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”Special 301”: Its Requirements, Implementation, and Significance

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Abstract

This Article reviews the Special 301 provisions and their implementation to date. Special 301 is designed to use the credible threat of unilateral retaliation by the United States to persuade trading partners to reform currently deficient IP practices. The article praises the US's use of Special 301 use thus far but warns against taking harsher action.

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"SPECIAL 301": ITS REQUIREMENTS, IMPLEMENTATION, AND SIGNIFICANCE

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INTRODUCTION

On August 23, 1988, President Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988 (the "1988 Trade Act"),[1] including provisions facilitating the Uruguay Round multilateral trade negotiations[2] and the so-called "Special 301."[3] A key aim of the Uruguay Round, and the sole aim of Special 301, is to promote the adequate and effective protection of intellectual property rights in foreign countries. The Uruguay Round offers the opportunity to realize this goal through a multilateral agreement with the trading partners of the United States. Special 301, by contrast, is designed to use the credible threat of unilateral retaliation by the United States to "persuade" trading partners to reform currently deficient intellectual property practices.

This Article will first review the Special 301 provisions and

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1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter 1988 Trade Act].

2. The Uruguay Round of multilateral trade negotiations is an ongoing effort to amend and to strengthen the cornerstone international trade agreement, the General Agreement on Tariffs and Trade ("GATT"), *opened for signature* Oct. 30, 1947, 61 Stat. (pts. 5 & 6) A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The ongoing Uruguay Round of multilateral trade negotiations in Geneva, scheduled to conclude by the end of 1990, was launched in September 1986 at a GATT Ministerial meeting in Punta del Este, Uruguay (thus the reference to the "Uruguay Round" negotiations).

3. 1988 Trade Act, *supra* note 1, §§ 1301, 1303, 102 Stat. 1164-76, 1179-81 (1988) (amending the Trade Act of 1974, Pub. L. No. 93-316, §§ 302(b), 182 (1974)).

their implementation to date. The Article will then focus on the relationship of the implementation of Special 301 to recent developments in the Uruguay Round. The Article concludes with an assessment of the significance and success so far of Special 301.

I. *CONCERNS ABOUT INTELLECTUAL PROPERTY AND SPECIAL 301*

The importance of protecting intellectual property has escalated in recent years. Inadequate protection of creative works—such as books, audio and video products, computer software, and semiconductor layout designs—distorts trade and prevents investors and other persons who rely on intellectual property protection from attracting capital and earning a reasonable return on their investments. The U.S. International Trade Commission estimated that in 1986 alone, piracy abroad of U.S. intellectual property resulted in sales losses by U.S. companies between $43 and $61 billion.[4]

Although the President and the Congress were frequently at odds with each other during the Reagan era, each was nevertheless committed to adequately protecting intellectual property rights and to aggressively pursuing this end through international trade negotiations and revisions to existing U.S. trade laws. In addition to amendments made to "generic" section 301,[5] the Generalized System of Preferences,[6] the Caribbean Basin Economic Recovery Act,[7] and the Export-Import Bank Act,[8] the Special 301 provisions of the 1988 Trade Act provided yet another means to this end.

The 1988 Trade Act expressly finds that the "international protection of intellectual property rights is vital to the international competitiveness of United States persons that rely on

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4. Foreign Protection of Intellectual Property Rights and the Effect on U.S. Trade and Industry, USITC Pub. 2065, Inv. No. 332-TA-245, at Appendix H (Feb. 1988); *see Hearings Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 31 (July 25, 1989) [hereinafter *Hearings*] (statement of Carla A. Hills, U.S. Trade Representative).

5. *See* 1988 Trade Act, *supra* note 1, § 1301, 102 Stat. 1164-76 (1988) (codified at 19 U.S.C. § 2411).

6. 19 U.S.C. § 2462 (1988).

7. *Id.* § 2702.

8. 12 U.S.C. § 635 (1988).

protection of intellectual property rights."[9] It further stresses that U.S. businesses that rely on intellectual property rights must be ensured fair and equitable market access in foreign countries in order to protect the economic interests of the United States.[10] Finally, the 1988 Trade Act indicates that the purpose of Special 301 is to provide for the development of an overall strategy to ensure that intellectual property rights and market access for those who rely on such rights will be adequately and effectively protected.[11]

President Reagan, in signing the 1988 Trade Act, stated that Special 301 will "strengthen the ability of U.S. firms to protect their patented, copyrighted, or trademarked goods and ideas from international thievery."[12]

A. *The Requirements of Special 301*

As enacted, Special 301 directs the U.S. Trade Representative (the "USTR"), within 30 days after the issuance of the National Trade Estimate Report,[13] to identify those foreign countries that deny "adequate and effective protection of intellectual property rights,"[14] or deny "fair and equitable market access to United States persons who rely upon intellectual property protection."[15] Special 301 further requires the USTR to name as "priority foreign countries" those countries: (i) whose acts, practices, or policies are the most onerous or egregious,[16] and have the greatest adverse economic impact on the United States;[17] and (ii) that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.[18]

In identifying "priority foreign countries" pursuant to

9. 1988 Trade Act, *supra* note 1, § 1303(a)(1)(A), 102 Stat. 1179 (1988).
10. *Id.* § 1303(a)(1)(B), 102 Stat. 1179.
11. *Id.* § 1303(a)(2), 102 Stat. 1179.
12. *President Reagan Signs Trade Bill Into Law, Saying Nation Now Speaks With One Voice*, 5 Int'l Trade Rep. (BNA) No. 54, at 1184 (Aug. 24, 1988).
13. The National Trade Estimate Report is required by 19 U.S.C. § 2241(b) (1988).
14. 19 U.S.C. § 2242(a)(1)(A) (1988).
15. *Id.* § 2242(a)(1)(B).
16. *Id.* § 2242(b)(1)(A).
17. *Id.* § 2242(b)(1)(B).
18. *Id.* § 2242(b)(1)(C).

Special 301, the USTR must consult with the Register of Copyrights, the Commissioner of Patents and Trademarks, and other appropriate government officials.[19] In an effort to clarify the types of practices that the 1988 Trade Act was designed to address, a U.S. House of Representatives conference report listed a number of practices within the purview of Special 301.[20] They include, among other things, licensing procedures that restrict the free movement of products, expropriatory practices, and barriers erected to protect "cultural sovereignty."[21]

Within thirty days after the USTR identifies "priority foreign countries," the USTR must initiate investigations into the acts, practices, or policies of those "priority foreign countries."[22] The USTR has only six months (and three additional months if the investigation involves complex issues or if substantial progress is being made) to complete the investigation and to seek to negotiate bilateral solutions.[23] If the acts, practices, or policies continue, the USTR is authorized, but is not required, to retaliate by increasing duties or imposing other restrictions on imports.[24] The USTR, however, is not required to initiate a Special 301 investigation if such investigation would be detrimental to U.S. economic interests.[25]

The USTR may designate additional "priority foreign countries" at any time[26] as well as revoke such identification.[27] In the event of revocation, the USTR must provide a detailed explanation of the reasons for such revocation in its semi-annual report to Congress.[28]

While Special 301 compels the USTR to initiate Special 301 investigations of certain "priority foreign countries," it nevertheless affords the USTR substantial discretion in determining which foreign countries engage in actionable activi-

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19. *Id.* § 2242(b)(2)(A).

20. *See* H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 580-81, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1613-14 [hereinafter CONFERENCE REPORT].

21. *Id.*, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 1613-14.

22. 19 U.S.C. § 2412(b)(2)(A) (1988).

23. *Id.* § 2414(a)(3)(A)-(B).

24. *Id.* § 2416(b).

25. *Id.* § 2411(a)(2)(B)(iv).

26. *Id.* § 2242(c)(1)(B).

27. *Id.* § 2242(c)(1)(A).

28. *Id.* § 2242(c)(2).

ties,[29] which of such countries are priorities,[30] whether a Special 301 investigation would be detrimental to U.S. economic interests,[31] and what response to actionable activities, if any, is appropriate.[32]

Special 301, like its counterpart, "Super 301," the controversial and more commonly known provision of the 1988 Trade Act,[33] is designed to increase leverage for U.S. trade negotiators seeking to promote international trade liberalization. Super 301, however, requires the USTR to probe into a wider variety of unfair trade practices over a twelve- to eighteen-month period, in 1989 and in 1990 only.[34] In contrast, Special 301 is a permanent feature of the 1988 Trade Act, lacking the two-year sunset provision embedded in Super 301. Moreover, Special 301 was devised solely to enhance the protection of intellectual property rights by foreign governments, and it demands that investigations be conducted on an expedited basis, faster than a normal section 301 investigation.[35]

B. *Legislative History of Special 301*

The Special 301 requirements derive from both the House and Senate omnibus trade bills. The House stressed the need for

> a comprehensive and effective program to address the growing problem of piracy and counterfeiting faced in foreign markets by United States firms and industries. This problem is not an isolated one affecting just one or two industries. It is a problem confronted by virtually all sectors of the U.S. economy, including manufacturers of semiconductors and other high technology products, motion pic-

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29. *Id.* § 2420(a)(1)(B), (a)(2).

30. *Id.* § 2420(a)(1)(A), (a)(3).

31. *Id.* §§ 2420(a)(2)(A), (a)(2).

32. *Id.* § 2414(a)(1)(B). The Conference Report urged the President and the USTR to "endeavor to fashion a response in such a manner as to discourage the erection of similar . . . barriers in other countries" in responding to the egregious acts or practices of the "priority countries." CONFERENCE REPORT, *supra* note 20, at 581, *reprinted in* 1988 U.S CODE CONG. & ADMIN. NEWS 1547, 1614.

33. 1988 Trade Act, *supra* note 1, § 1302, 102 Stat. 1176-79 (1988) (codified as amended at 19 U.S.C. § 2420 (1988)).

34. 19 U.S.C. § 2420(a)(1) (1988).

35. *See supra* note 33 and accompanying text. Like investigations initiated under Super 301, investigations launched under "normal" section 301 are conducted over a twelve- to eighteen-month period. 19 U.S.C. § 2414 (1988).

> tures, computer software, books, records, auto parts, pharmaceuticals, and chemicals. It also is a problem encountered in developed and developing countries alike.[36]

The House and Senate bills were so similar in this regard that there were only three notable differences between the two bills. First, both the House and Senate bills covered denials of adequate and effective protection of intellectual property rights, but only the Senate bill covered in addition denials of fair and equitable market access to U.S. persons who rely on intellectual property protection.[37] In the conference between the House and Senate to resolve differences between the two bills, the House receded to the Senate on this issue and the market access provisions were included.[38]

Second, the House bill would have authorized a six-month extension in Special 301 investigations involving complex issues.[39] The House receded to the Senate on this issue as well, and Special 301 allows only a maximum three-month extension in complex cases.[40]

Finally, the Senate bill would not have "transferred" au-

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36. H.R. REP. No. 40, 100th Cong., 1st Sess. 163 (1987). Similarly, the Senate bill established

> a comprehensive program, within the overall framework of Section 301, to address the growing problem of inadequate and ineffective intellectual property protection, and to address the unique foreign market access problems of U.S. companies that rely upon intellectual property protection. Improved protection and market access for U.S. intellectual property goes to the very essence of economic competitiveness for the United States. The problems of piracy, counterfeiting, and market access for U.S. intellectual property affect the U.S. economy as a whole. Effective action against these problems is important to sectors ranging from high technology to basic industries, and from manufacturers of goods to U.S. service businesses. The list includes manufacturers of semiconductors and other electronic products, motion pictures, books, chemicals, computer software, records, and pharmaceuticals.

S. REP. No. 71, 100th Cong., 1st Sess. 76 (1987).

37. S. 490, § 302 100th Cong., 1st Sess. (1987); S. 1420, § 302, 100th Cong., 1st Sess. (1987); *see* S. REP. No. 71, 100th Cong., 1st Sess. 76 (1987).

38. CONFERENCE REPORT, *supra* note 20, at 580, *reprinted in* 1988 U.S. CODE CONG. ADMIN. NEWS 1547, 1613. Section 2 of the 1988 Trade Act provides that the legislative history of H.R. 3 shall be treated as the legislative history of H.R. 4848, the bill enacted as the 1988 Trade Act. 1988 Trade Act, *supra* note 1, § 2, 102 Stat. 1119 (1988).

39. H.R. 3, § 173, 100th Cong., 1st Sess. (1987); *see* H.R. REP. No. 40, 100th Cong., 1st Sess. 163 (1987).

40. 19 U.S.C. § 2414(a)(3)(B) (1988); *see* CONFERENCE REPORT, *supra* note 20, at 583, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1616.

thority for action in Special 301 cases from the President to the USTR. In the case of both Special 301 and "generic" section 301 cases, the Senate would have left statutory authority for action exclusively with the President.[41] The Senate, however, receded to the House on the transfer of authority issue in both Special 301 and "generic" section 301 cases.[42] As a result, the USTR is authorized to act "subject to the specific direction, if any, of the President."[43]

II. *IMPLEMENTATION OF SPECIAL 301*

A. *USTR May 25, 1989 Report*

On May 25, 1989, Ambassador Carla A. Hills, the U.S. Trade Representative, outlined the Administration's initial implementation of Special 301.[44] Echoing the sentiment of Congress, Ambassador Hills observed that inadequate protection of intellectual property rights not only harms the U.S. economy but also "undermines the creativity, invention and investment that are essential to economic and technological growth in all countries."[45]

Although the USTR recognized that much remains to be done in obtaining adequate intellectual property rights protection from a number of U.S. trading partners, the agency pointed out that significant agreements had been reached since Special 301 was enacted.[46] For example, the USTR noted that during 1989, the People's Republic of China committed to provide copyright protection for computer software,[47] Colombia resolved royalty remission problems related to motion pictures,[48] Taiwan agreed to solve copyright problems concern-

41. S. 490, § 305, 100th Cong., 1st Sess. (1987); S. 1420, § 305, 100th Cong., 1st Sess. (1987); *see* S. REP. No. 71, 100th Cong., 1st Sess. 79-80 (1987).

42. *See* CONFERENCE REPORT, *supra* note 20, at 582-83, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1615-16.

43. 19 U.S.C. § 2411(a)(1),(b)(2) (1988).

44. Office of the United States Trade Representative, *Fact Sheet "Special 301" on Intellectual Property*, May 25, 1989 [hereinafter *Fact Sheet*] (copy on file at the *Fordham International Law Journal* office), *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 718 (May 31, 1989).

45. *Id.* at 2, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).

46. *Id.* at 3-4, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719-20 (May 31, 1989).

47. *Id.* at 4, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).

48. *Id.*

ing motion pictures,[49] and Saudi Arabia adopted a new patent law.[50]

The USTR pointed to other significant achievements since the enactment of Special 301, including a bilateral agreement on copyright protection between the United States and Indonesia,[51] a positive "framework agreement" on intellectual property rights resulting from the Uruguay Round mid-term review,[52] the submission by Chile of proposed patent law amendments, including increased protection for pharmaceuticals,[53] and the submission by Indonesia of proposals for a patent law, including product protection for pharmaceuticals.[54]

Despite these accomplishments, the USTR stated that a great deal remained to be achieved. The USTR noted that according to the 1989 National Trade Estimate Report, virtually no U.S. trading partner satisfied the standards on intellectual property protection proposed by the United States in the Uruguay Round.[55] The USTR, however, acknowledged that all of the countries that could be designated as "priority foreign countries" were engaged in good faith bilateral or multilateral negotiations or were taking unilateral measures to protect in-

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49. *Id.*

50. *Id.*; *see* Royal Decree No. M/38 of 10/6/1409 AH (The Patents Law) (English translation on file at the *Fordham International Law Journal* office).

51. *Fact Sheet*, *supra* note 44, at 4, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989); *see* Agreement on Copyright Protection, United States-Indonesia, Mar. 22, 1989 (copy on file at the *Fordham International Law Journal* office).

52. *Fact Sheet*, *supra* note 44, at 4, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).

53. *Id.*; *see* Durr, *Chile Surrenders to U.S. Threat on Pharmaceutical Patents*, Fin. Times, Feb. 1, 1990, § 1, at 5 (noting that Chile passed a pharmaceutical patent law on Jan. 31, 1990).

54. *Fact Sheet*, *supra* note 44, at 4, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989); *see* Act of the Republic of Indonesia, No. 6, Nov. 1, 1989 (Patents); *see also* Gingerich, *New Patent Law*, East Asian Executive Rep., Dec. 1989, at 9 (discussing Indonesia's new patent law and noting that it will come into effect on Aug. 1, 1991); *Hearings*, *supra* note 4, at 6.

55. *Fact Sheet*, *supra* note 44, at 2, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989). The key objectives of the U.S. proposal in the Uruguay Round are to reach a multilateral agreement that will establish minimum adequate substantive and enforcement standards and effective dispute settlement procedures and remedies. Topics set forth in the U.S. proposal for negotiations of substantive standards include copyrights, patents, trademarks, trade secrets, and semiconductor chip layout designs.

tellectual property rights.[56] Consequently, in light of the progress that was being made in ongoing negotiations, the USTR declined to identify any country as a "priority foreign country" under Special 301.[57]

1. Priority Watch List and Watch List Countries

Rather than identifying countries as "priority foreign countries" under Special 301, the USTR created a "priority watch list" and a "watch list," naming countries that are particularly lax in their protection of intellectual property rights or that have imposed barriers to market access.[58] The USTR placed Brazil, India, the Republic of Korea, Mexico, the People's Republic of China, Saudi Arabia, Taiwan, and Thailand on the priority watch list.[59] Seventeen other countries were named to the watch list.[60] The USTR stated that the decision was reached after consulting closely with key sectors of the business community that are affected by Special 301.[61] The USTR added that the business community supported its decision.[62]

Accelerated action plans were announced for each country on the priority watch list, and U.S. negotiators conducted intensified discussions with those countries until November 1, 1989.[63] The USTR sought expeditious improvement in the protection of intellectual property rights and the prevention of piracy. The USTR announced that it would take remedial steps to alleviate any remaining problems if further progress was not made by November 1, 1989, taking into account the objectives identified by the Administration in its accelerated action plans and the U.S. proposals for intellectual property

56. *Id.* at 1, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 718-19 (May 31, 1989).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 3, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989). The seventeen countries on the "watch list" were: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. *Id.*, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).

61. *Id.* at 1, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).

62. *Id.*

63. *Id.* at 6, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).

law protection in the Uruguay Round.[64]

In its May 25, 1989 announcement, the USTR identified a number of areas in which the priority watch countries inadequately protected intellectual property rights. For example, the USTR called for the government of Brazil to improve and provide adequate patent protection for all classes of inventions.[65] Additionally, the USTR stressed the need for improved enforcement against piracy, the elimination of local printing requirements for theatrical and television films, and the constructive participation by Brazil in multilateral intellectual property negotiations.[66]

Concerning India, the USTR stressed the need to improve patent protection for all classes of inventions, as well as the need to eliminate discrimination against the use of foreign trademarks.[67] Further, the USTR noted that it would pursue the registration of service marks, effective protection of well-known marks, improved access and distribution for U.S. motion pictures, and improved enforcement against piracy.[68] Finally, the USTR flagged the importance of India's constructive participation in multilateral intellectual property negotiations and bilateral negotiations aimed at concluding an intellectual property agreement between the United States and India.[69]

Concerning the Republic of Korea, the USTR emphasized the enforcement of Korea's existing patent, trademark, and copyright laws and administrative measures covered by agreements between the United States and the Republic of Korea.[70] However, the USTR also stated that it would follow closely the Republic of Korea's participation in intellectual property negotiations in the Uruguay Round.[71]

As far as Mexico is concerned, the USTR reported its aim to use the threat of remedial action under Special 301 to

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64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 7, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989); *see* Extension of the Science and Technology Initiative Between India and the United States, Oct. 5, 1988 (copy on file at the *Fordham International Law Journal* office).
70. *Fact Sheet, supra* note 44, at 7, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).
71. *Id.*

achieve improved and adequate patent protection for all classes of inventions and constructive participation by Mexico in multilateral intellectual property negotiations.[72]

The People's Republic of China was also singled out as a priority watch list country under Special 301.[73] The USTR said it would seek from the Chinese government the enactment of a copyright law, including coverage for computer software, the establishment of copyright relations with the United States, and improved and adequate protection for all classes of inventions.[74]

Additionally, the USTR stated that it would use Special 301 as an impetus to encourage Saudi Arabia to enact a copyright law, including protection for computer software and sound recordings.[75] The USTR further recommended that Saudi Arabia establish copyright relations with the United States and effectively enforce laws against piracy and counterfeiting of U.S. works.[76]

The USTR reported that although Taiwan and the United States had made significant progress in strengthening Taiwanese intellectual property laws, several areas of concern remained. Specifically, the USTR said it would seek more rigorous enforcement of Taiwan's patent, copyright, and trademark laws,[77] and the implementation of measures to fulfill Taiwanese obligations under the recent bilateral agreements on copyright and on other intellectual property rights.[78]

The USTR also noted that it would monitor developments in intellectual property protection in Thailand until November 1, 1989.[79] In particular, the U.S. negotiators determined they would focus on achieving improved patent protection for all inventions and effective copyright protection for U.S. works, including software.[80] Moreover, the USTR stated that it would also watch for improved protection of foreign trademarks and

72. *Id.*
73. *Id.* at 1, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).
74. *Id.* at 7, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).
75. *Id.*
76. *Id.* at 7-8, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).
77. *Id.* at 8, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 720 (May 31, 1989).
78. *Id.*; *see infra* note 91 and accompanying text.
79. *Fact Sheet*, *supra* note 44, at 8, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 721 (May 31, 1989).
80. *Id.*

constructive participation in multilateral intellectual property negotiations.[81]

2. Trade Improvements Due to Special 301

Finally, in its May 25, 1989 announcement, the USTR stressed that some significant improvements in protecting intellectual property rights had been realized already through the bilateral discussions prompted by Special 301. Taiwanese officials, for instance, agreed to make positive efforts to protect intellectual property.[82] The USTR stated that responsible Taiwanese authorities would handle individual cases of infringement of intellectual property and supply statistical data on piracy and counterfeiting to U.S. officials on a regular basis.[83] The USTR also called upon private industry in Taiwan to honor existing laws.[84] Similarly, Saudi Arabia took steps to enact copyright legislation covering books, music, audio and video recordings, art, and computer software.[85]

B. *USTR's November 1, 1989 Interim Review*

On November 1, 1989, the USTR announced the results of its interim Special 301 review (the "Interim Review").[86] Once again, it did not designate any trading partner as a priority foreign country under Special 301. Of the eight counties initially named to the priority watch list, three (the Republic of Korea, Taiwan, and Saudi Arabia) were removed from the priority watch list and placed on the more basic watch list.[87]

The Interim Review also noted the Republic of Korea's "steady progress" toward improving the enforcement of intellectual property rights,[88] including the creation of a task force to improve coordination between ministries on intellectual property rights issues, the designation of special enforcement

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81. *Id.*

82. *ROC-U.S. Talks Over "Special 301" End With Success*, Central News Agency (June 20, 1989) (LEXIS, Nexis library, Cenews file).

83. *Id.*

84. *Id.*

85. *See USTR Announces Intellectual Property "Watch Lists"*, 12 Middle East Executive Reports, No. 6, at 9 (June 1989); *infra* note 95 and accompanying text..

86. *Hills Announces Results of Special 301 Review* (Nov. 1, 1989) [hereafter *Interim Review*] (copy on file at the *Fordham International Law Journal* office).

87. *Id.* at 1.

88. *Id.* at 4.

teams of police and prosecutors, and the "vigorous" search, seizure and prosecution of violators.[89]

Concerning Taiwan, the Interim Review stressed Taiwan's "substantial progress" in enforcement matters and "a strong commitment" to improving the environment for protection of intellectual property rights.[90] In particular, the USTR noted Taiwan's initialing of a bilateral copyright agreement,[91] issuance of a senior-level public policy statement stressing the importance of intellectual property protection,[92] establishment of regional task forces of police and prosecutors,[93] and imposition of sanctions against infringers.[94]

The USTR further noted the Administration's understanding that Saudi Arabia would enact a copyright law by early November 1989,[95] in terms compatible with obligations established in the Berne Convention.[96] The USTR also stated its expectation that the same obligation will apply to computer software as well as to other literary works.[97]

The other five countries placed on the priority watch list on May 25, 1989—Brazil, India, Mexico, the People's Republic of China, and Thailand—remained on that list.[98] Similarly, the seventeen countries placed on the watch list on May 25, 1989 remained on it.[99] Moreover, the USTR noted "disturbing de-

89. *Id.*

90. *Id.* at 4.

91. *Id.*; *see* Agreement for the Protection of Copyright Between the American Institute in Taiwan and the Coordination Council for North American Affairs (initialed July 1989) (copy on file at the *Fordham International Law Journal* office).

92. *Interim Review, supra* note 86, at 4.

93. *Id.*

94. *Id.*

95. *Id.* at 3. Saudi Arabia enacted this copyright law on Dec. 17, 1989, to take effect on Jan. 12, 1990. *See* Royal Decree No. M/11 of 19/5/1410 AH. An unofficial English translation of this law can be found in 13 Middle East Executive Reports, No. 2, at 23 (Feb. 1990). *See* Johnson & Cassin, *New Saudi Copyright Law*, 13 Middle East Executive Reports, No. 2, at 9 (Feb. 1990).

96. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *reprinted in* World Intellectual Property Organization, Guide to the Berne Convention (1978). The complete text of the Berne Convention may also be found in N. BOORSTYN, COPYRIGHT LAW 715-37 (1981) and 4 M. NIMMER ON COPYRIGHT, Appendix 27-1 (1984).

97. *Interim Review, supra* note 86, at 3. The USTR also noted the need for clarification of some provisions of the law, including, for example, the need to protect sound recordings for a term of at least fifty years. *Id.*

98. *Id.* at 2, 4.

99. *Id.*

velopments" in Turkey and "slow progress" in Malaysia, which it stated would require "special attention" and stepped-up efforts.[100]

The USTR concluded the Interim Review with a commitment to continue to press for improvements from all twenty-five countries on either the priority watch list or the watch list, from the date of the Interim Review until the next Special 301 review required by late April 1990.[101] The USTR emphasized that it would pay particular attention to the contributions of those countries and their positions in the Uruguay Round negotiations on trade related intellectual property rights.[102]

III. *SPECIAL 301's EFFECTS ON URUGUAY ROUND NEGOTIATIONS*

Although Special 301 has achieved progress bilaterally, some trading partners initially expressed their concerns that Special 301 would jeopardize the progress of Uruguay Round negotiations on the protection of intellectual property. For example, on June 21, 1989, the Minister Counselor of the Brazilian Embassy in Washington maintained not only that Special 301 was undermining the progress of the Uruguay Round, but also stated that it was illegal under the General Agreement on Tariffs and Trade ("GATT").[103] He argued further that it violated the Punta del Este standstill provision,[104] prohibiting unilateral imposition of new laws or policies not yet covered by the GATT.[105]

Moreover, the Minister Counselor asserted that the bilateral approach embodied in Special 301 makes it difficult for participants in the Uruguay Round to believe that the United

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100. *Id.* at 4.

101. *Id.* at 5.

102. *Id.*

103. *U.S. Special 301 Process Undermining GATT, Hurts U.S. Credibility, Brazil Official Says*, Daily Rep. for Executives (BNA) No. 120, at A-2 (June 23, 1989).

104. *Id.* at A-3. The GATT Ministers pledged at the September 1986 meeting not to increase existing trade-distorting measures, but rather to "standstill" pending the outcome of these negotiations. General Agreement on Tariffs and Trade, *Ministerial Declaration on Uruguay Round*, at 4-5 (Sept. 20, 1986) (copy on file at the *Fordham International Law Journal* office). The standstill pledge, however, is a political, not legal, undertaking.

105. *U.S. Special 301 Process Undermining GATT, Hurts U.S. Credibility, Brazil Official Says*, Daily Rep. for Executives (BNA) No. 120, at A-3 (June 23, 1989).

States intends to negotiate within the GATT framework.[106] Citing another alleged flaw in Special 301, he argued that the United States should not treat lesser developed countries in the same manner that it treats a developed state, by expecting it to have laws as stringent and as firmly established as those in the United States.[107] The USTR sought to allay this particular concern, assuring foreign countries that U.S. objectives under Special 301 are flexible and reflect "an understanding that countries may be at different stages in recognizing the importance of adequate and effective intellectual property protection."[108]

India also has expressed serious reservations about the progress of multilateral negotiations as long as the threat of bilateral action exists.[109] The European Economic Community agreed with Brazil and India, contending that negotiations on the prevention of piracy and the protection of intellectual property rights will be viable only if the participants feel they are negotiating without coercion.[110]

Although many U.S. trading partners disapprove of Special 301 and are concerned about its effects on the intellectual property negotiations in the Uruguay Round, the USTR sought to implement Special 301 in a manner designed to complement rather than contradict U.S. objectives on intellectual property rights protection in the Uruguay Round. Ambassador Hills has stated that the "[b]ilateral negotiations and actions we have taken under our domestic legal procedures, including section 301, are fully complementary to our Uruguay Round objectives."[111] Responding to an inquiry about the effect of the USTR's decision to name priority watch list countries under Special 301, Ambassador Hills maintained that the USTR's office will monitor the Uruguay Round negotiations closely to ensure that they are conducted in good faith and that

106. *Id.*

107. *Id.*

108. *Fact Sheet*, *supra* note 44, at 2, *reprinted in* 6 Int'l. Trade Rep. (BNA) No. 22, at 719 (May 31, 1989).

109. *Trade: "TRIPRS" Negotiations On Collision Course, Warns India*, Inter Press Service (July 13, 1989) (LEXIS, Nexis library, Intrad file).

110. *Id.*

111. *See Hearings*, *supra* note 4, at 23.

significant progress is made.[112] She added that U.S. objectives have not changed and are fully consistent with Special 301.[113]

Addressing foreign concerns that Special 301 violates GATT, the Assistant USTR for Services, Investment and Intellectual Property Rights (who also serves as Team Leader for the Uruguay Round intellectual property negotiations) asserted that GATT's current lack of coverage of intellectual property does not tie the Administration's hands.[114] He did, however, note that this consideration will be factored into any decision made by the USTR.[115] He additionally pointed out that one reason no countries were identified as priority foreign countries under Special 301 is because they are participating in good faith in the ongoing negotiations at the Uruguay Round.[116]

CONCLUSION

The current Administration's implementation of Special 301 to date has been a ten-strike. Despite the concerns expressed by many trading partners, the United States has enhanced the leverage of its negotiators, stimulated the negotiations, and thus increased the prospects for achieving an adequate GATT agreement on the protection of intellectual property rights. The enactment of Special 301 and the Administration's commitment to its faithful implementation underscore that pirates will no longer be tolerated, and that U.S. intellectual property cannot be stolen with impunity. Special 301 provides useful muscle for the negotiations in Geneva.

Further, the USTR's artful application of Special 301 to date has not unduly jeopardized the Uruguay Round negotiations. In fact, Special 301 contemplates the prospect of possible unilateral U.S. action only if the United States fails to make progress in this area, either bilaterally or in Geneva. The threat of such recourse serves as an incentive for otherwise reluctant trading partners to negotiate in good faith. At the

112. *Fact Sheet, supra* note 44, at 9, *reprinted in* 6 Int'l Trade Rep. (BNA) No. 22, at 721 (May 31, 1989).

113. *Id.*

114. *U.S. Special 301 Process Undermining GATT, Hurts U.S. Credibility, Brazil Official Says*, Daily Rep. for Executives (BNA) No. 120, at A-3 (June 23, 1989).

115. *Id.*

116. *Id.*

same time, the judicious restraint exercised by the Administration in the initial implementation of Special 301 underscores the U.S. commitment to the Uruguay Round negotiations.

While a good beginning does not guarantee a successful conclusion, the Administration's use of Special 301 is at least well launched. So long as the Administration can refrain from taking harsher action under Special 301 for the duration of the Uruguay Round negotiations, Special 301 is unlikely to damage those negotiations and thus unlikely to harm the prospects for achieving a satisfactory multilateral GATT agreement on protecting intellectual property. And so long as the current Administration gets results or, at a minimum, makes clear and concrete progress in the negotiations, it will likely enjoy the continued support of Congress and the private sector.

However, the continued ability to keep nearly everyone happy concerning intellectual property protection depends on the successful conclusion of the Uruguay Round by the end of 1990. If a satisfactory agreement on intellectual property is not achieved in 1990, the USTR will be hard pressed by both Congress and the private sector to identify priority foreign countries in the application of Special 301 in 1991 and beyond. On the other hand, if a generally satisfactory agreement is achieved but Special 301 is nonetheless retained and implemented in a manner inconsistent with that agreement, the international community's response will be swift and harsh.