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Trade Agreement Monitoring and Enforcement: Issues for Congress

Dick K. Nanto and Mary Jane Bolle, Foreign Affairs, Defense, and Trade Division

February 12, 2001

Abstract. The policy issues for Congress surrounding the monitoring and enforcement of international trade agreements focus on three basic problems. The first is whether sufficient resources and the governmental organization exist to accomplish the task. The second and related issue is whether new data and information should be generated to determine whether trade agreements are being fully implemented. A third issue is the effectiveness of various monitoring and enforcement approaches and whether the WTO dispute settlement mechanism is effectively resolving complaints.

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Updated February 12, 2001

Dick K. Nanto
Specialist in Industry and Trade

Mary Jane Bolle
Specialist in International Trade
Foreign Affairs, Defense, and Trade Division

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Summary

Trade agreement monitoring and enforcement refers to U.S. efforts to gauge the effect of agreements dealing with international trade and to ensure that each signatory nation complies with the provisions of such agreements. If other signatory nations fail to fulfill the provisions of their agreements, American businesses may be placed at a competitive disadvantage. In addition, the perception that other countries fail to live up to their commitments in trade agreements undermines support for trade liberalization efforts. Congress also has interest in trade agreement monitoring and enforcement because of complaints from U.S. companies when provisions of agreements are not implemented and due to the rising U.S. trade deficit.

Nearly 300 international trade agreements are currently in force to which the United States is a party. These include 26 WTO agreements, the North American Free Trade Agreement, 26 other agreements with more than one signatory nation, and 238 bilateral agreements with countries such as Japan, China, Canada, and Israel.

U.S. monitoring and enforcement occurs on several levels. First is the gathering of data and investigation into foreign trade barriers or unfair trade practices that might violate trade agreements with the United States or U.S. trade law. Second is attempts to resolve such alleged violations through consultations and negotiations. Third is to take unresolved violations through formal dispute resolution processes such as those under the World Trade Organization and the North American Free Trade Agreement.

In response to concerns over the effectiveness of U.S. Government monitoring and enforcement activities, Congress has provided additional funding for federal agencies including the U.S. Department of Commerce, the Office of the U.S. Trade Representative (USTR), and the U.S. Departments of Agriculture and State. Both the Department of Commerce and USTR created trade monitoring and compliance units in 1996. Proposals also have been made to create a Congressional Trade Office whose responsibilities would include monitoring trade agreements.

In the Congress, the issue of compliance and monitoring of trade agreements was raised during the debate over granting permanent normal-trading-relations (PNTR) status to China and its entry into the World Trade Organization. The 106th Congress created a U.S.-China Security Review Commission to review the national security implications of trade and economic ties with China. It also required an annual assessment of China's compliance with its WTO trade obligations.

The policy issues for Congress surrounding the monitoring and enforcement of international trade agreements focus on three basic problems. The first is whether sufficient resources and the governmental organization exist to accomplish the task. The second and related issue is whether new data and information should be generated to determine whether trade agreements are being fully implemented. A third issue is the effectiveness of various monitoring and enforcement approaches and whether the WTO dispute settlement mechanism is effectively resolving complaints.

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Trade Agreement Monitoring and Enforcement: Issues for Congress

Trade agreement monitoring and enforcement refers to U.S. efforts to gauge the effect of agreements dealing with international trade and to ensure that each signatory nation complies with the provisions of such agreements. This has become a concern because in trade agreements the United States generally accords foreign businesses greater access to U.S. markets in exchange for trade liberalization in foreign markets. If other signatory nations fail to fulfill the provisions of their agreements, American businesses may be placed at a competitive disadvantage relative to businesses in the foreign countries. In addition, the perception that other countries fail to live up to their commitments in trade agreements undermines support for trade liberalization efforts. Congress also has interest in trade agreement monitoring and enforcement because of complaints from U.S. companies and due to the rising U.S. trade deficit.

The U.S. Government's monitoring and enforcement activities for international trade are primarily centered in the Office of the U.S. Trade Representative and U.S. Departments of Commerce and State, and, for agricultural products, the Department of Agriculture. The Departments of the Treasury, Labor, Justice, Interior, Energy, Defense, Transportation, Health and Human Services as well as agencies such as the International Trade Commission and Environmental Protection Agency and others also play a role.

The monitoring and enforcement process occurs on several levels. With respect to monitoring, the Federal Government attempts to identify instances in which foreign laws, regulations, and practices may be inconsistent with trade agreements. These government activities include gathering data and conducting investigations into foreign trade barriers or unfair trade practices that might violate agreements with the United States or U.S. trade law. Once apparent violations are identified, the Federal Government attempts to resolve them through consultations, negotiations, or the application of U.S. trade remedy laws. If the violation is covered by international trade agreements with dispute resolution mechanisms, the U.S. Trade Representative must take such unresolved violations through formal international dispute resolution processes – such as those under the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA). The WTO's strengthened dispute resolution mechanism – unlike the process under the General Agreement on Tariffs and Trade (GATT) that it replaced in 1996 – is designed to provide finality. This mechanism provides a means for violations of WTO agreements to be resolved through a consultation and quasi-litigation process.

In response to concerns over the effectiveness of U.S. Government monitoring and enforcement activities, the 106th and previous Congresses appropriated additional funding for those purposes to the U.S. Department of Commerce, the Office of the U.S. Trade Representative, and the U.S. Departments of Agriculture and State. Both the Department of Commerce and Office of the U.S. Trade Representative created

trade monitoring and compliance units in 1996. Proposals also have been made to create a Congressional Trade Office (S. 274, 107th Congress, Baucus).

In the Congress, the issue of compliance and monitoring of trade agreements was raised during the debate in 2000 over granting permanent normal-trading-relations (PNTR) status to China and its entry into the World Trade Organization. Many Members raised concerns that China's record for complying with past trade agreements was mixed at best. The law granting PNTR status to China (P.L. 106-286) contains provisions requiring an annual assessment of China's compliance to its WTO trade obligations. In the spring of 2000, the Clinton Administration also announced an initiative aimed at ensuring China's WTO compliance and requested additional funding.[1] The FY2001 appropriations bill for the Departments of Commerce, Justice, and State (P.L. 106-553) included a nearly 16% increase for the office of the USTR so it could hire 25 new employees – primarily to monitor and enforce trade agreements.[2] These budgetary and enforcement issues may arise again in the 107th Congress. The 106th Congress also established a U.S.-China Security Review Commission to review the national security implications of trade and economic ties between the United States and China (P.L. 106-398) and appropriated $3 million for it for FY2001.

Background

Globalization, faster and cheaper communications, reduced shipping costs, and the development of world markets, have combined to give international trade and investment a larger role in U.S. economic life. Currently, Americans export about $1 trillion worth of goods and services or about 10% of U.S. gross domestic product, while they import about $1.4 trillion of goods and services creating a trade imbalance of roughly $400 billion. World exports of goods and services have reached $7 trillion. Foreign direct investment in U.S. businesses and real estate has been running at about $300 billion each year.

The international rules that govern most international trade and investment are established in agreements of the World Trade Organization (WTO). If such agreements are signed by all members, they are considered to be multilateral. If they are signed a number of but not all the members, they are referred to as plurilateral (with several countries). The large number of WTO members (currently 140) and the fact that WTO rules represent a negotiated consensus among those members means that WTO agreements contain only those provisions with worldwide support. When a consensus on new trade liberalization cannot be reached, nations often turn to bilateral or regional trade agreements that augment or exceed WTO requirements (or are with countries which are not members of the WTO).

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[1] See CRS Report RL30555, *China-U.S. Trade Agreements: Compliance Issues*, by Wayne M. Morrison.

[2] Congress Ups Funding for USTR. *Washington Trade Daily*, December 21, 2000.

The U.S. Department of Commerce maintains a database of nearly 300 international trade agreements currently in force for which the United States is a party. These include 26 WTO agreements, the North American Free Trade Agreement (NAFTA), 26 other agreements with more than one signatory nation (e.g. with the European Union or such as the Berne Convention for the Protection of Literary and Artistic Works), and 238 bilateral agreements with individual countries such as Japan, China, Canada, and Israel. Many of the bilateral agreements focus on a single manufactured product or area (e.g., textiles, barley, intellectual property rights, or deregulation) and include no enforcement mechanisms because they are technically "written accords of negotiations." Some may not involve trade liberalizing measures or obligations.

Most U.S. trade agreements contain a variety of provisions that are aimed at removing barriers to American companies attempting to gain access to foreign markets. Compliance with the provisions of such agreements by the foreign signatory nations depends primarily on actions by the governments of the nations signing the treaties, particularly in reducing import tariffs or abolishing nontariff barriers that have been imposed by the government. Compliance becomes more complex, however, if the relevant barriers rest in industry structures or private actions that hinder access by foreign companies. Gaining access to some markets, for example, has been described as peeling an onion. When one barrier is stripped away, another appears.

At another level, some have asserted that trade agreements should be judged by their results. If official "trade liberalization" results in no increase in imports into the foreign country or rise in foreign market share, then it may be questioned whether or not the "trade liberalization" actually occurred. Of course, changes in trade flows depend also on efforts by exporters, demand by buyers, and macroeconomic conditions. Opening a door does not mean someone automatically enters. Likewise, opening a market, does not mean U.S. exporters automatically gain sales or market share. Still, in bilateral agreements that are aimed at lowering import barriers that have been keeping U.S. products from a particular market, in the medium-term, trade liberalization would be expected to have some impact on import flows.

Until recently, the monitoring and enforcement of trade agreements by the Federal Government was a somewhat *ad hoc* process that depended first on U.S. exporters or other interested parties to make and document complaints. These complaints, if corroborated by the government, were then taken to the applicable foreign government or trade body and attempts were made at resolution. Resolution often depended on U.S. leverage and the cooperation of the foreign government. If the problem involved an alleged violation of a multilateral agreement under the WTO (or its predecessor the General Agreement on Tariffs and Trade) or it violated an agreement that contained a dispute settlement mechanism, the U.S. Government could lodge an official complaint through the appropriate mechanism. The USTR also could self-initiate a complaint under Section 301 of the Trade Act of 1974 (as amended) or similar provision.

The weakness of this process became apparent during the 1990s when various studies attempted to determine the results of trade agreements, particularly those with

Japan.[3] The problems the studies uncovered were first, that the government had no central repository for trade agreements. Many of the agreements were not published, and there was no Federal agency that kept copies of all trade agreements and monitored compliance. This occurred because most of the agreements did not require Senate approval, and many were simply announcements, written accords that stated the results of negotiations, or memoranda of understanding. Second, it often was essential to keep the pressure on the foreign government to fully implement the agreements made. Third, there was no "one-stop shop" type of organization and there were insufficient agency personnel to handle the increasing number of trade complaints that were being raised. Fourth, no regularized process existed for U.S. businesses to determine whether the market access problems they encountered were covered by a particular trade agreement.[4]

As a result, in the mid-1990s, the U.S. Trade Representative (USTR) and the Department of Commerce (DOC) created trade agreement monitoring and enforcement units within their agencies. The Department of Agriculture already had organizations that performed these functions for agricultural trade. The chronology of actions that led to the creation of the monitoring and enforcement units at DOC and USTR are summarized in the accompanying box.

Monitoring and Compliance

The U.S. Government's monitoring and compliance process for international trade agreements is aimed at ensuring that benefits of such agreements are accorded to U.S. businesses. (This section deals only with industrial and service sectors, not agriculture.) The process requires four primary steps. The first is to determine whether benefits are being denied U.S. exporters – usually in response to a complaint by U.S. businesses. The second is to determine the appropriate avenue for possible resolution. The third is to consult with and negotiate with the foreign government to resolve the issue. If satisfactory results are not forthcoming, the fourth step is to litigate the issue through an appropriate dispute resolution process at the WTO or other institution. In some cases, the United States may impose trade sanctions if the dispute is not resolved.

The Department of Commerce provides the gateway for complaints by U.S. business about foreign trade problems dealing with industrial products and services. It seeks to ensure that benefits of trade agreements accrue to U.S. interests through activities in three areas: outreach, monitoring, and compliance. The first step in the

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[3] For example, see American Chamber of Commerce in Japan. *Making Trade Talks Work, Lessons from Recent History.* Tokyo, ACCJ, 1997. This was updated in 2000 and published as *Making Trade Talks Work, An On-The-Ground Analysis of U.S.-Japan Trade Agreements by American Business*. Tokyo, ACCJ, 2000. The 2000 study found that of 63 trade agreements between the United States and Japan, 53% were considered fully or mostly successful, while 47% fell short of this standard.

[4] For an extensive review of organizational aspects of the problem, see U.S. General Accounting Office. *International Trade, Strategy Needed to Better Monitor and Enforce Trade Agreements*. GAO/NSIAD-0-76, March 2000.

outreach program is to provide information on existing trade agreements. The DOC does this primarily through its Internet website which includes a database of the texts of nearly 300 trade agreements currently in force and which can be searched by both trading partner and subject.[5]

Creation of the Trade Agreement Monitoring and Enforcement Units in the Office of the U.S. Trade Representative and Department of Commerce

1979. Executive Order 12175 by President Jimmy Carter implemented Reorganization Plan No. 3 that assigned operational responsibility for monitoring compliance with international trade agreements to the Department of Commerce. (93 STAT. 1382)

1988. Section 301 of the *Omnibus Trade Act of 1988 (19 USC 2411)* classified violations of trade agreements as being subject to mandatory action by the USTR to enforce U.S. rights under the agreements or eliminate such violations. Section 306 (19 USC 2416) required the USTR to monitor the implementation of trade agreements and if such implementation was not satisfactory to take action as indicated in Section 301. No authority was given, however, under which *private* parties could trigger a U.S. government review of foreign compliance. The Act also established Super 301, Special 301, Section 1377, and Title VII.

January 1996. USTR Mickey Kantor announced the establishment of a permanent monitoring and enforcement unit at the Office of the U.S. Trade Representative.

July 1996. The Department of Commerce created the Market Access and Compliance (MAC) unit that included the Trade Compliance Center (TCC).

March 1999. President Clinton issued Executive Order 13116 that re-instituted Super 301 (expired in 1997) and Title VII (expired in 1996) authority.

May 2000. Section 306 of the Trade Act of 1974 was amended to direct the USTR, in cases where the United States has imposed retaliatory duties on imported products for a country's failure to comply with a WTO panel or Appellate Body report, periodically to revise the list of products subject to the increased duties (commonly referred to as the carousel provision). (P.L. 106-200)

December 2000. The 106th Congress increased funds for monitoring and compliance.

The organizational focus of monitoring and compliance activity by the DOC lies in its Market Access and Compliance (MAC) unit which contains its Trade Compliance Center (TCC). The MAC is designed to be the U.S. Government's "one-stop shop" to help American exporters facing foreign trade barriers and to ensure that foreign countries comply with their trade commitments. It monitors the effectiveness of trade agreements through two basic methods: a direct complaint

[5] On Internet at [http://www.mac.doc.gov/tcc/DATA/index.html].

system and a world-wide network that gathers intelligence on the operations of trade agreements.

Because of the large number and complexity of trade agreements, the DOC basically adheres to the concept that if the foreign countries are taking the required official actions and there are no complaints from American business interests, the trade agreements should be working. If business interests do have complaints, they can report them to the DOC through the TCC Trade Complaint Hotline on the DOC website.[6] The DOC also casts a wider net to gather information on possible violations through its U.S. & Foreign Commercial Service officers,[7] country and industry "desks" within the DOC, and sources that have information on export problems, such as U.S. Export Assistance Centers[8] and District Export Councils.[9] Private sector sources for information on trade barriers include DOC liaisons with more than 65 trade associations and labor groups around the country, contacts in the U.S. Chamber of Commerce and American Chambers of Commerce overseas, the U.S. and foreign business press sources, as well as direct calls and letters from businesses.

Once compliance problems are identified, the TCC management reviews the case to determine whether it requires formation of a compliance team. A team may be headed by an industry or country specialist in the TCC unit, may include other industry and/or country specialists, a DOC lawyer, someone from the Foreign Commercial Service in the country where the compliance problem exists, and others, as appropriate (e.g. from the National Institute of Standards and Technology). Data are gathered, and a technical analysis is made.

In order to achieve voluntary compliance, efforts at persuasion begin small and gradually escalate as they are passed up the administrative ladder. In most cases, the office of the USTR becomes involved in consultations with the foreign country. At times, the U.S. President may be asked to bring up a compliance issue with the relevant foreign head of state. If these efforts fail, the USTR may pursue formal negotiations and possible dispute settlement actions.

Enforcement

The USTR coordinates the Administration's active monitoring of foreign government compliance with trade agreements and pursues enforcement actions, using dispute settlement procedures and applying the full range of U.S. trade laws

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[6] On Internet at [http://www.mac.doc.gov/tcc/tcc2/hotline/hotline_intro.html].

[7] The DOC's Commercial Service includes 1,700 DOC employees whose work is to promote and protect U.S. business interests abroad. It has offices in both the United States and in more than 80 overseas posts.

[8] The DOC's Commercial Service maintains a network of international trade specialists located in almost 100 cities in the U.S. and Puerto Rico to help American small and medium-sized companies export their products and conduct business abroad.

[9] The Department of Commerce maintains 51 District Export Councils comprising nearly 1,600 business and trade experts who volunteer to help U.S. firms develop export strategies.

when necessary.[10] In trade negotiations, the USTR usually plays the leading role, although for some specific sectors, the Department of Commerce, Department of Agriculture, Treasury, or other government agency can take a lead or co-leading role. For example, in construction and automobile negotiations with Japan, the Department of Commerce took the co-lead with the USTR.

If consultations and bilateral negotiations fail, the USTR will decide whether to pursue formal enforcement actions. These are done in two arenas: unilaterally *under U.S. trade laws and instruments* and through *formal dispute resolution procedures* under the WTO or NAFTA.

For possible violations regarding non-implementation of WTO agreements, the USTR can raise complaints in committees the WTO General Council has established to monitor implementation of each WTO agreement. For example, since the WTO has an agreement on intellectual property, it also has an intellectual property committee. These committees often provide the USTR with its first opportunity to raise concerns about implementation without having to begin the process of dispute settlement. They are used regularly for informal dispute settlement and to monitor compliance and implementation.[11]

For possible violations of trade agreements or unfair trade practices with significant effect on U.S. business interests, the enforcement process usually begins with the pursuit of remedies under various U.S. trade laws and instruments. These include five instruments which grant the United States authority to suspend or withdraw benefits of trade agreement concessions and impose duties or import restrictions in response to unfair trade practices or violations of trade agreements. These five instruments are

- *Section 301* of the Trade Act of 1974 (to address unfair foreign government measures – actually Sections 301-309, as amended, 19 U.S.C. 2411);
- *Super 301* (for dealing with barriers affecting U.S. exports with the greatest potential for growth, Section 310 of the Trade Act of 1974; re-instituted by Executive Order 13116);

[10] In 1998, to ensure that the efforts of the Department of Commerce and U.S. Trade Representative would complement rather than compete with or duplicate each other, the two agencies signed a memorandum of understanding aimed at clarifying the division of their functions. It states that the "USTR unit focuses its attention on trade agreement implementation and pursuing enforcement actions, using dispute settlement procedures and applying the full range of U.S. trade laws that USTR administers. The Commerce unit focuses on analyzing foreign trade barriers, identifying possible trade agreement violations, and determining ways to ensure that the United States is getting the full benefits of its trade agreements." See The Secretary of Commerce. Memorandum for the National Economic Council, Subject: Enforcement of Trade Agreements, c. April, 1998. From: Secretary of Commerce William M. Daley and Ambassador Charlene Barshefsky.

[11] Esserman, Susan G., General Counsel, Office of the U.S. Trade Representative. Enforcement of Trade Agreements, Testimony before Congress. February 23, 1999.

- *Special 301* (for intellectual property rights protection and market access, Section 182 of the Trade Act of 1974);
- *Sec. 1377* of the Omnibus Trade and Competitiveness Act of 1988 for telecommunications trade problems; and
- *Title VII* of the 1988 Trade Act for problems in foreign government procurement (re-instituted by Executive Order 13116).

The Section 301 provision allows private parties to petition the USTR to investigate – or for the USTR to self-initiate an investigation into – injurious foreign trade practices. It also authorizes the USTR to take actions to remove the objectionable measures. The early stages of the Section 301 process include monitoring and compliance efforts discussed in the previous section. If a violation of an international trade agreement is involved, the USTR must initiate consultations with the offending country under the agreement's dispute settlement provisions. In the case of a violation of a WTO agreement, the USTR takes the case to the WTO's dispute settlement mechanism. If the case is resolved, the USTR may terminate the Section 301 investigation but must continue to monitor implementation.

If the case does not involve a trade agreement violation, the USTR is authorized but not required to act. If the USTR pursues a settlement but one cannot be reached within a specified period, 12 to 18 months for most cases, the USTR is required to determine whether to retaliate. Trade retaliation usually takes the form of 100% tariffs on selected imported products from the offending country in an amount approximately equal to the U.S. trade losses resulting from the trade barrier. When Section 301 is used independently of the WTO dispute settlement mechanism, some U.S. trading partners have complained that it involves unilateral action, uses the threat of sanctions to force countries to negotiate, and under certain circumstances contains deadlines that are inconsistent with WTO obligations. Section 301 cases that are not violations of trade agreements often lay the foundation for future trade agreement negotiations.

Under the Super 301 (priority foreign unfair trade practices) and Title VII (government procurement) provisions, the USTR is required to take more pro-active action to identify the most significant unfair foreign trade practices facing U.S. exports and to focus U.S. resources on eliminating those practices. The annual process is laid out as follows:

- On March 31, the USTR submits to Congress the *National Trade Estimate Report*, an analysis of trade barriers facing U.S. products and services around the world.
- By April 30, the USTR reports to Congress in its Super 301 report those priority foreign trade practices, which if eliminated, would give the greatest boost to U.S. exports. The USTR also reports to Congress in its Title VII report those foreign countries that engage in discriminatory government procurement practices.
- For the next 90 days (May, June, and July), the USTR seeks a satisfactory resolution of the priority foreign trade practices and discriminatory government procurement practices.
- The USTR initiates a section 301 investigation for every practice for which a satisfactory resolution is not achieved during the 90-day

period. The investigation period is 18 months for practices involving a WTO agreement to accommodate completion of WTO dispute settlement proceedings, 6 months for other discriminatory government procurement practices, and 12 months for other priority foreign country practices.

As with any section 301 investigation, if no agreement is reached, the USTR must determine whether the practice under investigation is actionable under section 301 – i.e., that it violates a trade agreement, or is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce. If the practice is deemed actionable, the USTR must also determine what retaliatory action, if any, should be taken.[12]

Related to trade agreement monitoring and compliance are U.S. Government activities aimed at ensuring compliance by foreign firms and governments with U.S. domestic trade laws, particularly those that deal with dumping (sales in U.S. markets at prices below foreign costs of production) and subsidies (excessive foreign government assistance to exporting industries). These fall under efforts primarily by the U.S. Department of Commerce and U.S. International Trade Commission to enforce U.S. antidumping and countervailing duty laws. When these laws are violated and result in serious injury to U.S. industries, remedies are generally imposed unilaterally by the U.S. Government. These actions intersect with the monitoring and enforcement of international trade agreements because the WTO has an Antidumping Agreement that discourages injurious dumping and permits remedies as long as they are not protectionist. With respect to injurious domestic subsidies, the WTO Agreement on Subsidies and Countervailing Measures generally makes them actionable under WTO dispute settlement procedures.[13]

Over time, the USTR has come to view its dispute-resolution responsibilities in an increasingly larger context — as both a policy-refining and policy-setting mechanism. That is, it uses dispute resolution as a mechanism for learning both how to write agreements in the future (to avoid ambiguity); and how to establish a favorable precedent which, if used in relation to one country, especially a developing country, will serve as an example to promote compliance by other developing countries.[14]

Each year, the USTR publishes a National Trade Estimate Report on Foreign Trade Barriers (NTE) that includes monitoring information on trade agreements. The NTE report covers significant barriers in the 50 largest U.S. export markets and

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[12] U.S. Trade Representative. USTR Barshefsky Announces Super 301 and Title VII Executive Order. Press Release 99-10, January 26, 1999.

[13] See CRS Trade Briefing Book. *Antidumping and Countervailing Duties*, by Jeanne J. Grimmett. On Internet at [http://www.congress.gov/brbk/html/ebtra86.html].

[14] Interview between Mary Jane Bolle, CRS, and Jane Bradley, Office of the U.S. Trade Representative. Washington, D.C. July 12, 1999.

whether they are consistent or inconsistent with international trading rules.[15] The USTR's report on Trade Policy Agenda and Annual Report provides a yearly review of trade enforcement activities.[16] These issues also are examined in the Departments of State and Commerce's Country Commercial Guides.[17]

Policy Issues

The policy issues for Congress surrounding the monitoring and enforcement of international trade agreements focus on three basic problems. The first is whether there are sufficient resources and an appropriate government organizational structure to accomplish the task. The second and related issue is whether new information is needed to determine whether trade agreements are being fully implemented. Third is the effectiveness of various monitoring and enforcement approaches and whether the dispute settlement process at the WTO should be changed.

Resources and Organization

The availability of sufficient resources, organization, and coordination to monitor and enforce trade agreements turns primarily on budget and staffing. The USTR, in particular, faces staffing constraints. It is a relatively small organization located in the Executive Office of the President with a FY2001 budget of $29.5 million. As part of the White House, it is subject to pressures by those advocating smaller government to decrease staffing levels. The 106th Congress increased funding for hiring more lawyers and other staff based on the office's growing workload. Some have suggested that any continuing USTR staffing constraints might be alleviated through more personnel being seconded from other agencies or by using non-governmental legal staff under contract as is done by the Department of Justice. As for the Department of Commerce, some of its increased resources devoted to monitoring and compliance have come from other divisions within the department.

In a March 2000 study of the monitoring and enforcement of trade agreements, the U.S. General Accounting Office reported that officials at the USTR and DOC (as well as Department of Agriculture) stated that steady declines in staff resources had limited the agencies' monitoring and enforcement activities. They also said that gaps in staff expertise had hindered their efforts to analyze and respond to compliance problems.[18]

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[15] U.S. Trade Representative. *2000 National Trade Estimate Report on Foreign Trade Barriers*. On Internet at [http://www.ustr.gov/html/2000_contents.html].

[16] U.S. Trade Representative. *2000 Trade Policy Agenda and 1999 Annual Report of the President of the United States on the Trade Agreements Program.* On Internet at [http://www.ustr.gov/html/2000tpa_index.html].

[17] On Internet at [http://www.state.gov/www/about_state/business/com_guides/].

[18] U.S. General Accounting Office. *International Trade, Strategy Needed to Better Monitor and Enforce Trade Agreements*. GAO/NSIAD-0-76, March 2000. P. 17.

Compliance with trade agreements became a particular issue during consideration of China's accession to the WTO. In this respect, P.L. 106-286 (H.R. 4444, 106th Congress) provides for three primary measures. The first is a statement that it "shall be the objective of the United States to obtain as part of the Protocol of Accession of the People's Republic of China to the WTO, an annual review within the WTO of the compliance by the People's Republic of China with its terms of accession to the WTO." (22 USC 6931)

The second measure authorizes additional resources for the U.S. Department of Commerce, USTR, and U.S. Department of Agriculture for monitoring and enforcement of U.S. trade agreements and trade laws with respect to the PRC. (22 USC 6941)

The third measure requires an annual report by the USTR (beginning one year after China's entry) on compliance by China with commitments made in connection with its accession to the WTO, including both multilateral commitments and any bilateral commitments made to the United States. (22 USC 6951)

The 106th Congress also established a U.S.-China Security Review Commission to review the national security implications of trade and economic ties between the United States and China (P.L. 106-398) and appropriated $3 million for it for FY2001.

Another approach to staffing and organization that has been proposed would be to create a Congressional Trade Office in the Legislative Branch to deal with trade issues. This trade office would deal with the whole range of trade issues including trade agreement monitoring and compliance. In the 107th Congress, Senator Baucus introduced S. 276 that would establish a Congressional Trade Office. The bill is based on findings including: (1) that foreign country performance under certain trade agreements has been less than contemplated, and in some cases rises to the level of noncompliance; (2) that the credibility of, and support for, the United States Government's trade policy is, to a significant extent, a function of the belief that trade agreements made are trade agreements enforced, and (3) that given the accession of the People's Republic of China to the WTO, Congress must play a key role in ensuring full and continuous monitoring of China's compliance with its commitments. The bill would establish a Congressional Trade Office that, among other duties, would monitor compliance with major bilateral, regional, and multilateral trade agreements by:

- consulting with the affected industries and interested parties;
- analyzing the success of agreements based on commercial results;
- recommending actions, including legislative action, necessary to ensure that foreign countries that have made commitments through agreements with the United States fully abide by those commitments; and
- annually assessing the extent to which current agreements comply with environmental and labor goals.

This proposal not only would establish a legislative organization somewhat akin to the Congressional Budget Office to deal with trade issues, but it would require an

analysis of the success of trade agreements based on commercial results. This would go beyond the basic premise that a trade agreement is working if there are no complaints to the contrary. It also would require an assessment of the extent to which agreements comply with environmental and labor goals, although this may pose problems with the vast majority of agreements that do not contain such provisions.

Data and Information

Accurate data and information are required to assess compliance with trade agreements and to determine the effect of international trade on the U.S. economy. With respect to this issue, the congressionally mandated U.S. Trade Deficit Review Commission, concluded in its November 2000 report that the federal statistical system "does not provide adequate or timely data on international trade and finance. The system is not gathering all the information needed to understand the evolving economy, or can the system ensure that all of the data are accurate." The Commission reported that the undercount in U.S. exports could be overstating the U.S. trade deficit by as much as a third. It also found that imports also are undercounted. The Commission concluded that "without accurate data to properly understand the effect of trade policy, oversight of that policy and the formulation of future policy are made more difficult" and that "problems with international trade statistics may provide a distorted view of the health of U.S. industries facing foreign competition."

The Commission called for comprehensive improvements in U.S. statistical gathering systems, more accurate data on services trade, financial flows, intra-firm trade, low-value exports, and software exports. Its recommendations included higher funding for key statistical agencies, the integration of the agencies most actively involved in economic statistics into a single independent agency, the automation of import and export reporting, and an expansion of the quarterly survey of international trade in services.[19]

Monitoring and Enforcement

A third policy issue centers on the effectiveness of various monitoring and enforcement approaches. The task of monitoring all U.S. trade agreements is a gargantuan task even with extensive cooperation from other governments. Countries may not have the organization or culture to implement international trade agreements fully. Current methods of uncovering problems may be insufficient, or formal dispute settlement procedures may not be operating satisfactorily.

Another problem is that countries in transition, such as China, may not have complete centralized control over local customs or other officials who implement the laws. These officials often are underpaid and are faced with opportunities for corruption. They may not feel constrained by laws promulgated by the central government, especially if such laws negatively affect economic sectors under their control. The USTR and other organizations have been providing technical assistance

[19] U.S. Trade Deficit Review Commission. *The U.S. Trade Deficit: Causes, Consequences and Recommendations for Action*. November 14, 2000. p. 280-90.

to trading partners, especially in developing countries, to ensure that key international trade agreements are implemented on schedule.[20] Still, adherence to the rule of law rather than the rule of people appears weak in certain countries. Full implementation of trade obligations may require a cultural shift that takes time. In such cases, it is not clear that filing numerous complaints with the WTO or politicizing disputes would be as effective as it is when dealing with similar problems with other nations.

Currently, the U.S. monitoring and enforcement effort relies heavily on complaints by businesses and other interests actually engaged in exporting to or doing business in the foreign country. Given the magnitude of the task, this is a practical method of operation. The problem is that companies attempting to gain market share may be reluctant to register complaints. They may fear retribution by host government officials who often can exercise considerable discretion in administering trade laws or approving business activities. They also may not want to damage perceptions of their product by projecting the image that the company needs foreign government assistance to sell its products. The staff of the USTR and DOC have attempted to circumvent this problem by becoming more proactive by routinely reviewing trade agreements for compliance. Their limited resources, however, requires that priorities be set and monitoring and enforcement efforts be balanced with other trade responsibilities.[21]

In the early 1990s, U.S. trade negotiators attempted a different method of monitoring trade agreements with Japan. Negotiators tried to include objective criteria to measure results of trade agreements in what Clinton Administration officials called "results-oriented" trade policy, but what others generally referred to as "managed trade." This approach stemmed partly from what had been viewed as a successful market sharing arrangement in semiconductors in which Japan agreed to a market share target for foreign semiconductor sales. Japan, however, refused to extend the method to other industries for fear of trade retaliation should the objective criteria not be met.[22]

The attempts at quantifying results of trade agreements, however, did shift negotiating goals in these cases away from a focus on lowering official trade barriers toward taking those actions – including but going beyond the lowering of trade barriers – that would have the greatest apparent impact on actual trade flows. They also clarified the necessity for negotiators to make explicit what products were covered in the negotiations and what data should be collected to evaluate the success of the effort.

Traditionally, trade negotiations and agreements would be deemed successful if trade barriers actually were lowered. "Managed trade" attempted to go beyond that

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[20] See, for example: Esserman, Susan G., General Counsel, Office of the U.S. Trade Representative. Enforcement of Trade Agreements, Testimony before Congress. February 23, 1999. P. 7.

[21] GAO, *International Trade, Strategy Needed to Better Monitor and Enforce Trade Agreements*, p. 16.

[22] See Archived CRS Report 94-524, *A "Managed Trade" Policy Toward Japan?* By Wayne M. Morrison, William H. Cooper, and Dick K. Nanto.

and examine whether the lowered trade barriers actually resulted in increased sales in the newly opened market by foreign companies with competitive products. Although, it is unlikely that any country will currently agree to market share targets – especially if they carry the threat of trade sanctions should they not be met – the managed trade debate did elucidate the need for better monitoring of actual trade flows resulting from trade agreements.

In its 2000 review of U.S.-Japan trade agreements, the American Chamber of Commerce in Japan again called for trade negotiators to establish "clear, measurable goals for trade agreements, where appropriate and credible, and mechanisms for joint government-industry monitoring of the implementation of trade agreements."[23]

Even when a trade agreement includes an enforcement mechanism, the enforcement process can be both tortuous and unpredictable. The major international enforcement process used by countries is the WTO Dispute Resolution mechanism.[24] (See Figure 1.) This mechanism has worked well in certain cases, but several problems have become apparent. First is that the consultation process often becomes superficial and *pro forma* as neither side wants to reveal too much about its case. The consultation process may just buy time for the defendant country.

A second problem with the WTO Dispute Resolution process is that the panelists may not, in the view of the United States, be sufficiently experienced in trade policy and issues to make satisfactory judgements. Currently, panelists are proposed by the WTO Secretariat and may not be opposed except for "compelling reasons."

A third problem is that the WTO does not have agreements in all areas of potential problems, such as in competition policy.[25] This may allow benefits of trade liberalization to be nullified by private parties. For example, a country may lower its official tariff rates but private local firms can engage in collusive or other anticompetitive behavior that denies foreign firms the benefits of the market opening measures. This may be allowed by foreign governments because such collusive behavior may not violate local antitrust laws. This was the contention of the United States in the Fujifilm-Kodak WTO case with Japan.[26] Since the WTO agreements currently do not cover antitrust issues, rules for competition policy might be considered in a new round of multilateral negotiations.

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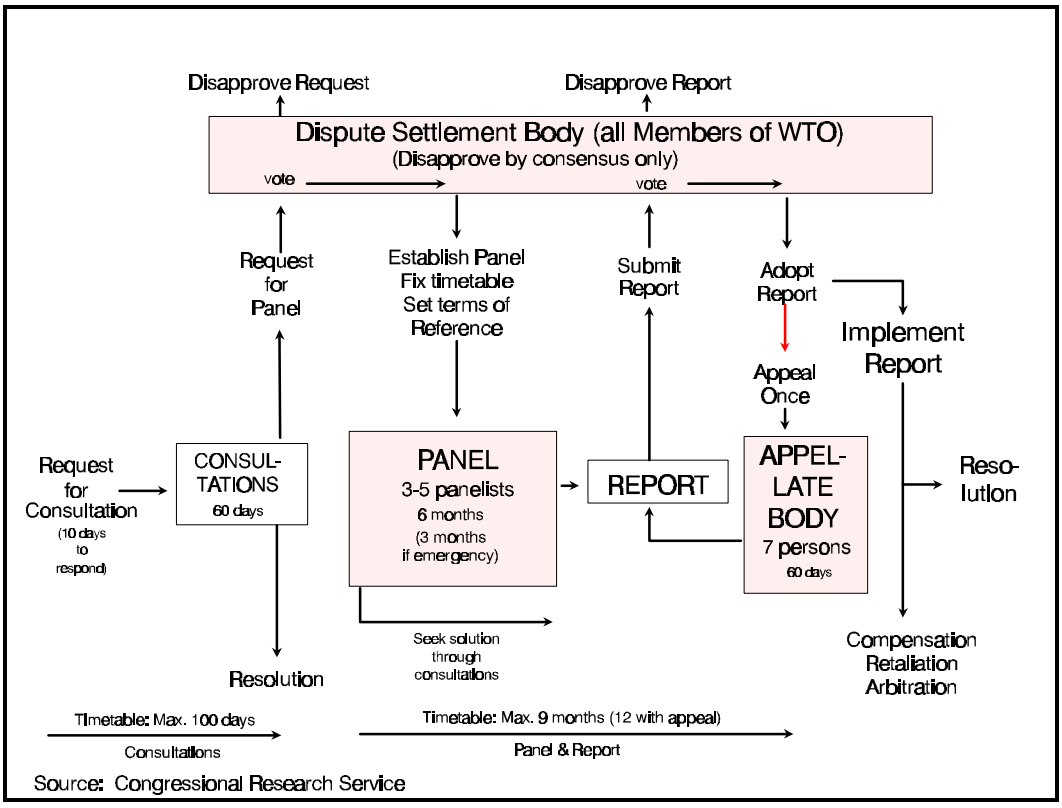
[23] American Chamber of Commerce in Japan, *Making Trade Talks Work 2000*, p. 34.

[24] For background and current cases, see WTO Internet site at [http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm]. CRS Report RS20088. *Dispute Settlement in the World Trade Organization: an Overview*, by Jeanne J. Grimmett.

[25] See CRS Report RS20191, *Trade and International Competition Policy*, by Dick K. Nanto.

[26] See CRS Report 98-442. *The Kodak-fuji Film Case at the WTO and the Openness of Japan's Film Market*, by Dick K. Nanto.

Figure 1. The World Trade Organization's Dispute Settlement Mechanism



A fourth problem is that even when the United States wins a case, the defendant country can stall or refuse to change the offending policy. In that case, the WTO can authorize the United States to impose trade sanctions which usually take the form of 100% import duties on products from the defendant country. The net result is that U.S. import barriers rise (and, hence, costs to U.S. consumers), and the trade barrier in the defendant country remains.[27]

Even though the WTO dispute settlement process is not without problems, the United States has won most of the cases it has filed there. The United States, however, also has lost most of the cases brought against it. This is not surprising, since cases that end up in the WTO tend to be those that have a reasonable probability of success by the complainant. As of January 17, 2001, of the 56 complaints the United States has filed with the WTO (since 1995), 13 were resolved to the satisfaction of the United States, in 15 cases the United States prevailed in litigation, in 3 the U.S. did not prevail, and 2 were merged with other cases. Of the remaining 23 cases, 3 were in the panel stage, and 20 were in consultations. Of the 47 complaints filed against the United States, 11 were resolved without litigation, in one the United States prevailed in litigation, in 11 the U.S. did not prevail and 2 were

[27] For a case in point, see CRS Report RS20130, *The U.S.-European Union Banana Dispute*, by Charles E. Hanrahan.

merged with other complaints. Of the remaining 22 cases, 7 are in the panel stage, and 15 are in consultations.[28]

The North American Free Trade Agreement's dispute settlement mechanism provides for the resolution of disputes among the United States, Canada, and Mexico related to the agreement. It deals with investment obligations and financial services and provides for possible review of antidumping, countervailing duty, and injury determinations of one NAFTA government against another. A dispute panel decision is to be made within 315 days after a request for a panel review is filed. As of January 2001, the United States had three cases with Mexico in which it was a plaintiff, and four cases with Mexico and one with Canada in which it was a defendant.[29]

In November 2000, the U.S. Trade Deficit Review Commission completed its study of the causes and consequences of the U.S. trade deficit and issued its recommendations. With respect to monitoring and enforcement of trade agreements, the consensus recommendation from the commission (evenly split between Republicans and Democrats) was to "fully enforce U.S. international trade laws and the international agreements that we have entered into while trying to ensure that the nations we trade with fully enforce the international agreements they have entered into."[30] The methods of enforcement, however, differed among the commissioners. The Democratic Commissioners recommended that the U.S. (1) adopt and enforce policies to attack hidden and non-tariff barriers in countries such as China and Japan, (2) improve enforcement of fair trade laws (including the creation of a new agency to self-initiate fair trade complaints), (3) take measures to reorganize government trade initiatives, (4) create a Congressional Trade Office, and (5) require a regular trade assessment from the DOC and an analysis of progress on WTO implementation from the Office of the USTR.[31]

The Republican Commissioners recommended (1) that trade agreements be subject to the same results-based evaluations that the federal government is now subject to pursuant to the 1993 Government Performance and Results Act, (2) that U.S. trade policy with respect to Japan involve a greater emphasis on compliance, (3) that increased funding be provided for staffing of DOC and USTR monitoring and compliance efforts, and (4) that U.S. trade policy agencies be organized to put increased emphasis on enforcement.[32]

The enforcement of international trade agreements, however, does not occur in a political and strategic vacuum. Such activities affect other aspects of international relations. Widely publicized trade disputes that reach high political levels before

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[28] U.S. Trade Representative. *Snapshot of WTO Cases Involving the United States*, Updated: January 17, 2001. On Internet at [http://www.ustr.gov/enforcement/snapshot.html].

[29] U.S. Trade Representative. Highlights in U.S. International Trade Dispute Settlement. January 10, 2001. On Internet at [http://www.ustr.gov/enforcement/high.html].

[30] U.S. Trade Deficit Review Commission. *The U.S. Trade Deficit: Causes, Consequences and Recommendations for Action*. November 14, 2000. P. xv.

[31] *Ibid*. P. 259-60.

[32] *Ibid*. P. 270-72.

resolution could generate a backlash against the United States that may negatively affect political and security relationships.