory, and argues that the "mandatory retaliation" provisions represent a sensible strategic response to the problem of "cheating" under the General Agreement on Tariffs and Trade (GATT) and other commercial agreements to which the United States is a party.

Section I describes the pertinent provisions of Section 301 in greater detail. Section II provides some background on noncooperative games, particularly the "repeated Prisoner's Dilemma." Section III examines the important strategic choices embodied in the mandatory retaliation provisions of Section 301, and argues that they are largely sound.

I. BREACH OF AGREEMENT AND SECTION 301

After the 1988 amendments to the statute, Section 301 cases fall into two categories: "mandatory retaliation" cases in which a foreign government violates an international agreement with the United States; and "discretionary retaliation" cases in which US commercial interests are injured by foreign practices that do not violate any international agreement. Because the "discretionary retaliation" cases do not involve violations of existing trade agreements, discussion of those provisions is omitted.

The "mandatory retaliation" provisions of Section 301 apply to any foreign government practice that "violates, or is inconsistent with .. or otherwise denies benefits to the United States" under a trade agreement, or "is in violation of, or inconsistent with, [other] international legal rights of the United States and burdens or restricts United States commerce." The terms "inconsistent" and "otherwise denies benefits" are not defined or explained, but presumably include practices that do not necessarily violate the letter of a trade agreement or other international legal obligation but nonetheless deny commercial benefits which the United States reasonably expects to receive. Thus, the mandatory retaliation cases are primarily those in which the foreign practice at issue impairs the rights or reasonable expectations of the United States under international trade agreements.

Section 301 authorizes a variety of actions in response to such practices.

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9 19 U.S.C. 2411(d)(4)(A) (defining "unjustifiable").
11 For example, it is well-established under GATT that a signatory can cause "nullification or impairment" of benefits owing to another signatory through actions that on their face are consistent with GATT, but nevertheless frustrate expectations. The classic illustration is the introduction of a subsidy to domestic producers after the subsidizing country has negotiated a tariff ceiling or "binding" applicable to competing imports. Even though the GATT does not explicitly restrict the ability of signatories to use domestic subsidies, the introduction of a new subsidy after a tariff negotiation can disadvantage trading partners just as seriously as an illegal tariff increase, thereby frustrating the expectations developed in the course of the negotiations. See J. JACKSON, WORLD TRADE AND THE LAW OF GATT 376-78 (1968).
One option is to negotiate an agreement to eliminate the practice or its harmful effect upon US commerce, or alternatively, to provide compensation to the United States in the form of trade concessions on other goods or services.\(^{12}\) If negotiations fail, the statute provides a range of retaliatory options, including authority to impose duties or other restrictions upon US imports of goods and services from the recalcitrant trading partner.\(^{13}\)

Procedurally, cases may commence following a petition from a private-sector group or upon the USTR's own initiative.\(^{14}\) A determination that the case has potential merit results in a decision to "initiate" an investigation. The USTR must then request informal consultations with the country in question.\(^{15}\) If these consultations do not yield a satisfactory solution, the USTR will invoke formal dispute resolution procedures under the international agreement in question — usually, though not always, the GATT.\(^{16}\)

No later than eighteen months after the case is initiated, the USTR must make a formal determination whether the conditions for "mandatory" retaliation are present — that is, whether the practice in question violates or is inconsistent with the legal rights of the United States.\(^{17}\) As provided by the 1988 amendments, this eighteen-month time limit applies whether or not formal dispute resolution procedures have concluded under the applicable trade agreement. If the USTR finds that retaliation is appropriate, it must simultaneously determine what action to take in response to the practice.\(^{18}\) The USTR's decision, and its reasons, must be published in the Federal Register.\(^{19}\) Where a determination to take retaliatory action has been made, the action is to be implemented within 30 days, although the USTR has fairly broad discretion to extend this period by 180 days in most cases.\(^{20}\)

The retaliatory options are much the same in both "mandatory" and "discretionary" retaliation cases. The distinguishing feature of the "mandatory" class is that the USTR "shall" take one of the actions enumerated in the statute. This is another change made by the 1988 Act.\(^{21}\) Whenever retaliation is required, the retaliation must be commensurate with the burden upon US commerce caused by the foreign practice. To this degree, retaliation is "mandatory" — the USTR nominally lacks the discretion to do nothing, and lacks the discretion to undertake token or inconsequential retaliatory actions.

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\(^{13}\) 19 U.S.C. § 2411(c)(1)(B).

\(^{14}\) 19 U.S.C. §§ 2412(a)-2412(b).

\(^{15}\) 19 U.S.C. § 2413(a)(1).

\(^{16}\) See 19 U.S.C. § 2413(a)(2).

\(^{17}\) 19 U.S.C. § 2414(a).


\(^{19}\) 19 U.S.C. § 2414(c).


\(^{21}\) 19 U.S.C. 2411(a)(1).
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Other provisions of the 1988 amendments, however, preserve considerable discretion on the issue of retaliation. Inaction is permissible if action would jeopardize “national security,” or if action would have an “adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this chapter . . . .” 22 Likewise, any USTR action is “subject to the specific direction, if any, of the President,” 23 who can ultimately order the USTR not to act.

Another area of obvious slippage lies in the determination whether the practice in question violates or is inconsistent with US rights. If the USTR does not wish to retaliate, it may decide this issue in the negative, or even decline to initiate an investigation. Finally, the USTR’s actions are not subject to judicial review; thus, the only real constraint upon the USTR’s ability to bend the statutory scheme is the prospect of Congressional reaction.

II. TRADE AGREEMENTS AS NONCOOPERATIVE GAMES

Game theory encompasses both “cooperative” and “noncooperative” games. A “cooperative” game is one in which the parties can assume that promises will always be kept—in the parlance of game theory, commitments are “binding.” 24 Otherwise, the game is “noncooperative.” 25

Parties to trade agreements cannot view commitments as binding because no external authority exists to force them to honor their commitments. Under the GATT, for example, a signatory that violates the agreement is subject simply to the withdrawal of trade concessions by others. 26 Even this sanction is rarely authorized by formal GATT action, in large part because the GATT operates by “consensus.” A single nation, including the signatory in violation of the agreement, can block the consensus necessary to authorize sanctions, 27 and the only penalty for of the agreement at that point violation is unilateral action by an aggrieved signatory. Consequently, parties to the GATT, as well as to other trade agreements, can simply break their commitments. The strategic environment is noncooperative.

A. Compliance, Cheating, and the Prisoner’s Dilemma

Perhaps the best-known example of a noncooperative game is the “Prisoner’s Dilemma,” which can be recast as a game involving a trade agreement. Consider a simple agreement, in which the United States promises to

25 Id.
reduce the tariff on Japanese widgets to zero and, in return, Japan promises to reduce the tariff on US gadgets to zero. Thereafter, for simplicity, each nation faces a dichotomous choice between “compliance” and “cheating.”

Presumably, the elimination of the tariff on Japanese widgets, putting aside the Japanese concession, imposes a political cost on US officials. If tariff reductions are politically advantageous, they will be undertaken unilaterally and trading partners will not need to offer concessions in return. Likewise, the elimination of the tariff on US gadgets no doubt imposes a political cost on Japanese officials. The trade agreement is possible despite these political costs because concessions abroad yield political benefits to officials in each country — exporters gain and “reward” the political officials who are responsible for obtaining the concession. It is also reasonable to suppose that if one country cheats, officials in the other country forfeit most or all of the political gains from obtaining the concession — exporters will not reward officials who obtain concessions on paper that do not materialize in practice. It follows that officials in each country would prefer an environment in which the tariff abroad remained at zero, but the tariff at home was raised (“compliance” by the other country, “cheating” at home). They would then avoid the political costs associated with the concession at home, yet reap the political benefits associated with the concession abroad.

Thus the “payoff structure” for this trade agreement game has the following properties: In each country, officials are better off if both trading nations comply with the agreement than if they both cheat. If only one nation cheats and the other complies, officials in the cheating nation are better off yet, but officials in the complying nation are worse off than if they also cheated.

Figure I illustrates this payoff structure. The numbers are arbitrary, except that they obey the above inequalities.

**FIGURE I**

<table>
<thead>
<tr>
<th>Japanese Strategy</th>
<th>Comply</th>
<th>Cheat</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Strategy</td>
<td>Comply</td>
<td>(10,10)</td>
</tr>
<tr>
<td></td>
<td>Cheat</td>
<td>(15,0)</td>
</tr>
</tbody>
</table>

For each possible combination of strategies, Figure I provides an ordered pair representing the payoff to officials in each country. The payoff to US officials is the first number, and the payoff to Japanese officials the second. Thus, for example, if Japan cheats and the US complies, US officials receive a payoff of zero and Japanese officials receive a payoff of 15.

Suppose that officials in both countries anticipate Armageddon in ten days. As a consequence, no matter what strategy the officials pursue, offi-

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28 The “reward” may take the form of votes, campaign contributions, and so on.
cials in the other country will not have time to react and modify their strategy. To put it differently, each government makes a one-time choice of what strategy to play, payoffs are distributed, and the game ends—in game theoretic parlance, a “single-play” game.

Under these conditions, each country will cheat, because cheating is a “dominant” strategy. Consider the US perspective: No matter which choice Japanese officials make, US officials are better off by cheating (15 > 10 and 5 > 0). Precisely the same situation confronts Japanese officials. Acting rationally, both governments will elect to cheat. The consequence, of course, is the (5,5) payoffs. Officials in both countries would be better off if both nations complied with the agreement and received the (10,10) payoffs. But that outcome is untenable because the initial promise to comply is not binding, and because in a single play game neither side can punish the other for cheating in a future period. A payoff structure in which the single play-outcome, determined by the choice of dominant strategies by each player, is inferior to some other feasible outcome is the hallmark of the “Prisoner’s Dilemma.”

B. The Repeated Prisoner’s Dilemma

Plainly, the single-play assumption is not descriptive of the strategic environment confronting parties to actual trade agreements. Such agreements are typically open-ended in duration, so that each party can react to the other’s behavior. One can conceptualize such a strategic environment, albeit somewhat simplistically, as a sequence of games where the payoff structure reflects the Prisoner’s Dilemma in each “period.” Officials in both countries choose their strategy every period knowing that officials abroad will have the opportunity to react in future periods.

The opportunity for players to punish one another in future periods for cheating, coupled with the fact that mutual compliance is better for everyone than mutual cheating, offers some hope that compliance can be sustained over time. But sustained compliance is by no means assured. For example, consider a game that is played only twice. In the hope of avoiding the outcome of mutual cheating, the United States and Japan each announce that if the other party cheats in the first period, they will respond by cheating in the second period. Will such a threat suffice to induce mutual compliance in the first period? The answer is seemingly no. In the second period, each player confronts the payoff matrix in Figure I, with no opportunity to punish

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29 See, e.g., R.D. Luce & H. Raiffa, Games and Decisions 94-97 (1957).
30 One obvious deficiency in this conceptualization is that the payoff matrix likely changes over time. The political rewards to protectionism tend to increase as financial conditions in the industry seeking protection worsen. See Protectionism, supra note 4, at 276-77. Likewise, officials who aspire to reelection no doubt face a different payoff structure than officials who cannot be reelected.
31 Interested readers may wish to consult chapters four and five of E. Rasmusen, supra note 24.
the other player in the future for cheating (the game will be over). Hence, cheating becomes the dominant strategy for each player in the second period. And, each player can figure this out in the first period — for example, Japan knows that the United States will cheat in the second period regardless of which strategy Japan chooses in the first period. The United States threat to punish cheating is thus an empty one, and would have no deterrent effect on Japan in the first period. Cheating becomes the dominant strategy for Japan in the first period just as in the single-play game. This reasoning also applies to the United States, and so both countries would cheat in both periods.

Precisely the same logic applies to a game that is repeated four times, five times, and n times, as long as each player knows the number of repetitions. Acting “rationally,” both players anticipate that they will each cheat in the last period, and so they have no reason not to cheat in the next to last period, no reason not to cheat in the next to next to last period, and so forth.

Such unraveling of compliance occurs because of two crucial properties of this repeated game. First, the number of repetitions is finite and each player knows the period in which the game will end. Each player can thus forecast that cheating will occur in that period, and thus in the period before, and so on. Second, each player is entirely “rational,” capable of thinking through the entire game and playing accordingly on the assumption that the other player is equally “rational” and will exploit a dominant strategy when the opportunity arises. If either property of the game is modified, opportunities for sustained, mutual compliance begin to emerge.

If the game will go on indefinitely (an “infinite horizon” game) or at least the probability of it ending each period is small enough, and if decision makers do not discount the importance of outcomes in future periods too heavily, sustained compliance is possible although by no means inevitable — a proposition implied by the “Folk Theorem.” The key distinction between the infinite game and the finite game is the lack of a final period, and thus the lack of a point in time at which cheating becomes the dominant strategy. The threat to cheat in response to cheating by the other party, and the promise not to cheat otherwise, are potentially credible indefinitely. Various strategies of this general sort might be employed. One possibility is the “grim” strategy, in which a player complies until the other player is discovered cheating, and then cheats forever thereafter. Another is the “tit-for-tat” strategy, in which a player behaves in the current period just as the other player behaved in the previous period.

Relaxing the “rationality” assumption also affords an opportunity for sustained compliance to emerge, even in finite games. If one of the players refuses to cheat on the basis of the logic developed above for the finite game, but instead pursues a policy of complying until someone else cheats — and

32 See, e.g., E. RASMUSSEN, supra note 24, at 91-94.
33 Id. at 91.
34 Id.
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the other party expects this behavior to continue — then sustained compliance is possible.35 Such behavior is "irrational" in the sense that it fails to exploit the dominant strategy in every period and to anticipate that the other party will do the same, yet in another respect it makes wonderful sense because everyone is ultimately better off.

Experimental studies of the Prisoner's Dilemma tend to confirm that players do not behave quite so rationally as theory predicts. In the most famous of these studies, the organizer invited a number of game theorists to submit strategies for playing a 200 repetition (finite) game, to be matched head-to-head against each other in a round robin computer tournament. The players did not all resign themselves to perpetual cheating on every play, but instead submitted strategies of various complexity that in some fashion rewarded compliance with compliance and punished cheating with cheating. The players were thereby able to improve systematically upon the rational outcome.36

Interestingly, a simple tit-for-tat strategy did the best on average of those submitted, although it lost out in individual pairings to other strategies. Some writers take this result as strong evidence in favor of tit-for-tat as a guideline for the formulation of public policy,37 although others express skepticism that tit for tat policies are the best that one can do.38

Whatever the merits of particular strategies such as tit-for-tat, however, several guidelines for playing the repeated Prisoner's Dilemma are uncontroversial. First, passive compliance, regardless of the behavior of other players, is foolhardy. If other players know that a particular player will never cheat, even in retaliation, then their strategy will be to cheat constantly. Cheating must be punished, or at least other players must anticipate that cheating will be punished.

Second, and related, the threat to punish cheating must be credible. Other players must believe that the threat will be carried out, and thus the execution of the threat must not be so contrary to the interests of the party issuing the threat that other parties dismiss it as idle. Likewise, other players must believe that the threat will not be carried out if they comply — recall that the threat to punish cheating in a two-period game fails to deter because the second-period "punishment" is inevitable regardless of the other party's behavior in the first period.

Finally, moving away from the classic Prisoner's Dilemma to games with

35 Id. at 118-19.
37 Axelrod, supra note 36.
38 E. Rasmussen, supra note 24, at 120 (Rasmussen agrees that the tit for tat strategy is effective across various environments of rationality and irrationality. However, he notes that it is suboptimal for any specific environment; for instance, where rationality predominates and everyone knows it, "finking" produces the best results.)
a set of possible actions more complex than simply "cheating" and "compliance", threatened sanctions must be large enough to wipe out the gains from violations of the agreement by another party. A threatened sanction cannot possibly induce compliance if other parties are better off by cheating and incurring the sanction than they are by complying and avoiding the sanction.

III. STRATEGIC ANALYSIS OF SECTION 301

The very existence of trade agreements suggests that a reasonable level of compliance with their terms is feasible. If rampant cheating could not be avoided, nations would not bother to incur the costs of trade negotiations. Evidently, trade agreements have enough of the character of an infinite horizon game, or of a game with less than fully "rational" players, that the parties implicitly or explicitly confront credible and effective threats of sanction for cheating.

The mandatory retaliation provisions of Section 301, as supplemented by the Super 301 provisions, help to create such threats of sanction. The more difficult question is whether they promote US interests, and the interests of the trading community as a whole, as well as possible. The analysis below explores the possible strategic explanations and justifications for the key components of Section 301.

A. Delegation to USTR

Before discussing the details of the statutory scheme, it is instructive to begin by asking why any statute is needed. After all, Section 301 is not essential to the ability of the United States to sanction "cheating" under trade agreements. In the absence of Section 301, the United States could simply respond (or threaten to respond) to violations of trade agreements on a case-by-case basis with retaliatory legislation, enacted by the Congress and signed into law by the President. Section 301 avoids the need for such legislation by delegating both investigative and retaliatory authority to the USTR. The question arises whether this delegation is in the strategic interests of the United States. For several reasons, the answer seems to be yes.

The delegation of investigative authority to the USTR is readily understandable. The value and effectiveness of retaliatory threats diminish if the determination whether a breach of agreement exists becomes "noisy." Genuine violations may then escape sanction, and compliant behavior may be subject to sanction. The former problem reduces the ability of threatened retaliation to induce compliance; the latter problem discourages trading partners from entering agreements in the first instance and heightens the prospects for counter-retaliation because the United States, albeit in error, commits the initial breach. Consequently, it is important for an accurate assessment of the legality of trade practices abroad to precede any decision regarding retaliation. The USTR, with its preeminent role in the negotiation
of trade agreements and its consequent legal expertise, is the logical choice to make this assessment.

However, this observation does not explain why the USTR should also possess retaliatory authority. One conjecture is that the delegation of retaliatory authority facilitates a more rapid response to violations, and thus provides a more effective deterrent. Even if delegation does facilitate a more rapid response, however, a potent counter-argument arises — any delay can be offset by an increase in the magnitude of the sanction.

A more persuasive argument is that the USTR has greater leverage in negotiating with trading partners if it is empowered to threaten sanctions that trading partners know can be carried out without Congressional approval. In other words, the need to secure Congressional approval would reduce the credibility of the retaliatory threat.

To be sure, Congress is traditionally far more protectionist than the Executive, and it is questionable whether the Executive would ever face serious Congressional opposition to protectionist measures that were proposed in retaliation for breach of a trade agreement. Yet, the need to secure Congressional approval would open the door to a variety of legislative possibilities. Perhaps Congress would capitalize on the finding of a “violation” by insisting upon a level of retaliation that would be excessive in relation to the size of the violation, or perhaps the proposed legislation would become a “Christmas tree” (to use the parlance of Washington lobbyists) laden with peripheral or unrelated amendments. In either event, the President might find it difficult to sign the legislation. Anticipating such an outcome, trading partners might indeed conclude that threats of retaliation are not credible when Congressional approval is necessary. As with the delegation of investigative authority to the USTR, therefore, the delegation of retaliatory authority also serves a plausible, useful strategic function.

Interestingly, the delegation of retaliatory authority to the USTR was an innovation of the 1988 Trade Act. Previously, the authority to retaliate lay with the President, who would receive a recommendation from the USTR on

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30 Implicitly, the assumption is that the future is “discounted,” so that a given sanction today is more costly to trading partners than the same sanction in some future period.

40 A possible response to the counter-argument is that threats will not always succeed at deterring violations, and sanctions will sometimes have to be imposed to maintain the credibility of the threats. Yet, sanctions are usually costly to the United States economy, for the same reasons that any protective measures are usually costly. Thus, it might be argued, the United States gains if the size of the sanction can be minimized. However, this response is flawed. Just as trading partners likely discount the future and are thus less deterred by a given sanction when its imposition entails considerable delay, so must the United States discount the future and recognize that a given sanction down the road is less costly to the economy than the same sanction imposed today.

41 See infra Section III.D.2 (discussing appropriate ceiling on threatened sanctions).
the matter. The nominal transfer of authority from the President was a subject of great controversy. Most commentators have concluded, however, that it was of little practical consequence. Indeed, it is difficult to imagine how a transfer of retaliatory authority from the "President" to a subordinate who remains "subject to the specific direction, if any, of the President," will materially alter the credibility of the retaliatory threat or any other aspect of the strategic posture of the United States. The better conjecture is that the decision by the Democratic Congress to "strip" the Republican President of his nominal authority was important for domestic political reasons.

B. Retaliation for Persistent Cheating vs. Retaliation for Intransigent Cheating

Section 301 does not threaten retaliation for every violation of a trade agreement which harms US interests, but applies only if the offending party will not desist and adhere to the agreement thereafter. At first blush, this feature of Section 301 seems something of a puzzle.

Violations are sometimes difficult to detect. Suppose, for example, that US exporters lose sales due to the introduction of a GATT-illegal export subsidy which benefits competing suppliers. United States firms may or may not be aware of the new subsidy. Further, even in cases where violations can be easily and quickly detected, the time required to document the violation and negotiate for its discontinuance is usually considerable. Consequently, the "optimal" foreign response to Section 301 would seemingly be to cheat on commitments with the expectation that the benefits from cheating will be realized at least temporarily. If and when cheating is detected, the foreign government could simply desist and avoid any penalty. This observation provides an argument, seemingly quite a powerful one, for a more aggressive US response to cheating that punishes all detected violations even if the foreign government in question agrees to correct them.

One counter-argument rests on the observation that sanctions are usually costly to the US economy, just as all protectionist actions are costly. If a trading partner can be induced to honor its commitments in the future without the actual imposition of sanctions, the argument might run, the United

43 See Bello & Holmer, The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301, 25 Stan. J. Int'l L. 1, 2-10 (1988) (discussing the determination of actionable foreign acts, policies or practices)
44 Id.; Note, supra note 18, at 130-32.
States avoids the cost of the sanction and still enjoys the benefits of the trade agreement over the long term.

This argument is unpersuasive. If existing US policy indeed encourages temporary “cheating” by trading partners, the United States will incur a considerable cost in the form of lost surplus on export sales. A credible threat of sanctions can deter cheating in many cases and, where deterrence succeeds, sanctions need not actually be imposed. Further, in cases where deterrence fails and sanctions become necessary to preserve the credibility of the threat, it is possible to devise sanctions that have a substantial impact on trading partners yet only a modest adverse impact on the United States. For example, a tariff can yield a considerable transfer of rents from foreign producers to the United States government, and only a small deadweight loss triangle by comparison. Indeed, “optimal tariff” theory establishes that some tariffs can actually increase US economic welfare through proper exploitation of the collective monopsony power of US consumers. An artful choice of sanctions, therefore, can greatly reduce the attendant cost to the US economy.

A second counter-argument to the position favoring a more aggressive US response to cheating rests on the proposition that retaliation will sometimes provoke counter-retaliation. The costs to the US economy may then swamp the gains from eliminating the practice at issue. To minimize the risk of such outcomes, the argument might run, the United States should accept the costs of temporary cheating by trading partners and retaliate only if they insist on continuing to cheat after they are caught.

This argument is more persuasive than the last, but relies on the assumption that a considerable danger of counter-retaliation arises when the United States sanctions cheating. In cases of blatant cheating, counter-retaliation amounts roughly to a strategy whereby a foreign government announces that it intends to cheat periodically in a manner that everyone can recognize as cheating, and if caught and sanctioned it will respond by cheating to an even greater extent. Such countries will obviously enjoy poor reputations in the trading community, and discourage other nations from entering trade agreements with them. For this reason, it is questionable whether any nation sanctioned for a blatant act of cheating would find counter-retaliation to be an optimal strategy. And, if some nations indeed tend to counter-retaliate under these circumstances, they may well be equally intransigent and prone to counter-retaliation under the existing Section 301 regime that threatens sanctions only for a refusal to stop cheating.

But it is important to distinguish cases of blatant cheating from cases in which foreign governments have respectable arguments in defense of their

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behavior. A review of the history of Section 301 cases suggests that the latter type of case predominates, and it is not difficult to understand why. As noted, blatant cheating can carry a considerable reputational penalty. If nations regard the past behavior of their trading partners as a useful basis for predicting future behavior, blatant cheating can jeopardize opportunities for future agreements on trade and other matters.

In addition, trade agreements typically afford opportunities to avoid politically burdensome commitments without blatant cheating. Under GATT, for example, Article XXVIII authorizes periodic renegotiation of tariff bindings, and Article XIX authorizes "escape" from GATT obligations when an import-competing industry is seriously injured by increased imports. Such provisions require that trading partners receive compensation for the loss of concessions, or in the alternative authorize measured retaliation. The provision of compensation will often prove the least burdensome alternative. And, even if negotiations over compensation break down, nations will often prefer the measured retaliation authorized by Articles XIX and XXVIII to the reputational loss and more unpredictable sanctions that will attend blatant GATT violations.

But "cheating" need not be blatant. Trade agreements typically contain significant ambiguities that allow signatories to restrict imports and promote exports, to the detriment of other signatories, while arguably respecting the terms of the bargain. Under GATT, for example, signatories may impose new quantitative or other trade restrictions because of balance of payments difficulties (Article XII), national security concerns (Article XXI), the need to conserve natural resources or eliminate local short supply problems (Article XX), the need to protect intellectual property rights (Article XX), the furtherance of certain agricultural price support schemes (Article XI), and a number of other reasons. They may employ export subsidies to promote the sale of "primary" (usually agricultural) products as long they do not capture "more than an equitable share" of world trade (Article XVI). The temptation exists to construe or exploit these ambiguous GATT provisions in self-interested fashion. The resulting differences of interpretation among GATT signatories form the basis for the bulk of GATT disputes. Similarly, differences of interpretation underlie the bulk of Section 301 cases.

49 See S. Phillips, supra note 5, at 560.
50 The economics of reputation is closely related to the economics of the repeated Prisoner's Dilemma. A country that establishes a good reputation has successfully convinced other nations that it will cooperate in the repeated game, at least as long as other nations do the same. For a brief discussion, see E. Rasmussen, supra note 24, at 94-96.
51 See infra Section III. D. 2 (for further discussion of these provisions and their function within the GATT).
52 "Primary" products are those of farm, forest or fishery at an early stage of processing. See GATT art. XVI; GATT Subsidies Code art. 10 n.29.
53 See GATT Subsidies Code, art. 10.
54 For example, the wheat flour dispute between the United States and the European
Thus, in most instances, the existence of “cheating” is in controversy. And, if the United States were to sanction behavior that violated its unilateral interpretation of ambiguous provisions, it would incur a considerable reputational cost much like the blatant cheater — such a policy would discourage agreements in the first instance. Further, because the United States could be characterized as sanctioning compliant behavior, the likelihood of counter-retaliation would increase. These observations make a strong case against sanctions in cases where trading partners have reasonable arguments in defense of their actions and where the outcome of bilateral or multilateral efforts to clarify the terms of the bargain are pending.

The negotiation period under Section 301 allows the United States to pursue a bilateral meeting-of-the-minds. Should this fail, the United States can seek formal dispute resolution and obtain an impartial determination whether a violation is present. Only after the existence of “cheating” is established through this process, and the foreign government nevertheless refuses to modify its practices, will sanctions be imposed. This regime can be viewed as sanctioning all acts of “cheating,” just as the theoretical analysis counsels, with the proviso that “cheating” does not exist until the terms of the bargain are clear. A contrary policy could well be counterproductive because of the reputational cost and the increase in the likelihood of counter-retaliation.

C. Time Limits in Section 301 Cases

The argument against sanctions prior to the resolution of ambiguities in the bargain is subject to an important caveat. Trading partners may refuse to accept an interpretation of the agreement that is acceptable to the United States in the course of bilateral consultations. Further, they may introduce great delay into the subsequent formal dispute resolution process. Under GATT, for example, the “consensus” rule allows a disputant to block the formation of a dispute resolution panel, and to block approval of a panel's

Community (Inv. 301-06), which has been a subject of extended Section 301 investigation, involves the question whether European export subsidies on wheat flour, arguably a primary product, allow Europe to gain a more than equitable share in world trade. The pasta dispute with the European Community (Inv. 301-25) concerned, among other things, the question whether export subsidies on pasta (a non-primary product) can be characterized as subsidies on the durum wheat content of the pasta (a primary product). The recent Super 301 action against Brazil (Inv. 301-73) attacked certain quantitative restrictions that Brazil defended as necessary and permissible for balance of payments purposes. Many other examples might be offered.

55 See supra note 46.
59 See supra Section II.B.2.
findings by the GATT Council. Therefore, dispute resolution does not conclude until both disputants are prepared to accept its conclusion.

Prior to 1988, the ability to delay dispute resolution provided nations subject to investigation under Section 301 with an obvious counter-strategy. They could negotiate in "good faith," make colorable arguments in defense of their actions, and refuse to modify their position. They could then delay for many months, or even years, efforts by the United States to secure an impartial ruling to clarify the terms of the agreement. This counter-strategy had great appeal because it allowed the nation in question to continue its practices and avoid retaliation for an extended period of time.

The 1988 amendments to Section 301 introduced an important response to this counter-strategy. In most investigations involving alleged violations of trade agreements, the USTR must determine whether US rights have been violated within 30 days after the conclusion of formal dispute resolution, or within eighteen months of initiation, whichever comes first. Thus, implicitly, the United States will respect the outcome of dispute resolution if it concludes within an eighteen month period. If not, the United States will unilaterally determine whether the terms of the agreement have been violated.

Because of this 1988 amendment, trading partners arguably have little incentive to delay the dispute resolution process by more than eighteen months — the outcome of an impartial process is seemingly more likely to favor them than a unilateral determination by the USTR. Thus, to the extent the eighteen-month period affords an amount of time sufficient for a dispute to be resolved without dilatory tactics, the amendment seems both a reasonable and necessary strategic adaptation by the United States.

One possible counter-argument arises: Where a trading partner anticipates an adverse outcome from dispute-resolution and wishes to continue its questionable practices, it may prefer to delay the dispute-resolution so that the United States will act "unilaterally," without the imprimatur of an unfavorable dispute-resolution finding. A refusal to stop "cheating" after a unilateral finding of violation will likely impose less of a reputational cost. Thus, despite the time limit introduced in 1988, trading partners whose practices are least defensible may at times elect to delay dispute resolution and force the United States to act unilaterally. Quite possibly, such unilateral action will sometimes provoke counter-retaliation, or at least impose some reputational cost upon the United States for "taking the law into its own hands."

Notwithstanding this possibility, a time limit seems desirable on balance. The dilatory counter-strategy was available in virtually every case prior to 1988, with the result that delays in the Section 301 process became a severe

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60 See J. JACKSON & W. DAVEY, supra note 27, at 354-55.
61 See 19 U.S.C. § 2414(a)(2). In cases involving a dispute under the Subsidies Code, the time limit is twelve months. Id.
weakness and reduced its effectiveness. 62 In the future, by contrast, the incentive to delay lies primarily with those nations that are unwilling to modify their practices and that anticipate a substantial possibility of an adverse outcome in formal dispute resolution. Quite plausibly, these cases will prove a reasonably modest subset of Section 301 actions. Further, the trading community should recognize that dilatory tactics by the target of a Section 301 investigation provide a signal on the merits of the case — a signal favorable to the United States. It is reasonable to suppose, therefore, that the reputational cost to the United States attendant upon “unilateral” action in these cases will be modest.

D. The Magnitude of the Sanction

The new “mandatory retaliation” provisions of Section 301 stipulate that any retaliatory action “shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.” 63 Though oddly worded, the apparent requirement is that the USTR inflict damage on the recalcitrant trading partner in an amount roughly equivalent to the damage inflicted upon the United States by the unfair practice under investigation. This provision seemingly imposes both a floor and a ceiling upon the magnitude of the retaliatory sanction.

The importance of this provision is difficult to analyze because of ambiguities and difficulties of measurement. For example, must the sanction affect the same volume of trade as the practice under investigation; must it impose the same loss of surplus; or is some other benchmark to be employed? A sanction affecting approximately the same volume of trade might not be difficult to devise. However, the damage to the United States caused by impediments to its exports is properly measured by the loss of surplus to US exporters. That amount would be difficult to calculate, and it would be equally difficult to calculate what level of sanction would impose an equivalent loss of surplus abroad. For these reasons, the apparent statutory constraint upon the level of sanction may not prove much of a constraint in practice, and may be of little strategic consequence.

Nevertheless, to paraphrase a principle of statutory interpretation, the very existence of this provision is some evidence that it is not pointless. Therefore, consider its strategic consequences on the assumption that it does impose a meaningful floor and ceiling upon the magnitude of retaliation.

1. The Strategic Rationale for a Minimum Sanction

If the Prisoner’s Dilemma payoff structure of Figure 1 64 applies every time the United States confronts “cheating” by a trading partner, then a statutory

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62 See U.S. GENERAL ACCOUNTING OFFICE, supra note 47.
64 See supra Section IIA.
floor upon the size of the sanction is unnecessary. Not only can a retaliatory strategy wipe out the Japanese gains from cheating and increase the chances for mutual compliance in the long run but it also yields a sure benefit to officials in the short run. If a trading partner cheats, therefore, it is clearly in the interest of the officials to impose a retaliatory sanction. Here, the threat to retaliate is eminently credible.

But consider the following modification of the payoff structure. Suppose again that the United States is better off if both nations comply with trade obligations than if both cheat (or, equivalently, Japan cheats and the United States "retaliates"). And again, the United States is better off if both countries comply than if Japan cheats and the United States complies. A twist arises, however, because the United States is better off when Japan cheats and the United States complies than when both countries cheat. This payoff structure is reflected in Figure II:

![Figure II](image)

**Figure II**

<table>
<thead>
<tr>
<th>Japanese Strategy</th>
<th>Comply</th>
<th>Cheat</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>U.S. Strategy</strong></td>
<td>Comply</td>
<td>(10,10)</td>
</tr>
<tr>
<td></td>
<td>Retaliate</td>
<td>(9,0)</td>
</tr>
</tbody>
</table>

Figure II differs from Figure I in its relabeling of the US strategy from "cheat" to "retaliate", and in the payoffs to the United States in the upper right-hand and lower left-hand pairs. Here, retaliation by the United States harms the political interests of US officials, regardless of the strategy pursued by the Japanese. In effect, what was once a concession to the Japanese that came at some political cost to US officials now yields political advantage.

This change in the payoff structure is not implausible. Import-competing industries eventually adjust to the initial trade concession, so the political gains from renewed protection are likely smaller than the political costs of removing it originally. Further, new or expanded import-consuming industries may have emerged that would be damaged by the renewal of protection. Yet another possibility is that non-commercial considerations have entered the payoff structure — perhaps retaliation would impair certain military or diplomatic interests.

Such a modification of the payoff structure has an obvious, adverse consequence for the United States. Compliance becomes the dominant US strategy in the single-play game, and the Japanese know it. In the repeated game, the US threat to retaliate if the Japanese cheat may lose credibility because retaliation is sure to impose a political cost rather than to yield a political
benefit in the short run. As a result, the Japanese may elect to cheat, although they would not if the threat to retaliate were credible.\textsuperscript{65}

The United States can perhaps make the threat to retaliate credible by \textit{worsening} its payoff in the upper right-hand ordered pair.\textsuperscript{66} For example, by changing that payoff from 6 to 4, retaliation yields a gain to the United States in the single-play game if the Japanese cheat, and the Japanese are more likely to anticipate that cheating will result in a retaliatory response.

A statutory floor on the magnitude of the sanction may have this effect. In the absence of a statutory floor, trading partners would know that the USTR could respond to recalcitrance with token measures. Further, because the economic consequences of particular sanctions may not be readily apparent, the USTR may be able to characterize token retaliation as a significant retaliatory move and thereby avoid an adverse domestic political reaction. A stiff tariff on some Japanese export, for example, may be of no consequence to the Japanese if they can simply divert their exports to other world markets at the same price, yet it may appear as a substantial sanction to the general public.

In the presence of a meaningful statutory floor upon retaliation, however, the USTR cannot employ such token measures. Instead it can avoid imposing a significant sanction only by determining that US rights have not been violated or by invoking one of the statutory exceptions that allow it to avoid “mandatory retaliation” (national security, etc.). In many cases, it will be politically difficult for the USTR to determine that no violation exists—for example, cases in which a GATT panel rules in favor of the United States. Likewise, questionable appeals to “national security” and the like may expose the USTR (and the Administration) to considerable political criticism for being weak on trade issues. Therefore, a statutory provision that prohibits token retaliation can raise the political costs of inaction. The threat of retaliation can become credible and more likely to dissuade cheating.

Of course, in cases where a trading partner is still intransigent, measures that make inaction more costly increase the likelihood that retaliation will actually occur, and retaliation may indeed be costly to the United States. The possibility of counter-retaliation also arises. But for reasons discussed earlier,\textsuperscript{67} sanctions can usually be devised that impose only a modest burden upon the US economy. Likewise, counter-retaliation is likely to be infrequent unless the existence of cheating is genuinely in controversy. Thus, as long as the United States delays retaliation until after a meeting of the minds on the terms of the agreement or a ruling pursuant to formal dispute resolution (subject to the earlier caveat about dilatory tactics by the country under

\textsuperscript{65} Note that in the single play game, the outcome where the U.S. “complies” and the Japanese “cheat” is the unique Nash Equilibrium.

\textsuperscript{66} The analysis here is akin to Schelling’s analysis of “commitment strategies” in bargaining situations. See T. Schelling, \textit{The Strategy of Conflict} 22-28 (1960).

\textsuperscript{67} \textit{See supra} Section III.B.
investigation), measures to increase the credibility of the threat are likely to prove beneficial.

2. The Rationale for a Maximum Sanction

The statute does more than simply prohibit token retaliation — it specifies both the level of retaliation and its duration. Regarding the level of retaliation, the statute suggests that the damage to the recalcitrant trading partner should be commensurate with damage done to the United States. And, although the statute contains no express provision on the duration of retaliation, the requirement that retaliation be commensurate with the harm implicitly suggests that retaliation will cease once a trading partner brings its practices into compliance with its legal obligations. The statute thus embodies a commitment to "measured retaliation," limited in duration to the period of recalcitrance abroad. It is very much a "tit for tat" policy.

a. Consideration of Other Possible Strategies

Many other strategies might be employed. For example, why limit the duration of the retaliation to the duration of the violation? The "grim" strategy, noted earlier, entails a threat to "cheat" perpetually in retaliation for "cheating" by the other side. Such a strategy is potentially quite effective at inducing sustained compliance in the repeated Prisoner's dilemma game.

Likewise, even if the duration of retaliation is to be limited to the period of the violation, why limit the level of retaliation during this period? Instead of retaliation commensurate with the harm, for example, the United States might employ "massive" retaliation. In one version, the United States might threaten that if a nation refuses to honor the provisions of a trade agreement with the United States, the United States will deem the entire agreement abrogated. A GATT violation, for example, would result in the offending country being treated as a non-signatory, subject to the column 2 tariff rates left over from the Smoot-Hawley tariff of the 1930s.

Of course, in cases where the trading partner does not capitulate initially, perpetual retaliation rules out the possibility of negotiated solutions down the road. Further, because violations of trade agreements usually involve only a small part of the bargain, massive retaliation creates a great risk of escalation. But these observations are not sufficient to rule out the wisdom of either strategy — threats of perpetual or massive retaliation are more costly when carried out, but are also more likely to motivate compliance with the agreement.

Another possible objection to threats of perpetual or massive retaliation is that they may not be credible. Trading partners may anticipate opportunities for future negotiations even if the United States announces a "grim"

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69 See supra at 16.
70 See E. RASMUSSEN, supra note 24, at 91 (the "grim" strategy employed by both players is a sub-game perfect Nash Equilibrium).
71 See J. JACKSON & W. DAVEY, supra note 27, at 364.
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strategy — after all, the Congress and President of today will have great difficulty binding the Congresses and Presidents of the future. Similarly, actions by the United States that revoke a wide range of trade concessions might well impose such substantial costs on the United States that the threat of these actions seems an obvious bluff. Yet, the fact that threats of perpetual or massive retaliation may not be credible in many cases does not justify foreclosing them. They may sometimes be credible, and perhaps useful.

Nevertheless, the statute apparently rules out these massive retaliation strategies in favor of “measured” retaliation that is limited to the period of intransigence abroad and that inflicts damage commensurate with the harm done to the United States. Even on the assumption that the more severe forms of retaliation discussed above would be imprudent, it is not obvious why this is the best option for retaliation. Indeed, with reference to the simple payoff matrix in Figure I, a crucial feature of an effective retaliatory threat in the repeated game is that it at least wipes out the gains from cheating — otherwise, the cheater will prefer to accept retaliation and continue to cheat. There is no obvious relationship, however, between the harm done to the United States by a violation, and the gains abroad from the violation. Why not provide instead that retaliation shall be measured, yet sufficient to ensure that continued non-compliance is not in the interest of a recalcitrant trading partner (i.e., measured retaliation tailored to wipe out the gains from cheating)?

In short, strategic considerations alone cannot explain the choice of sanction under the statute. A variety of other sanctions might be utilized that could well prove more effective at deterring cheating.

b. Lessons from the GATT

Certain provisions of the GATT, however, suggest both an explanation and justification for the retaliatory strategy that the statute embodies. Under Article XXVIII, tariff bindings are periodically renegotiated. If negotiations break down, a party that proposes to raise a bound tariff may nevertheless do so, and adversely affected trading partners are then free to withdraw “substantially equivalent concessions.” Likewise, under the “escape clause” of Article XIX, signatories may avoid GATT obligations when increased imports cause or threaten “serious injury” to an import-competing industry. A signatory that invokes Article XIX must negotiate with other signatories over the possibility of compensatory concessions. But again, if negotiations break down, other signatories are authorized to withdraw “substantially equivalent concessions” as long as the GATT membership as a whole does not disapprove.

These provisions of GATT, like all of its provisions, may be understood as part of an efficient bargain among the signatories. The GATT, after all, is

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72 GATT art. XXVIII(2)(a).
73 GATT art. XIX(3).
74 To be sure, “efficiency” from the perspective of the negotiators and officials who
a contract, and parties to contracts have an incentive to include provisions that are Pareto optimal from their perspective.\textsuperscript{76}

GATT provisions such as Articles XXVIII and XIX are politically valuable because trade negotiations occur under conditions of uncertainty. When trade concessions are first negotiated, officials do not know for certain what political costs they will incur as a consequence. In some instances, those political costs will prove exceptionally large, and the gains from the ability to revoke them will be great. Indeed, the revocation of concessions \textit{ex post} will be Pareto optimal for the negotiators \textit{ex ante} if, roughly, the political gains to the party that revokes a concession exceed the political costs to others. One can interpret the injury test under Article XIX as an effort to identify such circumstances.\textsuperscript{76}

The retaliatory provisions of GATT Articles XIX and XXVIII seemingly serve much the same function. As a very rough test of whether the revocation of a concession will yield a net gain, both Articles require signatories who seek to avoid concessions to pay a significant but not prohibitive price. Ideally, the price comes in the form of compensatory concessions that other signatories agree to accept. Such amicable renegotiations yield Pareto improvements to the signatories \textit{ex post}, and likely \textit{ex ante} as well, with the added virtue that the overall level of protection in the trading system remains relatively constant. But when negotiations break down for some reason, signatories will pay a different price — the withdrawal of “substantially equivalent concessions” by others. In a world of high transaction costs and incomplete contingent contracts, this system of compensation and measured retaliation presumably serves as well as possible to allow “cheating” when it is efficient but to discourage it otherwise, all the while striving to maintain harmony. It is not only useful to the political officials who negotiate and sign trade agreements, but also tends to promote the cause of trade liberalization by making concessions less risky and thereby facilitating a greater number of them.\textsuperscript{77}

The parallel between the GATT provisions and the US strategy under Section 301 is striking. When the United States imposes a sanction that is commensurate with the harm done to the United States, it indeed withdraws “substantially equivalent concessions.” Implicitly, the United States will accept “cheating” by a trading partner if that nation is willing to pay the same price that it would pay if it proceeded under GATT Article XXVIII or Article XIX.

The parallel in policy makes good sense for two reasons. First, most Section 301 cases involve GATT signatories, and in many of these cases Articles

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\textsuperscript{77} See Protectionism, supra note 4.

\textsuperscript{77} See K. DAM, THE GATT 99 (1970); Protectionism, supra note 4.
XXVIII and XIX will afford an alternative way for the country under investigation to impose its desired restrictions upon US exports. In such cases, if the United States asked for a higher "price" than would be paid under Article XXVIII or XIX, it would simply induce the trading partner in question to proceed by one of these alternate routes.

Second, Section 301 is needed precisely because the procedures for resolving disputes and discouraging "cheating" under GATT and other trade agreements are not always satisfactory, necessitating a resort to unilateral measures. Through Section 301's mimicking of the GATT retaliatory provisions, the United States draws upon worthy precedent for the design of its unilateral policy. It implicitly accepts the principle embodied in GATT that "cheating" is sometimes acceptable, as long as the nation in violation of its obligations is willing to pay the going price.

E. Mandatory Retaliation

Other commentators correctly note that retaliation under the 1988 "mandatory retaliation" amendments is not really "mandatory". Given the national security exception, the costs out of proportion to benefits exception, and so on, USTR retains considerable discretion to determine whether to take action.\(^7^8\) One commentator even goes so far as to conclude that since the mandatory retaliation amendments preserve so much discretion, "any apparent change becomes illusory."\(^7^9\)

But the "mandatory retaliation" amendments are not without strategic significance. They limit the conditions under which the USTR can decline to retaliate, just as the 1988 amendments also limited the ability of the USTR to engage in token retaliation. Drawing again upon the plausible assumption that the political costs of different options for inaction vary, any constraint upon those options will in some cases increase the political cost inaction. The threat to retaliate then is more likely to be credible, and thus more effective. Of course, the familiar concern arises that counter-retaliation will follow instances of actual retaliation, so that measures to make retaliation more likely can prove unfortunate in the end. Indeed, concerns about counter-retaliation were a primary reason for administration opposition to the mandatory retaliation amendments.\(^8^0\) But as argued previously, the danger of counter-retaliation seems an acceptable risk to run where the existence of "cheating" is properly established or the target of the investigation employs dilatory tactics.\(^8^1\)

\(^7^8\) See Bello & Holmer, supra note 43, at 10-18; Phillips, supra note 5, at 520-22.

\(^7^9\) Note, supra note 16, at 139.

\(^8^0\) See Bello & Holmer, supra note 43, at 12-13. Interestingly, former USTR Strauss favored changes in the law to make retaliation "mandatory . . . but not compulsory." \textit{Id.}

\(^8^1\) See supra at 25, 30-31.
CONCLUSION

The proposition that the new mandatory retaliation provisions of Section 301 are well-designed to preserve US export opportunities under existing trade agreements, without undue risk of frequent retaliatory and counter-retaliatory actions, may or may not be borne out by experience. What seems clear at present, however, is that a threat of unilateral sanctions by the United States for violations of trade agreements is a necessary component of US trade policy. Until trading nations establish bilateral and multilateral dispute-resolution mechanisms with the power to issue definitive legal interpretations and to enforce compliance subsequently, unilateral action will at times afford the only hope of controlling abuses under GATT and other agreements affecting commerce. Section 301 has an important role to play for now, and its continued evolution in response to past successes and failures is to be welcomed.