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STATEMENT FOR THE RECORD

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ON

SECTION 301 OF THE TRADE ACT OF 1974, AS AMENDED

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We are pleased to submit a summary of our on-going work on the use of section 301 of the Trade Act of 1974, as amended, in combating unfair foreign trade practices. This provision gives the President broad powers to enforce U.S. rights granted by trade agreements and to attempt to eliminate policies of a foreign government that are unjustifiable, discriminatory, or unreasonable and that restrict U.S. trade. It is the only section of U.S. trade law that authorizes the U.S. government to act against unfair trade practices which restrict U.S. access to foreign markets. As such, it has been called the "key weapon" in the administration's "trade arsenal".

Concerns have grown that perhaps this trade "weapon" is not strong enough and that the process is too lengthy, too uncertain, and too seldom used. To address these concerns, GAO reviewed section 301 cases to determine how and why this provision has been used and whether the cases were successful. To do this, we analyzed all section 301 cases which were pending or initiated between January 1, 1980, and December 31, 1985. A total of 35 petitioner-initiated cases was analyzed--23 of which may be characterized as "GATT" cases because they were brought before the General Agreement on Tariffs and Trade (GATT) for dispute settlement and 12 as "non-GATT" since they involve countries that are not members of the GATT or issues not covered by the GATT. We also analyzed the four cases self-initiated by the administration.

We obtained views on the 301 process from representatives of all petitioners in the cases analyzed. We also examined all pertinent agency files and held discussions with Office of the U.S. Trade Representative (OUSTR) staff administering section 301 and with staff from other agencies participating in the inter-agency 301 Committee process.

SECTION 301'S USEFULNESS

Experience with section 301 shows that it has been used relatively infrequently and is of limited usefulness in helping petitioners to combat unfair foreign practices. The process is often lengthy and, at best, minimally effective in eliminating the specific unfair trading practices and the concomitant injury experienced by petitioners.

Section 301 infrequently used

Although section 301 gives the President sweeping powers to use at his discretion, the provision has rarely been used compared with other sections of U.S. trade law dealing with unfair foreign trade practices. During 1984, for example, 3 petitions for action under section 301 were filed with OUSTR compared with 126 petitions filed with the Department of Commerce

and the International Trade Commission under the antidumping and countervailing duty laws. Some of the reasons why section 301 has not been used more frequently include the perceptions among the business and legal communities that (1) the 301 process has been very lengthy and has had a poor record of success in remedying trade complaints, (2) the administration has been reluctant to actively pursue trade complaints or to exercise its discretionary retaliation authority, and (3) the petitioning firm or industry may incur the foreign government's hostility by filing 301 actions.

Process is lengthy

The 301 process necessitates detailed negotiations with another sovereign nation which cannot be forced to mitigate, or even acknowledge, a trade practice deemed unfair by the United States. Hence, in even the most clear-cut cases, the 301 process is never simple and often lengthy--primarily due to the complexity of balancing competing international and domestic, legal, and political issues in each case. Indeed, few cases have been settled quickly; most have taken roughly 3 years to conclude, while some have lingered for a decade.

The actual length of the 301 cases we analyzed varied dramatically, with GATT cases averaging much longer than non-GATT cases. Overall, cases averaged 34 months in duration, with GATT cases averaging 45 months and non-GATT cases 12 months. These averages will ultimately be longer because they include cases which were pending as of June 1, 1986, which was our cutoff date. One key determinant of the length of a specific case is whether it must be directed to the GATT for dispute settlement.

Relationship between the Section 301 and the GATT dispute settlement processes

Section 301 creates a unique relationship between U.S. law and the GATT dispute settlement process, allowing private parties to access this international mechanism for settling disputes by enlisting the aid of the U.S. government to address an unfair trading practice used by a foreign government. Once a 301 investigation is initiated, if initial bilateral consultations fail to resolve the trade dispute, OUSTR must invoke the dispute settlement provisions of the applicable international trade agreement, if any.

The dispute settlement process has no binding deadlines. However, there are certain guidelines for that part of the process up to the final consideration of a panel's report by the GATT Council or Code Committee. The maximum guideline time for dispute settlement is 13 months, if we add together the longest specified time for each possible step of the process. This does

not include the time taken for final consideration by the Council or Committee which is unspecified and can be very lengthy.

U.S. practice has been to allow the GATT dispute settlement process to formally conclude before any Presidential action is taken. The one exception to this U.S. practice occurred in December 1985 when the President unilaterally decided that the dispute settlement process in the citrus case (OUSTR docket #301-11) had run its full course and chose to act rather than wait for a GATT settlement.

Delays in dispute settlement

Numerous factors have prolonged the dispute settlement process. One of the most frequently cited complaints is that virtually anything can serve as a reason to delay resolution of a case without penalty to the party causing the delay. The 301 cases we analyzed were delayed for the following reasons,

--Delays in consultations/conciliation: The United States cannot force another sovereign nation to agree to specific timeframes for consultations. Delays and postponements of cases have ensued for various reasons--national holiday schedules, time conflicts between negotiators, and sheer reluctance to proceed. For instance, the citrus case was initiated in November 1976, and consultations have gone on for nearly a decade but, to date, no agreement has been reached.

The National Broiler Council case (OUSTR Docket #301-23) is another example of lengthy delays in the consultation phase. The original U.S. petition, alleging GATT-illegal export subsidies, was filed in September 1981 against the European Community. However, it soon became evident that resolution of the complaint would be impossible without including Brazil in the deliberations, since the European Community claimed its subsidies were necessary to compete with Brazilian subsidies. Two sets of bilateral negotiations ensued, yielding no progress. The necessity for trilateral meetings was finally acknowledged, and these began in May of 1984, nearly 3 years after the 301 petition was initiated.

--Delays in panel formation: GATT dispute settlement requires the establishment of a panel if consultations fail to produce an agreement. The panel, which serves as an advisory body to the GATT Council or appropriate Code Committee, reviews the complaint and makes recommendations to the Council/Committee, which then decides what action to take, if any. Since these decisions are based on consensus, not majority rule, delays, or even outright blockages, of a formal decision often occur--contributing to a settlement

process that generally takes years to conclude and is considered inefficient by virtually all parties.

In some instances, the technical complexity of a case leads to prolonged negotiations regarding the establishment of specific facts. This problem developed in the wheat flour case (OUSTR docket #301-6). Technical discussions about the European Community's subsidy mechanisms took nearly nine months prior to the panel's establishment. The panel, which met from December 1981 through March 1983, had difficulties determining such issues as the meaning of "more than an equitable share" of world market--in fact, no final determination was ever achieved on this issue and the case has never been formally settled.

--Delays in panel report adoption: Even after a panel is established to the satisfaction of participants and is able to agree on recommendations to be presented in the formal panel report, delays can still result in the full Council or Code Committee review of that report. In the National Pasta Association case (OUSTR Docket #301-25), the panel report was finally concluded in May 1983, after almost a full year of deliberations. The Subsidies Code Committee considered the report throughout the remainder of 1983 but, to date, has deferred a decision on adopting the report, which was opposed by the European Community.

Outcome of 301 cases

Section 301 provides a means for private industry to gain the support of the U.S. government in eliminating unfair foreign trade practices; but, during the 12 years since its enactment, it has been only minimally effective in accomplishing this objective.

The threat of filing a 301 petition and the threat of retaliation have been useful in several cases, but the overall results of the 35 petitioner-initiated cases we reviewed are disappointing. Many cases, especially those requiring use of the GATT dispute settlement process, experienced delays. The unfair trading practices and related trade injury continued during these delays.

Differing criteria of success

The U.S. government generally views success as the removal of the unfair trading practice. Using this measure of success, OUSTR has had only limited success in eliminating the unfair trade practices cited in the 35 cases we analyzed. In our interviews, three petitioners said that the section 301 process remedied the unfair foreign trade practice completely. Twenty

petitioners reported that the section 301 process had no net effect on the practice or that the foreign country had replaced the practice with another restrictive practice. Twelve petitioners stated that it remedied the practice partially.

Petitioners are also concerned about the elimination of the injury which resulted from the unfair trading practice. For example, of the 12 petitioners who reported that the unfair practice had been partially remedied, half also indicated that the injury remained unchanged or became more severe. Using this measure of success, i.e., removal of trade injury, section 301 has not produced substantial results. Eleven out of the thirty-five petitioners reported that the trade injury cited in their complaints was remedied either completely or partially by the disposition of the cases, but the majority (23 petitioners) felt that there was no net effect on the injury cited.

Factors influencing success

In general, petitioners believe that the success of the 301 process is limited severely when the GATT dispute settlement process is used. Petitioners were dissatisfied with the time required for pursuing a case through GATT dispute settlement, the significant burden in developing evidence imposed by the requirements of dispute settlement, and the general lack of results. These factors, in fact, have led some attorneys to advise their clients to avoid section 301 cases altogether or to avoid the GATT dispute settlement process if at all possible.

Some petitioners also contended that an expression of "political will" is important to the resolution of section 301 cases. They noted that prior to the fall of 1985, the administration emphasized foreign policy considerations over trade-related concerns. However, the administration indicated a stronger commitment to combating unfair foreign trade practices by self-initiating four section 301 cases in the fall of 1985. In addition, the President directed OUSTR to accelerate its efforts in resolving the canned fruit, leather, and leather footwear section 301 cases. These cases were favorably resolved in late 1985.

Follow-up on resolved cases

Section 301 does not require OUSTR to review resolved cases. Accordingly, OUSTR does not systematically follow up on resolved cases to evaluate the impact of the resolutions on the original trade problem or to monitor compliance.

Trading partners have not always fully complied with agreements resulting from 301 negotiations. Although the Korean government agreed in a formal 1979 exchange of letters with OUSTR to alter its insurance practices, it did not comply fully with

the agreement. OUSTR took no action on Korean noncompliance for several years, but self-initiated a renewal of the complaint in September 1985, just as the U.S. industry was preparing its own 301 filing. Japan also breached a bilateral agreement which liberalized restrictions on U.S. leather imported into Japan. It was not until pressure mounted in Congress that the United States acted by taking retaliatory measures.

U.S. experience with retaliation

Retaliation has been used in section 301 cases only four times since 1974, and the actions taken only slightly benefited the petitioners in the original complaint. In no case of retaliation has the unfair foreign trade practice been eliminated. However, retaliation may provide some leverage in future efforts to remove unfair foreign trade practices. For example, citrus industry representatives told us that the industry is making slow, steady progress with Japan on its citrus quotas that restrict imports.

Retaliation risks escalating trade disputes with U.S. trading partners. For example, the European Community responded to U.S. retaliation in the citrus case by counter-retaliating against lemons and walnuts. The United States is considering further action.

The threat of a section 301 filing and the threat of possible retaliation have produced some results. Taiwan opened its beer, wine, and tobacco markets to the United States in response to a threatened self-initiated petition by OUSTR. It also changed its rice export subsidy practices which hurt U.S. rice producers in third countries as a result of the possibility that the United States might withdraw special lower tariffs available to Taiwanese goods under the Generalized System of Preferences. In addition, the European Community and Japan were responsive to threats of impending retaliation, enabling the United States to reach satisfactory results in the canned fruit case and in the leather and leather footwear cases.

PETITIONERS' VIEWS AND EXPERIENCES

A majority of the petitioners expressed dissatisfaction with the 301 process, citing specifically the length of time involved in most cases. Several stated that they would never attempt to use this provision again, especially if it entailed going through the GATT dispute settlement process. Nearly twice as many petitioners involved in GATT cases stated that they were dissatisfied with the process as did petitioners in non-GATT cases. Dissatisfaction with the process could be expected, since both the alleged unfair foreign practice and the estimated injury are rarely eliminated in a 301 case. The petitioners also generally advocated stricter domestic and international

timeframes for the settlement of cases. Many were convinced that more could have been done to support their cases and that the United States must have "the political will" to push for U.S. industry's trade rights. Petitioners stated that often the only way to move a case through the stalled process is to achieve adequate political pressure--cases do not necessarily get the support needed for resolution based on merit alone.

GAO OBSERVATIONS

1) Is section 301's scope adequate?

We believe that the scope of section 301 is sufficiently broad to cover a multitude of unfair practices and does not need to be revised. To date, section 301 has been used to seek a remedy for the effects of production and export subsidies, import preferences, quota restrictions, customs duties rebates, Standards Code issues, restrictions on trade in such services as insurance, advertising, air couriers and satellite launching, and such other trade issues as intellectual property, industrial targeting, and investment. With regard specifically to foreign industrial targeting practices, we concluded in our May 23, 1985, report, (Foreign Industrial Targeting--U.S. Trade Law Remedies (GAO-NSIAD-85-77), that section 301 has the capability to address instances when foreign industrial targeting is judged to unfairly affect trade even though the effects of such targeting cannot be adequately measured in all cases.

Current efforts to insert into the law language specifying coverage of particular trade practices seem unnecessary. In addition, such specific language may result in the elevation (if only symbolic) of those practices relative to other unfair trading practices covered by section 301. Only one of the 35 petitioners in our study had concerns about the scope of the law.

2) Can the 301 process be improved?

One of the primary complaints about the 301 process was the lack of expeditious resolution of cases. The cases we analyzed were often subject to lengthy delays, specifically those cases which involved GATT dispute settlement. Whether or not a specific case must be directed to GATT dispute settlement to a large extent determines how long the 301 process will take. Therefore, the 301 process could be made more efficient by strengthening the GATT dispute settlement process.

The dispute settlement process is considered inefficient by virtually all parties--administration and GATT officials, as well as 301 petitioners, agree that improvements are both warranted and necessary. The GATT settlement process can be delayed, and indeed blocked, by any disputing party for virtually any reason.

Participants in the 301 process generally believe that a reasonable limit on the maximum length of the dispute settlement process could make the process more efficient while allowing 301 petitioners a more certain timeframe for the determination of cases. The administration considers improvement in the dispute settlement process as a primary objective of the forthcoming round of multilateral trade negotiations. We agree that only in this forum can the dispute settlement process be improved and its potential value realized.

However, because the anticipated negotiations will be protracted, we believe a uniform mechanism should be established now to limit the length of U.S. participation in dispute settlement for section 301 cases. In order not to undermine the GATT process, any such limits should not be shorter than the GATT guidelines. A reasonable time limit appears to be about 20-24 months. We propose OUSTR be required by statute to set a date for each applicable section 301 case at which time the United States would be expected to withdraw from the GATT dispute settlement process if it is not completed. The statute should give OUSTR some flexibility in setting the required limit on participation based on the complexity and sensitivity of each case. A limit on U.S. participation would alter the climate of pervasive, unlimited delays which often impede the resolution of legitimate U.S. trade complaints.