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# Section 301 of the Trade and Competitiveness Act of 1988: Its History and Implications in the U.S.-South Korea Trade

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## COMMENTS

### Section 301 of the Trade and Competitiveness Act of 1988: Its History and Implications in the U.S.-South Korea Trade

#### I. INTRODUCTION

The recent passage of the Omnibus Trade and Competitiveness Act of 1988 (Trade Bill)<sup>1</sup> may signal a new turning point in the United States/South Korea (Korea) relationship. Reputedly the most sweeping of U.S. trade legislation up to date, the Trade Bill has generated much controversy both within<sup>2</sup> and outside the U.S.<sup>3</sup> No more intense criticism of the bill has been levied by trading partners than by Korea. Fearing retaliation under the new Section 301<sup>4</sup> of the bill and angered by what they perceive as U.S. protectionism, Korean government officials have sent out quick and strong messages both to the Korean public and to the U.S. expressing their criticism of the bill in general and of the new Section 301 in particular.<sup>5</sup>

If, as rumored,<sup>6</sup> Korea is selected as a "priority" country in 1989 or in 1990 under the "Super 301"<sup>7</sup> provision or is otherwise

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1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1107.

2. See 154 CONG. REC. 114, S0-10660 (daily ed. Aug. 3, 1988).

3. See *New U.S. Trade Law is Protectionist, European Community Tells GATT Council*, 5 Int'l Trade Rep. (BNA) 1302 (Sept. 28, 1988) (LEXIS, Itrade library, Intrad file); *President's Signing of Omnibus Trade Bill Poorly Received By Major Trading Partners*, 5 Int'l Trade Rep. (BNA) 1208 (Aug. 31, 1988) (LEXIS, Itrade library, Intrad file).

4. 19 U.S.C.A. §§ 2411-31 (West Supp. 1988).

5. Jeffrey Jones, an international business lawyer in Seoul, Korea states: "The reaction to the new Act by Korean government officials has been swift and primarily negative. . . . Senior government officials have. . . been saying that the bill will lead to additional trade friction between the U.S. and Korea and will not promote further openings in Korea's market." Letter from Jeffrey Jones to author (Sept. 24, 1988); see also *A View From Both Sides*, BUS. KOREA, Oct. 1988; *Dispelling Damaging Notions*, BUS. KOREA, Sept. 1988.

6. See Lande, *Paving the Way for Retaliation or Reconciliation?*, BUS. KOREA, Sept. 1988; see also *Korea Should Shoulder Greater Burden in World Trade*, KOREA BUS. WORLD, Jan. 1988; *Korea, U.S. Move Too Slowly to Suit Each Other's Needs*, KOREA BUS. WORLD, Jan. 1988, at 30.

7. 19 U.S.C.A. § 2420 (West Supp. 1988).

subjected to the other sanctions of the tightened provisions of Section 301, the impact on Korea will be severe. The Korean economy, dangerously dependent on U.S. trade,<sup>8</sup> will meet an unnegotiable obstacle. The result may mean an abrupt halt to the progress now being made both in the economic and political sectors of a newly developing democratic nation.<sup>9</sup> In the economic sector, it may mean a freeze or decrease in wages and a slowdown in the burgeoning labor movement. It may be an irreparable blow to the already vulnerable agricultural economy and may set off a mass exodus of the rural population into the industrialized areas, creating urban social problems including unemployment and poverty.<sup>10</sup> It may also mean a reversal of the payback plans for Korea's external debt and, perhaps, the accrual of more foreign debt. Politically, it will signify to the Korean public that U.S. supported President Roh Tae Woo<sup>11</sup> is just a U.S. puppet after all, and that his U.S.-backed campaign promises to watch out for the "ordinary" working and rural populations were empty rhetoric. This comment examines Section 301 of the new Trade Bill,<sup>12</sup> outlining sections most applicable to the U.S.-Korea trade relationship and highlighting the extremely controversial "Super 301" provision.<sup>13</sup> Next it examines Section 301 actions in the context of the U.S.-Korea relationship: how it has been used, what actions might be brought in the near future, and what impact those actions may have on the Korean economy and politics as well as the impact they may have on the U.S. This comment then examines the possibility of Korea being selected as a priority country under the "Super 301"

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8. In 1986, the U.S. bought 90% of Korea's computer exports, 71% of its aircraft engine exports, and 65% of its telecommunications equipment exports. In 1987, the U.S. bought 80% of Korea's automobile exports. *USTR Criticizes South Korea's Trade Policy, Rejects Gephardt Approach*, 5 Int'l Trade Rep. (BNA) 330 (Mar. 9, 1988).

9. For a general discussion of the impact of premature import liberalization, see Young, *Korean Trade Policy and Its Implications for Korea/U.S. Cooperation*, KOREA'S ECON., May 1988, at 3.

10. *Id.* at 9-10.

11. President Roh Tae Woo was elected by popular vote in December, 1987. He won the three-way race by a tight margin, and it is speculated that the thing that pushed him over the top was his promise of economic progress for the farmers and working class. See Lee, *Roh Promises Bright Future to Ordinary People*, KOREA BUS. WORLD, Jan. 1988, at 14; see also Nakarmi, *Has Bush Helped Paint Roh Into a Corner?*, BUS. WK., Mar. 13, 1989, at 61.

12. 19 U.S.C.A. § 2411 (West Supp. 1988).

13. *Id.* § 2420.

provision. It urges the use of caution while continuing Section 301 actions against Korea but discourages the selection of Korea as the priority country under Super 301.

## II. THE TRADE BILL AND THE NEW "SECTION 301"

Confronted with a record trade deficit,<sup>14</sup> the 98th Congress sought a sweeping reform of U.S. trade practice.<sup>15</sup> Many believed that the deficit problem could be mended by, among other measures, tightening up Section 301, the provision for the enforcement of U.S. trade rights under bilateral trade agreements and general international law.<sup>16</sup> Others believed that changes to Section 301 were unnecessary and that in fact such tightening up would result in long term harm to the U.S. trade.<sup>17</sup> When the dust settled after a great deal of public controversy and Congressional debate, Section 301 was not only tightened up but a brand new provision popularly called "Super 301" was added.

Under the new Section 301, the United States Trade Representative (USTR) is given authority to bring mandatory or discretionary sanctions against "unfair" trade practices.<sup>18</sup> These "unfair" trade practices consist of "unjustifiable," "unreasonable," and "discriminatory" acts, policies, or practices; each a term of art representing a separate category of violations subject to different types and levels of retaliatory action.<sup>19</sup>

"Unjustifiable" acts, policies, or practices are deemed to occur in two different contexts.<sup>20</sup> First, it is unjustifiable for a

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14. At the end of 1985, the United States became a net debtor for the first time since World War I. 3 Int'l Trade Rep. (BNA) 872 (July 2, 1986). The U.S. trade deficit reached \$148.5 billion in 1985, \$155.1 billion in 1986, and a record high of \$170.3 billion in 1987. The annual trade deficit for 1988 has been estimated at \$137 billion. The annual trade deficit for 1989 is projected to remain at \$137 billion. See *U.S. Monthly Trade Deficit for 1988 and Since 1985*, Reuter Bus. Rep. (BC cycle) (Feb. 17, 1989) (LEXIS, Nexis library, Omni file); *Will We Ever Close the Trade Gap?*, Bus. Wk., Feb. 24, 1989, at 86.

15. See *Bentsen to Make Omnibus Trade Bill High Priority in 1987, Tough Measures Expected*, 3 Int'l Trade Rep. (BNA) 1359 (Nov. 12, 1986); *Deomocrats Make Passage of Trade Bill This Year's Top Priority, Floor Votes in the Spring*, 4 Int'l Trade Rep. (BNA) 49 (Jan. 14, 1987).

16. See 154 CONG. REC. 114, S-105660 (daily ed. Aug. 3, 1988).

17. See *Yeutter Asserts Proposed Changes in Section 301 are Unnecessary, Would Harm U.S. Interests*, 3 Int'l Trade Rep. (BNA) 940 (July 23, 1986); see also *Dingell Asserts Reaction to Trade Problem is Naive, Indifferent*, 3 Int'l Trade Rep. (BNA) 1198 (Oct. 1, 1986).

18. 19 U.S.C.A. § 2411 (West Supp. 1988).

19. See generally *id.* at §§ 2411-19.

20. *Id.* § 2411(d)(4)(A).

trade partner to deny U.S. benefits under a trade agreement. Examples of such violations include the denial of national or most favored nation treatment and the right of establishment or protection of U.S. intellectual property rights. Second, a trade act, policy, or practice can be found "unjustifiable" even in the absence of a trade agreement if it is found by the USTR to be inconsistent with U.S. international rights and burdens or restricts U.S. commerce.

The USTR is required to take mandatory retaliatory action against "unjustifiable" practices, subject to Presidential direction,<sup>21</sup> within a limited time and then to make a report to the Congress.<sup>22</sup> Such action is not required, however, if: (1) a General Agreements on Trade and Tariffs (GATT) panel to which the conflict is referred rules against the U.S., (2) the foreign government agrees to eliminate the practice, (3) the foreign government agrees to provide satisfactory compensation, (4) the costs to the U.S. of retaliation would substantially exceed the benefits, or (5) the action would cause harm to U.S. national security.<sup>23</sup>

"Unreasonable" acts, policies, or practices represent another category of violations of U.S. trade rights or expectations.<sup>24</sup> They include the denial of opportunities for establishment of U.S. enterprise, failure on the part of a foreign government to make provision for U.S. intellectual property rights, or market access to U.S. products. They also include export targeting<sup>25</sup> and a pattern of labor-related violations such as denial of rights of association, organization, or collective bargaining; lack of minimum wages, hours, or safety standards; and the practice of forced or compulsory labor.<sup>26</sup>

"Discriminatory" acts, policies, or practices are those that deny national or most-favored-nation treatment to U.S. goods, services, or investments.<sup>27</sup> The USTR is authorized to take discretionary action, subject to Presidential direction, against "un-

21. *Id.* § 2411(a)(1).

22. *Id.* § 2412(b)(2)(C).

23. *Id.* § 2411(a)(2).

24. *See generally id.* at § 2411(d)(3).

25. "Export targeting" means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group, resulting in assistance to the enterprise, industry, or group in becoming more competitive in the export of a class or kind of merchandise. *Id.* at § 2411(d)(3)(E).

26. *Id.* § 2411(a)(2).

27. *Id.* § 2411(d)(5).

reasonable” or “discriminatory” trade practices.<sup>28</sup> The sanctions available to the USTR under Section 301 include suspension or withdrawal of trade benefits, imposition of duties or other import restrictions, or entering into a binding agreement with the foreign country to eliminate or phase out the foreign policy or practice.<sup>29</sup>

Although an in-depth analysis of the changes made to Section 301 is beyond the scope of this comment, it is important to note that the changes are primarily geared toward creating and enforcing the reciprocity of foreign market access. The imposition of mandatory retaliation for unjustifiable trade policy or practice outside of a trade agreement is new, leaving intact the option of discretionary action for those that are unreasonable or discriminatory. Presidential discretion has been reduced<sup>30</sup> so that in all practicality his involvement will be limited to the most important actions related to national foreign policy. There are stringent time limits placed on the USTR for each stage of a Section 301 action, and a more strict reporting requirement to the Congress.<sup>31</sup> The definition of “unreasonable” was expanded to include violations of worker rights and denials of intellectual property rights, export targeting, and foreign government toleration of “systematic anticompetitive activities.”<sup>32</sup> Beyond these changes, the new Section 301 contains a provision popularly called the “Super 301”<sup>33</sup> which is a brand new tool intended to create a broad, systematic approach to opening up a targeted foreign market. “Super 301” is largely the result of intensive lobbying by special interest groups impatient with the sector-by-sector approach for opening up a foreign market that was time consuming and which allowed the foreign country to merely shift any barrier to another trade sector.<sup>34</sup>

Under “Super 301,” the USTR is required to identify in

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28. *Id.* § 2411(b)(1).

29. *See id.* § 2411(c)(1).

30. Under the new Section 301, the USTR is the chief executive, “subject to Presidential discretion, if any.” 19 U.S.C. § 2411(a)(1). For a Congressional debate on presidential discretion, see 154 CONG. REC. 114, S-105660 (daily ed. Aug. 3, 1988)(debate on the words “if any”).

31. *See* 19 U.S.C.A. §§ 2411(b)(2)(C), 2414(a)(2), 2414(a)(3)(B)(iii), 2417(c)(2) (West Supp. 1988).

32. *See id.* § 2411(d)(3)(b)(iii).

33. *Id.* § 2420.

34. *See* Int’l Div., U.S. Chamber of Commerce, THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, A STRIGHTFORWARD GUIDE TO ITS IMPACT ON U.S. AND FOREIGN BUSINESS (1988).

1989 and again in 1990: (1) the unfair trade practices that, if eliminated, would result in the most significant increase in U.S. exports ("priority practices"), and (2) the country that has engaged in those practices in the most systematic and pervasive manner ("priority country").<sup>35</sup> Factors identifying priority practices include the competitive position and export potential of U.S. goods and services, whether the sale of a product has implications beyond its actual value; and the medium and long-term implications of such practices for foreign government procurement commitments to U.S. exports.<sup>36</sup> Factors identifying priority countries include the number and pervasiveness of those practices and the reasonable level of U.S. exports that could be expected under full compliance with existing agreements.<sup>37</sup> Once identified, the country has three years to gradually eliminate the market barrier or to offer equivalent U.S. trade benefits in another area.<sup>38</sup> Sanctions for non-compliance under Super 301 are not clearly spelled out, but they are presumably the same as those under Section 301.<sup>39</sup>

### III. SECTION 301 IN U.S.-KOREA TRADE

The U.S.-Korea relationship has a relatively short history. Fittingly labeled the "Hermit Kingdom," Korea was slow to join the westernization movement of its neighbors prior to the Korean War (1950-1953).<sup>40</sup> However, following the devastation of the war, the government launched on an economic development that has flourished with amazing speed. Korea's overall economy has grown at the highest average annual rate in the world.<sup>41</sup> For example, Korea's per capita Gross National Product (GNP) has grown from \$395 in 1962 to an estimated GNP of \$3,728 in 1988.<sup>42</sup> Since 1986 Korea has been paying off its foreign debt,

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35. See 19 U.S.C.A. § 2420(a)(1)(A)-(B) (West Supp. 1988).

36. *Id.* § 2420(a)(3).

37. *Id.* § 2420(a)(2).

38. *Id.* § 2420(c)(1)(A)&(B).

39. *Id.* § 2411(c)(1).

40. Technically the war, termed a "police action" by the United Nations, never ended. There is only a ceasefire. For a description of current conditions at the 38th parallel and general political unrest in South Korea, see Wysocki, *Korean Military Shows New Restraint, Old Restiveness*, *Wall Street J.*, Sept. 15, 1987, at 30, col. 1.

41. Korea Development Institute as reported in *Korean Economy Fights Against Uncertainties Ahead*, *KOREA BUS. WORLD*, Feb. 1988, at 15.

42. *Major Economic Indicators*, *BUS. KOREA*, Jan. 1989, at 72.

and expects to be a net creditor by 1990, ahead of the government's original target date of 1992.<sup>43</sup>

There are two major sources of Korea's economic success which merit special mention. One is the neo-Confucian tradition which still permeates the Korean society. Within this tradition the government takes the role of a benevolent, if not controlling, father who guides every aspect of its people's lives, ever encouraging frugality and modest individual consumption coupled with national loyalty.<sup>44</sup> The other equally important source of Korea's economic success has been its trade relationship with the U.S.<sup>45</sup> Although U.S. aid began initially in commodities, by the 1960's it was based on development loans. These loans, combined with the government's strong lead,<sup>46</sup> enabled Korea to build a strong export program. Korea's efficient labor and an abundant U.S. market have combined to form a compatible and successful match for several decades.

Nevertheless, it looks as though the "honeymoon" has been over for some time in the U.S.-Korea trade relationship. The Korean trade deficit with the U.S. shrank incrementally beginning in the 1960's, until Korea registered a \$2 billion surplus in 1982.<sup>47</sup> This surplus continued to grow until 1987 despite U.S. limitations on certain exports and a large number of antidumping, countervailing, and Section 337 sanctions that have been levied against Korea.<sup>48</sup> Section 301 actions have also been used, mostly in 1987 and 1988, shortly after the initial U.S. deficit with Korea. Despite their recent utilization, Section 301 actions have proven to be a particularly sore spot due to the subjective and unilateral nature of the provision.

Section 301 actions in the U.S.-Korea trade context have been used to further two major U.S. interests: (1) providing market access to U.S. insurance services and agricultural products

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43. *Moving From Borrower to Lender*, BUS. KOREA, Oct. 1988.

44. See Lee, *Some Aspects of Korea/U.S. Trade*, 11 KOREAN J. COMP. L. 19, 30 (1983).

45. *Id.* at 20.

46. For a thorough discussion and a Korean perspective on government control of trade, see *id.* at 30-35.

47. See Young, *Import Liberalization and Industrial Adjustment in Korea* KOREA'S ECON., Aug. 1987, at 10.

48. For a comprehensive review of trade violation actions taken by the USTR against Korea, see Junker, *U.S. Regulation of Imports: An Overview of Principal Statutes and Procedures*, 12 KOREAN J. COMP. L. 109 (1984).



such as cigarettes, beef, and wine; and (2) protecting U.S. intellectual property rights.

### A. Insurance Market

In 1985 the USTR initiated an investigation<sup>49</sup> into Korea's policy of restricting U.S. insurance firms interested in underwriting fire and life insurance policies for the Korean market.<sup>50</sup> Korea's prior restrictions were in violation of the national treatment clause of Article VII of the U.S.-Korea Friendship, Commerce, and Navigation (FNC) Treaty.<sup>51</sup> This investigation was terminated<sup>52</sup> following Korea's agreement to license qualified U.S. insurance firms to underwrite both life and non-life insurance policies for the Korean public. As a result, by October 1988, three U.S. insurance firms established joint ventures in Korea.<sup>53</sup>

Korean officials are quite unhappy with this result noting that the use of Section 301 to open the Korean service market presents an inequitable insertion of the FNC treaty as the basis of forced market access. They specifically lament the Treaty's lack of exceptions for the cultural purpose of infant-industry protection. In their view such strict enforcement of the Treaty allows no room for self-regulation of trade and would lead to virtually free trade at a great risk to domestic infant industry. However, U.S. officials have not been sympathetic toward the infant-industry argument. Charging that the insurance market had been monopolized by six Korean companies providing inadequate coverage at high premiums, they hale the influx of U.S. companies as a means of providing greater coverage at a more reasonable rate.<sup>54</sup>

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49. 50 Fed. Reg. 37,609 (1985).

50. South Korea's insurance market is the eleventh largest in the world, according to Gordon Cloney, President of the International Insurance Council. *Trade Policy, South Korea Agrees to Permit U.S. Insurers to Form Joint Ventures*, Daily Rep. for Executives, (BNA) (Jan. 29, 1988) (LEXIS, Itrade library, Intrad file).

51. Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of Korea, Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947.

52. 51 Fed. Reg. 29,446 (1986).

53. These firms are SIGNA, American International Group, and Aetna. Another handful of American companies are negotiating joint ventures. See 50 Fed. Reg. 37,609 (1988).

54. See, e.g., Comments by J. Booth, Vice President of the American Chamber of Commerce in Korea, in *A View From Both Sides*, BUS. KOREA, Oct. 1988.

### B. Agricultural Products

The first in a series of conflicts over market access of agricultural products concerned U.S. made cigarettes. Petitioned by the United States Cigarette Export Association in 1988,<sup>55</sup> the USTR determined<sup>56</sup> that the Korean policy of non-access to U.S. cigarettes constituted a violation of Section 301. When news of the investigation reached the Korean public, there were angry anti-American protests on the streets of Seoul decrying the U.S. policy of "exporting cancer."<sup>57</sup>

The U.S. tobacco industry admitted that it was seeking foreign markets due to the slump suffered in the domestic market.<sup>58</sup> It asserted, however, that there was a demand for U.S. cigarettes and that the Korean people had the "right" to purchase them. It charged that the Korean government was not concerned about the health effects of cigarettes on its people, since the Korean tobacco industry was already being subsidized. Korea countered again with the infant industry argument and right to self-regulation, but ultimately Korea capitulated<sup>59</sup> by committing to provide non-discriminatory market access to U.S. cigarettes. Another U.S. product seeking access to the Korean market is high quality beef. In March 1988, the American Meat Institute, the lobbying arm of U.S. livestock raisers, petitioned the USTR to investigate the possibility of re-opening the Korean beef market.<sup>60</sup> The Institute demanded that Korea import between \$10-17 million in high-quality beef for a net profit of \$5 million. Even though the monetary amount of this demand was small, Korean farmers staged a violent protest. The protesters, most of them one-cow farmers who subsist on a marginal income from small farms, accused the Korean Minister of Agriculture of being willing to kill ten million farmers in order to please the U.S.<sup>61</sup> The national press joined the protest, calling the U.S. "arrogant" and "insolent," and depicting America in cartoons as a big bully and a gun-slinging cowboy.<sup>62</sup>

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55. 53 Fed. Reg. 4,926 (1988).

56. *Id.*

57. *See Is U.S. Ire Over Trade Bark, Bite, or Both?*, KOREA BUS. WORLD, Mar. 1988, at 38.

58. *Id.*

59. 53 Fed. Reg. 20,406 (1988).

60. 53 Fed. Reg. 10,995 (1988).

61. *See Gittelsohn, Where the Beef Really Is In U.S./Korean Trade Fight*, KOREA BUS. WORLD, Feb. 1988, at 29.

62. *Id.*

Here in the U.S., the American cattle business had fallen into a slump from a drop in beef sales due to the anti-red meat campaign. Amid accusations that USTR Clayton Yuetter took on a meritless Section 301 case because of his hometown ties to beef-raising Nebraska, the two governments were not able to reach an agreement.<sup>63</sup> This dispute has subsequently been referred to a GATT panel.<sup>64</sup> Meanwhile, Korea has temporarily fended off U.S. pressures by agreeing, over violent public protests, to a one-time purchase of 14,500 metric tons of U.S. beef in 1988.<sup>65</sup> The third agricultural group to seek entry into the Korean market was the wine industry. Following a petition filed by the Wine Institute and Association of American Vinters, the USTR initiated investigation into the Korean wine market in June 1988.<sup>66</sup> The petition charged as unfair Korea's import barriers, including 100% tariff on table wines and a quota on imports, an absolute ban on imports of sparkling wine, wine coolers, brandy and dessert wines and non-grape wine; and labeling, packaging, and certification requirements impeding access to the Korean market.<sup>67</sup> On January 18, 1989, the USTR announced that the two countries had reached agreement according national treatment to U.S. made wines.<sup>68</sup> The Korean reaction to this result has been similar to reactions to other agricultural issues: liberalizing the wine market interferes with the domestic policy of infant industry and self-reulation based on Confucian style of frugality.<sup>69</sup>

### C. Intellectual Property Rights

The first investigation in intellectual property rights area was initiated in 1983 when allegations were made that Korean

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63. *Id.*

64. If the GATT panel finds the U.S. position valid, it may recommend possible countermeasures. However, the U.S. still has the option to push through the 301 actions. See *Is U.S. Ire Over Trade Bark, Bite, or Both?*, *supra* note 57, at 38-39.

65. *South Korea Unilaterally Loosens Quotas on Beef Imports, Creates Governing Body*, 5 Int'l Trade Rep. (BNA) 1016 (Aug. 3, 1988).

66. 53 Fed. Reg. 22,607 (1988).

67. *Id.*

68. 54 Fed. Reg. 4,099 (1989).

69. Outside of these products, Korea is the fourth largest importer of U.S. agricultural products. Nearly half of Korea's agricultural imports are comprised of U.S. wheat, corn, cotton, and soybeans. U.S. Dept. of Ag. figures reported in *The Changing Nature of U.S.-Korea Agricultural Trade: A Development Perspective*, KOREA'S ECON., Dec. 1988, at 12.

rope products were infringing U.S. trademarks.<sup>70</sup> This issue was resolved when Korea agreed to stop the alleged violation.<sup>71</sup>

The second investigation, the Korea Intellectual Property investigation, was self-initiated by the USTR in November 1985.<sup>72</sup> It sought to change South Korean copyright and patent laws which allegedly restricted U.S. sales and investment in Korea by denying effective protection to the intellectual property of U.S. firms.<sup>73</sup> Prior to the investigation, Korea's copyright law, which only protected works first published in Korea, allowed the works of American authors and computer software designers to be copied and sold in Korea without payment of royalties or license fees. Korean patent law also expressly excluded from patentability inventions concerning foods, beverages, medicine and chemical substances, and extended most patents only to methods of manufacture rather than to end products.<sup>74</sup> After a number of consultations and negotiations, this investigation terminated in 1986 with Korea agreeing, among other concessions, to enact in 1987 comprehensive copyright laws explicitly covering computer software and acceding to existing international copyright laws.<sup>75</sup>

#### *D. Section 301 Actions Under the New Trade Bill*

The first Section 301 petition to be filed against Korea under the new Trade Bill was instituted by the Motion Picture Export Association of America (MPEAA) in October 1988.<sup>76</sup> This petition was voluntarily withdrawn later the same month when Korea again agreed to undertake in good faith means to assure U.S. film companies unencumbered access to the Korean market.<sup>77</sup> According to the Korean press, this was hardly a 301 case, since the petition was based on private protests at movie theatres showing U.S. movies which had been imported after the government had already liberalized import barriers earlier in the

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70. 48 Fed. Reg. 20,529 (1983).

71. 48 Fed. Reg. 55,790 (1983).

72. 50 Fed. Reg. 45,883 (1985).

73. *Id.*

74. See Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1144-45 (1987).

75. 51 Fed. Reg. 29,445 (1986).

76. *U.S., South Korea Reach Accord on Movie Distribution, Avoiding 301 Case*, 5 Int'l Trade Rep. (BNA) 1444 (Nov. 2, 1988).

77. *Id.*

year.<sup>78</sup> The most likely area of future Section 301 activity is in intellectual property protection. While many copyright issues were resolved with a Section 301 action in 1986,<sup>79</sup> two U.S. pharmaceutical companies<sup>80</sup> have filed and subsequently withdrawn petitions requesting investigations under Section 301, alleging that the government is not enforcing U.S. patent rights. Their withdrawal was only a conditional one, based on action promised by the USTR's office that it would collect data from other U.S. firms in Korea.<sup>81</sup> Pursuant to that promise, in June 1988, then USTR Yuetter announced the establishment of an interagency fact-finding task force to investigate the policies and practices of the Korean government for obtaining and enforcing patents.<sup>82</sup> If the task force concludes that the Korean government is not enforcing the laws for protecting U.S. intellectual property, then the two petitions which had been withdrawn when the task force was launched, will be refiled.<sup>83</sup> Korean officials have admitted, at least outwardly, that stronger enforcement of U.S. intellectual property rights is necessary.<sup>84</sup> Additionally, they seem to be making some effort to back up that claim. At the request of the Ministry of Trade and Industry of Korea and sponsored by several government instrumentalities, the First Korean-U.S. Intellectual Property Seminar was held in Seoul on November 9, 1988.<sup>85</sup> The seminar was geared primarily at educating the CEO's of major Korean businesses as to the implications of infringement and counterfeiting.

### *E. Summary of 301 Actions*

Former USTR Clayton Yuetter often referred to the effectiveness of Section 301 actions in the U.S.-Korea context in his open and vigorous opposition to changes in Section 301.<sup>86</sup> Ex-

78. *A Fatal Attraction?*, BUS. KOREA, Nov. 1988.

79. Hansen, *supra* note 74.

80. These companies are Bristol-Myers Co. and Squibb Corp. 53 Fed. Reg. 22,758 (1988).

81. *See id.*

82. Authority for this investigation is found under 19 U.S.C. § 2415 (1982). 53 Fed. Reg. 22,758 (1988).

83. *See* 53 Fed. Reg. 22,758 (1988).

84. *See* Chacko, *New Challenges for Korea and Taiwan*, BUS. KOREA, Nov. 1988; *see also* *Deficit Burden Heavy For U.S. Trading Partners*, KOREA BUS. WORLD, Jan. 1988, at 33.

85. *See* Chacko, *supra* note 84.

86. *See, e.g.,* *Yuetter Asserts Proposed Changes in Section 301 are Unnecessary, Would Harm U.S. Interests*, *supra* note 17.

cept for the action involving beef, Section 301 actions have resulted in swift agreements in favor of the U.S. Even at the risk of angering the Korean public, the Korean government has been careful to accommodate U.S. demands. Had it not been for the political significance of the beef issue, Korea would have also accommodated the U.S. long before the resulting deadlock. If the GATT panel decides for the U.S., Korea may have no choice but to acquiesce on that issue as well, because it cannot afford U.S. sanctions under Section 301. This result would be unfortunate because the Korean government would suffer serious political repercussions, and many one-cow farmers would lose their livelihood while the overall benefit to the U.S. industry would amount to only \$5 million. Beef is not the only area where a U.S. industry may have become "301-happy" with Korea. An example of a group taking the section too far is illustrated by the petition filed by MPEAA in response to private protests by Korean citizens at theatres showing U.S. films. As a result of that petition, the Korean government has been placed in a role of not only liberalizing U.S. film imports to Korea, but also of assuring that U.S. films get unencumbered access in the Korean market—i.e., that there are no further private protests. In this process, the Korean government must quash the freedom of expression of the Korean people on top of having already threatened the livelihood of the protesters whose infant industries were placed at risk. Even without an extensive analysis, this example illustrates the heavily criticized unilateral nature and the potential abuse of Section 301. On the other hand, there are promising areas of Section 301 action that would result in better protection for U.S. companies without generating intense international criticism or Korean ire. Intellectual property is such an area. It appears that there is concern on both sides that U.S. rights are not being protected adequately. Having already acknowledged inadequate protection of U.S. rights in this area, the Korean government no doubt expects to extend U.S. protection through continued Section 301 actions if necessary.

Thus, while Section 301 has the potential for being a useful tool for improving the U.S.-Korea trade imbalance, it should be used carefully and only where substantial benefit for the U.S. could result. By pushing Korea on issues where there is little benefit to the U.S. or where the Korean government would have to move with a heavy hand against the free expression of its people, the U.S. might one day go too far.

## IV. "SUPER 301" IN THE U.S.-KOREA TRADE

Super 301 has never been tried before. All eyes are on the office of the USTR as it prepares to determine which country will be selected under the new provision.<sup>87</sup> This process will be triggered on April 30 this year when the USTR issues its National Trade Estimates report identifying foreign market barriers and unfair trade practices. By May 30, USTR must single out those foreign countries and practices on its list that will be investigated, and the cases against them must be initiated by June 30. According to the latest reports, the USTR's office is playing its cards "close to the chest."<sup>88</sup>

According to some trade experts, Korea is the most likely candidate for either 1989 or 1990 to be identified as the "priority" country under "Super 301."<sup>89</sup> The selection will be limited to the largest trading partners of the U.S. The new Bush administration will most likely choose a country whose selection will draw the least international criticism and/or complications in implementation of retaliatory action. Countries in the European Economic Community (EEC) are in all likelihood not vulnerable,<sup>90</sup> given the importance of the EEC to the negotiating interests of the U.S. in the Uruguay round of GATT. The more prominent trading partners in Latin America (such as Mexico, Brazil, or Argentina) may be considered too weak to withstand

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87. See *New Bush Administration and Congress Likely to Make Trade a High Priority Again in 1989*, 6 Int'l Trade Rep. (BNA) 113 (Jan. 25, 1989).

88. *News*, 6 Int'l Trade Rep. (BNA) 166 (Feb. 8, 1989). As of the date this comment was submitted for publication, no decision had been made. Even if Korea is not selected for 1989, it could still be chosen in 1990.

89. Telephone interview with John Howard, Section 301 Chairman, International Chamber of Commerce (Oct. 10, 1988) (stating that South Korea was the prime target for Super 301); see also Lande, *Paving the Way for Retaliation or Reconciliation?*, BUS. KOREA, Sept. 1988; *U.S. Should Support Pacific FTA To Counter 'Protectionist' EC 1992 Plan*, Packwood Says, 6 Int'l Trade Rep. (BNA) (Feb. 15, 1989) (LEXIS, Itrade library, Intrad file) (Senator Packwood forecasting that Japan may be high on the list, but also naming the EC and South Korea for telecommunications violations); *USTR Hills Refuses to Cite Japan As Major Unfair Trading Partner*, Daily Rep. for Execs. (BNA) No. 39 (March 1, 1989). But see *Super 301, FBX: Danforth predicts Japan will be cited as unfair trade partner*, 6 Int'l Trade Rep. (BNA) 166 (Feb 8, 1989) (LEXIS, Itrade library, Intrad file); *U.S. Senators Urge Hills to Put Japan on "Super 301" List*, Kyodo News Service (Mar. 2, 1989) (LEXIS, Nexis Library, Omni file) (Senator Bentsen, Chairman of the Finance Committee, and Senator Danforth, a key author of the Trade Bill, urging USTR Hills to put Japan on Super 301 list.).

90. But see *European Community, EC Concerned About Being On U.S. Target List of Nations Having Unfair Telecom Practices*, 6 Int'l Trade Rep. (BNA) 139 (Feb. 1, 1989).

such strong action. Japan has been steadily improving its trade relations with the U.S. so that it has recently drawn public praise from Secretary Schultz for its liberalization policies.<sup>91</sup> Hong Kong and Singapore are competitive countries, but have largely open markets. Even though Taiwan may also be a prime target, most experts agree that the U.S.-Taiwan trade has not been as riddled with market access problems as the U.S.-Korea trade has been.<sup>92</sup>

But beyond the emotional rhetoric, there is very little substantive data on which to select Korea as the priority country. Korea has thus far met U.S. demands in all but one Section 301 action in a quick and an accommodating manner. The beef issue, now at the GATT panel, will not make a significant difference to the U.S. economy<sup>93</sup> while dealing a harsh economic and political blow to Korea. Even though substantial violations may exist in the intellectual property area, nothing has been affirmatively found. Moreover, even if violations are found, there is not the same political explosiveness accompanying this issue as there is with the beef. Having already pledged to support U.S. intellectual property rights,<sup>94</sup> the Korean government will no doubt respond to negotiations or a regular Section 301 action short of a Super 301 action. The premature and unjustifiable imposition of a Super 301 action would only irritate a sore spot between the two governments when a lesser and more friendly approach would solve the problem and protect U.S. credibility in the eyes of the international community.

In addition to the scarcity of substantive data, there are overriding reasons to spare Korea from Super 301 sanction. There have been drastic changes in the two most important resources for Korea's success: cheap labor and favorable trade conditions with the U.S. Labor costs have doubled in the past two years due to an accelerated labor movement in Korea.<sup>95</sup> At the same time, the U.S. dropped Korea from its Generalized Prefer-

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91. *Secretary of State Shultz Warns Nations of Pacific Against Economic Complacency*, 5 Int'l Trade Rep. (BNA) 1283 (Sept. 21, 1988).

92. *See New Challenges for Korea and Taiwan*, BUS. KOREA, Nov. 1988.

93. *See supra* notes 60-65 and accompanying text.

94. *See supra* notes 84-85 and accompanying text.

95. For a discussion on the Korean labor movement and wage development, see *Spring Labor Offensive Comes Under New Leader, New Rules*, KOREA BUS. WORLD, Feb. 1988, at 35. *See also* Darlin, *Korean Labor Movement's Woes Raise Doubts About its Survival*. . . , Wall Street J., Sept. 9, 1987, at 32, col. 1.



ence Systems (GSP) list<sup>96</sup> and further restricted quotas on Korean imports of textiles and steel products.<sup>97</sup> Furthermore, Korea has frantically been trying to reduce its trade surplus with the U.S. In the first six months of 1988, Korean exports to the U.S. increased 11.7% to 9.5 billion, while imports to Korea rose nearly four times by 43.3%, to \$5.6 million.<sup>98</sup> Korea's surplus with the U.S. is estimated to be \$8.47 billion in 1988, down from the 9.5 billion figure in 1987, and is projected to shrink to \$6.5 billion in 1989.<sup>99</sup> Although Korea's liberalization is not going fast enough for the U.S., Korean officials assert that they are doing all they possibly can to balance trade.<sup>100</sup> According to some in the international market, Korea is "giving more than Japan or Taiwan."<sup>101</sup>

In the face of these recent developments, the Korean economy is simply too fragile to take a hard blow. Even though the Korean economy is developing at an unprecedented rate,<sup>102</sup> it has only been "in the black" for little over three years.<sup>103</sup> The government is in a real bind between trying to meet the U.S. demand to appreciate the Korean Won<sup>104</sup> and responding to the labor population whose wages have doubled in the last two years.<sup>105</sup> Additionally, the Korean agricultural sector is on the

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96. The GSP system was created by the United States Trade Act of 1974 and put into effect in 1976. 19 U.S.C. § 2461-65 (1982). It authorized the President to exempt from import duties certain eligible products imported into the U.S. from designated developing countries. South Korea, Taiwan, Hong Kong, Brazil, and Mexico were designated as GSP countries in 1976. Of those, Korea, Taiwan, Signapore, and Hong Kong were dropped from the GSP list in May 1988. 53 Fed. Reg. 15,785 (1988). Korea's cost of being dropped will be an annual \$60 million. *Korea's Exports Face End of GSP Favors in U.S., E.C.*, KOREA BUS. WORLD, Jan. 1988, at 36.

97. 53 Fed. Reg. 27,542 (1988) (Steel Sheets Review); 53 Fed. Reg. 16,759 (1988) (Trade Limit Revision on Textiles).

98. See *New Challenges for Korea and Taiwan*, *supra* note 92.

99. Moffat, *U.S. Prodding to Cut Trade Imbalance is Stirring Hornet's Nest in South Korea*, Wall Street J., Feb. 3, 1989, at A10, col. 1.

100. See *Korea, U.S. Move Too Slowly to Suite Each Other's Needs*, KOREA BUS. WORLD, Jan. 1988, at 30.

101. See Moffat, *supra* note 99.

102. See *supra* notes 43-45.

103. See *Current Account Surplus: A Hot Potato for Korean Economy?*, KOREA BUS. WORLD, Feb. 1988, at 19.

104. The Korean Won appreciated 16% in 1988, more than the 15% urged by the U.S. Wall Street Journal. Moffat, *supra* note 99. It is projected to appreciate another 7-8% in 1989. *Healthy Slowdown Expected*, BUS. KOREA, Jan. 1989, at 11 (Bank of Korea projection).

105. See *Spring Labor Offensive Comes Under New Leader, New Rules*, *supra* note 95.

verge of collapse.<sup>106</sup> According to many Korean economists and officials, agriculture may no longer be a viable industry in Korea. This will mean a massive economic reform to industrialize the rural areas, which even though already begun, will need at least 10 years for completion by some estimates. An unanticipated speed-up of this time frame would mean a mass exodus of the rural population into the urban areas, with its accompanying difficulties of housing, unemployment, and social problems.<sup>107</sup>

There are also some serious questions regarding Korea's responsibility for the economic well-being of the U.S. Despite the dramatic increase in the per capita GNP of Korea, it is still only about one-fifth that of the United States.<sup>108</sup> Moreover, the Korean economy is dangerously dependent on trade.<sup>109</sup> Any changes in the trade area will have a great impact on the Korean economy. One international economist emphasizes:

Speaking as an economist . . . whatever Korea does will have a tiny and almost insignificant effect on the U.S. economy. Because if the real problem is in the U.S., no matter what Korea does, it's not going to solve the problem. And there could be significant cost to the Korean economy. I don't believe the U.S. is in a position to ask a country like Korea, with much smaller per capita income . . . to do things on behalf of the rest of the world at this moment. Korea should do things on behalf of Korean people. It's far too small and young in the development process.<sup>110</sup>

Finally, the U.S. cannot afford any more bad press in the international community. With Uruguayan Round at its halfway mark, the U.S. needs to regain the support of the EEC and GATT representatives who have been intensely critical of Section 301's "license to retaliate" whenever it wished, irrespective of GATT standards.<sup>111</sup> The U.S. will especially need good rela-

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106. Today, agriculture accounts for 24% of employment and 14% of GNP in Korea. Young, *Import Liberalization and Industrial Adjustment in Korea*, KOREA'S ECON., Aug. 1987, at 3; see also *Korea Trade Policy and Its Implications for U.S./Korea Cooperation*, KOREA'S ECON., May 1988, at 3.

107. Young, *supra* note 47, at 3.

108. See Lee, *Some Aspects of U.S.-Korean Trade Relations*, 11 KOREAN J. COMP. L. 19, 40 (1983).

109. See *supra* note 8.

110. See *Korea is Not a Second Japan*, KOREA BUS. WORLD, Feb. 1988, at 10 (Interview with Professor Jeffrey D. Sachs of Harvard).

111. See *New U.S. Trade Law is Protectionist, European Community Tells GATT Council*, 5 Int'l Trade Rep. (BNA) 1302 (Sept. 28, 1988).

tions with Korea as it contemplates free trade agreements with the Association of South East Asian Nations (ASEAN)<sup>112</sup> to begin in 1991. It should show the world and the people of Korea that it is sensitive to the economic and political realities of a growing nation which needs time to work out its various growing pains.

## V. CONCLUSION

There is very little substantive data in the Section 301 area which supports the current level of anti-Korean sentiment in the U.S. Korea has acquiesced to every U.S. demand for market access thus far except one, in which acquiescence would constitute complete abandonment of governmental responsibility. The suspected intellectual property violations, under preliminary investigation now, may prove to be an area where Section 301 sanctions will be effective and responsible. In the meantime, there is very little basis for finding Korea a prime target for the "Super 301" mandate. As former USTR Yuetter has emphasized, Section 301 should be a tool of strength, not of arrogance.<sup>113</sup>

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112. The ASEAN free trade agreements would involve South Korea, Taiwan, and the Pacific Region in general. 53 Fed. Reg. 179 (1988); see also *U.S. Should Support Pacific FTA to Counter 'Protectionist' EC 1992 Plan*, Packwood Says, 6 Int'l Trade Rep. (BNA) 166 (Feb. 8, 1989) (LEXIS, Itrade library, Intrad file).

113. See remarks made by former USTR Yuetter at the Dataquest Semiconductor Industry Conference in San Diego, Fed. News Serv., Oct. 17, 1988 (LEXIS, Nexis library, Omni file).