Retaliation against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment

Robert E. Hudec
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Section 301 of the Trade Act of 1974† grants the President sweeping authority to impose retaliatory trade restrictions in response to trade practices of foreign governments. The authority extends not only to foreign trade practices in violation of international obligations, but also to other trade practices which the President determines to be "unreasonable." The definition of "unreasonable" in the relevant committee reports refers to the GATT concept of "nullification and impairment" as one example of the standard to be applied. It is the only specific example given.

The formal statement of the nullification and impairment concept in Article XXIII of the General Agreement on Tariffs and Trade is not particularly illuminating. In pertinent part,

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the text provides that a member government is entitled to certain remedies—a ruling, a recommendation, and in serious cases a right to increase trade restrictions—if any benefit accruing to [that government] directly or indirectly under this Agreement is being nullified or impaired... as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation...

The remedy provision makes no distinctions among the three

3. For two other commentaries on the history and meaning of Article XXIII, see J. Jackson, supra note 2, at 163-87 and K. Dam, supra note 2, at 351-75.

The full text of Article XXIII is as follows:
1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation,
the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.
quite different triggering conditions.

The words of Article XXIII raise several obvious questions. What is a "benefit accruing . . . under this Agreement"? What does it mean to "nullify or impair" such a benefit? More broadly, what kind of legal concept is it that provides seemingly identical remedies for things as diverse as a legal violation, a measure not in violation, and "any other situation"? And finally, how is this concept related to the section 301 concept of "unreasonableness"?

GATT Article XXIII has a negotiating history and a small amount of interpretative case law that has been generated in GATT legal disputes. This Article undertakes to recount the part of the GATT experience which relates to the section 301 concept of "unreasonable" trade restrictions. Part I deals with the negotiating history of GATT Article XXIII. Part II deals with the relevant GATT complaints and decisions involving the nullification doctrine, while Part III discusses the GATT's more general experience with retaliation. Part IV then examines section 301 against this background and offers some conclusions about the meaning of section 301 and the relationship between section 301 and United States obligations under GATT.

If there were a Part V of this Article, it would argue—in a balanced way—that the content, tone, and expressed intent of section 301 make it a highly dangerous piece of international brinksmanship. Part V has been forgone in order to focus more sharply on the present problem—what to do with section 301 now that we have it. Although there will be considerable pressure not to use the new retaliation authority during the current round of GATT trade negotiations, the new authority will not be easy to contain. The Executive Branch may feel compelled to resort to section 301 in order to maintain its "credibility" with foreign governments, or with the Congress. Private parties also have the right to initiate proceedings under a separate complaints procedure established by section 301. In view of the particularly

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5. Trade Act of 1974, § 301 (d) (2) requires the Special Representative for Trade Negotiations to publish any complaint filed by an interested party in the Federal Register, to "conduct a review" of such complaints, to conduct public hearings at the request of the complainant, and
disruptive effects which section 301 retaliation could have at the present time, it is important that all participants, private as well as public, have some basic understanding of the relationship between section 301 and the international legal framework in which it will operate.

I. THE NEGOTIATING HISTORY

A. THE TRADE AGREEMENTS BACKGROUND

The concept of nullification and impairment originated in the bilateral trade agreements of the 1920's and 1930's. The dominant purpose of those trade agreements was the exchange of tariff reductions. Negotiators haggled long hours to obtain maximum concessions, in part for their own sake and in part because the ability to demonstrate a sound bargain was considered essential in the enlistment of domestic political support. The word for the idea of a balanced exchange was "reciprocity."5

Tariffs were only one instrument of trade policy, of course, and the commercial opportunity of a tariff reduction could easily be nullified unless other trade policy measures were also held in check. To maintain reciprocity, therefore, quantitative restrictions, discrimination, and similar trade practices had to be prohibited. Trade agreements came to include general codes of trade policy obligations.7

Even these more general obligations did not fully guarantee reciprocity. Other purely domestic measures, such as product safety legislation, could on occasion render tariff concessions just as worthless as would a direct prohibition of imports. It would have been next to impossible to catalog all such possibilities in advance. Moreover, governments would never have agreed to

to report summaries of such proceedings to the Congress every six months. The Special Representative is directed to issue regulations governing these proceedings. Section 301(e) provides for hearings before Presidential action.


7. For an example of the code which had evolved in United States trade agreements just prior to the GATT negotiations, see Reciprocal Trade Agreement with Mexico, Dec. 23, 1942, 57 Stat. 333, E.A.S. No. 311.
circumscribe their freedom in these many other areas for the sake of a mere tariff agreement.

A report by a group of trade experts at the London Monetary and Economic Conference of 1933 concluded that trade agreements should contain another more general provision addressed to the problem. The provision would merely recognize that government action which produced an adverse effect on the balance of commercial opportunity was a legitimate ground for formal consultation. In other words, a government causing an alleged impairment would be obliged to talk about it. Trade agreements came to incorporate such clauses.

There was no guarantee, of course, that consultations would in fact resolve any particular grievance. The final protection against nonreciprocity had to be a termination clause that would allow the disappointed party to get out altogether, on short notice. Termination provisions requiring only three to six months notice were common.

The overriding concern for reciprocity naturally affected the outlook toward legal obligations contained in such agreements. So long as governments could terminate on short notice, there was obviously a limit to the pressure one party could usefully bring to bear in trying to enforce those obligations. In short, even though the legal obligations were usually written with precision, they had to be treated pliably enough to assure continued satisfaction on both sides.

One demonstration of this pliability was the fact that disputes procedures in most bilateral trade agreements did not even

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8. Monetary and Economic Conference, League of Nations, Reports Approved by the Conference on July 27th, 1933, and Resolutions Adopted by the Bureau and the Executive Committee, Doc. No. C.435.M. 220.1933.II.Spec. 4, at 29-30. The clause recommended by the experts was:

If, subsequent to the conclusion of the present treaty, one of the Contracting Parties introduces any measure, which even though it does not result in an infringement of terms of the treaty, is considered by the other Party to be of such a nature as to have the effect of nullifying or impairing any object of the treaty, the former shall not refuse to enter into negotiations with the purpose either of an examination of proposals made by the latter or of the friendly adjustment of any complaint preferred by it.

Id. at 30.

9. See authorities cited in notes 11 and 12 infra.

10. See, e.g., Reciprocal Trade Agreement with Mexico, supra note 7, art. XVIII:2 (6 months). Some United States agreements had a thirty-day termination provision in the event a claim of nullification and impairment could not be resolved. See, e.g., Reciprocal Trade Agreement with Uruguay, July 21, 1942, art. XII, 56 Stat. 1624, E.A.S. No. 276.
distinguish between violations of legal obligations and other events claimed to impair reciprocity.¹¹ For example, the typical United States trade agreement spoke only of a single cause of action called "nullification and impairment," a term which applied to "any measure . . . even though it does not conflict with the terms of this Agreement."¹² There was no need to separate the claims involving legal violations, for the procedure in all cases was simply to consult.

B. NULLIFICATION AND IMPAIRMENT IN THE ITO CHARTER

The postwar plan for international organizations included an International Trade Organization with jurisdiction over trade relations (called "commercial policy") and other related matters. Negotiations were convened by the United Nations in 1946, and in March 1948 the negotiators initialed the final text of a Charter of the International Trade Organization, perhaps better known as the "Havana Charter."¹³ The Charter encountered stiff opposition in the United States Congress and was never ratified.¹⁴

The General Agreement on Tariffs and Trade came into existence in October 1947, as the result of a separate round of tariff negotiations conducted by 23 governments engaged in the ITO negotiations. Needing a trade agreement in which to incorporate the results of their negotiations, the governments used an existing draft of the Charter's Commercial Policy Chapter, adopting it nearly verbatim. The GATT survived the defeat of the ITO Charter and eventually inherited the mandate of the ITO in the area of international trade relations.

The unusual origins of the GATT gave it a rather unusual negotiating history. The texts of most GATT articles, including

Article XXIII on nullification and impairment, were negotiated entirely in the ITO Charter negotiations. Article XXIII has a further twist, because the interim ITO text copied into the General Agreement was substantially renegotiated, by the same governments, in subsequent ITO negotiations. Since most GATT draftsmen were simply ITO negotiators wearing another hat, and since these same ITO veterans continued to serve as the backbone of GATT operations during its formative years, one can treat the entire negotiating history of the ITO as authoritative evidence of their intent.16

1. The Legal Setting

The story of the GATT-ITO nullification and impairment provision must begin with a brief account of what happened to ITO legal obligations. The original legal design of the International Trade Organization promised an institution with authority to interpret and apply a detailed code of legal obligations modeled after the old trade agreement rules. As the negotiations proceeded, this legal design began to soften. In general, as the substantive content of the ITO legal obligations became longer and more lawyer-like, the enforcement powers behind them became weaker.17

A proposal for direct review of ITO legal rulings by the International Court of Justice was rejected in favor of a gentler ICJ advisory opinion procedure that avoided direct judgments against member countries.17 This left enforcement generally in the hands of the ITO. Midway in the negotiations, it was decided to model the ITO disputes procedure on the standard nullifica-

15. GATT officials have frequently referred to ITO texts negotiated after October 1947 as authoritative. One example, pertinent to the subject of this Article, can be found in the Working Party decision in the Australian Subsidy case. See text accompanying notes 59-74 infra. In a concluding paragraph, 2 GATT, BISD 195 (1950), the Working Party explains its recommendation as one which will “best assist the [parties] to arrive at a satisfactory adjustment,” virtually a quotation of article 94(2) (e) of the Havana text of the ITO Charter. Later in the same paragraph, the Working Party explains that GATT Article XXIII does not “empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy,” a statement obviously drawn from the Havana committee reports explaining the ITO’s recommending power. See text accompanying notes 40-43 infra.


tion and impairment provision, a version of which had been tucked away in the Commercial Policy Chapter.\textsuperscript{18} Legal violations thus became only one form of nullification and impairment, subject to what appeared to be the same set of remedies: (1) a legal ruling, (2) a recommendation proposing corrective action, and (3) authorization for the injured party to impose compensatory trade restrictions.

In the final negotiating session at Havana, after the GATT had already come into existence, the negotiators made an effort to distinguish the remedies for breach of legal obligations from those for other kinds of nullification. With regard to the authorization of trade restrictions, the issue was whether the remedy should be limited to "compensatory" restrictions (the amount that would offset the reciprocity imbalance caused by the offending action) or might also include, in the case of legal violations, an added measure of "sanction" to enforce compliance. The idea of sanctions was considered at length in a drafting subcommittee, but ultimately the draftsmen concluded that the governments would not accept an international organization with such powers. The remedy for both legal violations and nonviolation nullification and impairment would have to be "compensatory."\textsuperscript{19}

\textsuperscript{18} U.N. Doc E/PC/T/186, at p. 53 (1947) (report of the Preparatory Committee on the results of the Committee's second drafting session).

\textsuperscript{19} ITO CHARTER, supra note 13, at art. 95(3). For the negotiating background, see Hudec, supra note 16, at 625-27.

The full text of the ITO Charter provisions which parallel GATT Article XXII are as follows:

\textbf{Article 93}

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of
   (a) a breach by a Member of an obligation under this Charter by action or failure to act, or
   (b) the application by a Member of a measure not conflicting with the provisions of this Charter, or
   (c) the existence of any other situation
the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.

\textbf{Article 94}

1. Any matter arising under sub-paragraphs (a) or (b) of paragraph 1 of Article 93 which is not satisfactorily settled and any matter which arises under paragraph 1 (c) of Article 93 may be referred by any Member concerned to the Executive Board.
A similar result was reached on the power of the ITO to make recommendations. At one point the drafting committee considered something called a "cease or desist" order for legal violations. Here, too, the draftsmen eventually backed away and substituted a gentler power to "request the Member concerned to take such action as may be necessary . . . to conform to the provisions of this Charter."20

In the end, even though the remedies in nullification cases were enumerated separately from those for breach of legal obligations, the latter emerged from the negotiations so muted that it was difficult to find any real differences between the two. Legal obligations still carried some force, but it was a force consisting almost entirely of the informal normative pressures that

2. The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 1 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:

(a) decide that the matter does not call for any action;
(b) recommend further consultation to the Members concerned;
(c) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;
(d) in any matter arising under paragraph 1 (a) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;
(e) in any matter arising under sub-paragraph (b) or (c) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment.

Article 95

2. Where a matter arising under this Chapter has been brought before the Conference by the Executive Board, the Conference shall follow the procedure set out in paragraph 2 of Article 94 for the Executive Board.

3. If the Conference considers that any nullification or impairment found to exist within the terms of paragraph 1 (a) of Article 93 is sufficiently serious to justify such action, it may release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired. If the Conference considers that any nullification or impairment found to exist within the terms of sub-paragraphs (b) or (c) of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may similarly release a Member or Members to the extent and upon such conditions as will best assist the Members concerned and contribute to a satisfactory adjustment.

could be focused through the various “events” of the procedure—the gentle “requests” and the supposedly “compensatory” restrictions.\textsuperscript{21} The same “events” were available in ordinary nullification cases as well. There was nothing in the text of the agreement to indicate that their normative overtones would be any different.

2. Nullification, Round One: The Escape Clause

The nullification and impairment clause entered the ITO Charter by the back door. In the original draft submitted by the United States, the clause appeared as a disputes procedure for the Commercial Policy Chapter only,\textsuperscript{22} placed there in anticipation of using that Chapter as a separate trade agreement. The clause followed the old trade agreement model: it applied to any action, whether or not in breach of legal obligations, which was alleged to have nullified or impaired “the objects of this Chapter.” Unlike the trade agreement model, it empowered the ITO to investigate the merits of such allegations, to make rulings and recommendations, and, failing an affirmative solution, to authorize the complaining member to withdraw appropriate concessions in response to the offending action.

The discussion of the nullification and impairment clause at the first negotiating session, in London in late 1946, paid almost no attention to the potential regulatory impact that had been created by adding third-party decisions to the procedure. Delegates focused on the nullification provision as an “escape clause” for members with disappointed expectations. The spokesman for Australia took a leading role, arguing that a government could not be expected to liberalize trade in times of general economic disequilibrium, particularly if, as many feared, a massive post-war depression was about to strike the United States economy. The Australian delegation therefore proposed that the trade policy obligations of the Commercial Policy Chapter be expressly conditioned on achievement of the broader objectives of the ITO Charter, so that a government might be excused in whole or in part if these objectives did not materialize.\textsuperscript{23}

The Australian concern was satisfied with a few word

\textsuperscript{21} For a case study examining how GATT legal obligations are understood and used in this manner, see Hudec, \textit{supra} note 16, at 636-65.

\textsuperscript{22} Suggested Charter for an International Trade Organization of the United Nations, Article 30, reprinted in U.S. \textsc{Dep't of State}, \textit{Commercial Policy Series No. 93}, p. III (1946).

changes whose economy belied their enormous breadth. The United States draft had defined nullification and impairment as any action by another government which impaired "the objects of this Chapter"—that is, the trade liberalization "objects" of the Commercial Policy Chapter. To make clear that a depression or other general economic upheaval would be considered an impairment, the London draft simply substituted the words "any object of this Charter"—that is, any of the broad welfare "objects" of the entire ITO Charter. Then, to make it clear that this broader concept of impairment might include developments, like a depression, for which no one government was responsible, the London text added the word "situation" to the list of acts which might cause impairment. The hypothetical United States depression would thus be covered as a "situation," which impaired the "objects" of the chapter on employment policy. The remedy provision was likewise expanded. Whereas the original draft would merely have authorized the aggrieved party to suspend obligations vis-a-vis the party causing impairment, the London draft allowed suspension of obligations "as may be appropriate in the circumstances," thus permitting the release of obligations on all sides in "situations" for which no one government was responsible.24

3. Nullification, Round Two: A Punishment in Search of Sins

Concern over the potential regulatory impact of the nullification and impairment clause surfaced at the next regular negotiating session, held at Geneva in the summer of 1947. The debate began with a South African memorandum25 which made two points. First, the nullification and impairment procedures had virtually no substantive guidelines, for the statements of principle throughout the Charter were broad enough to cover almost anything. Second, the remedies for cases of nullification and impairment were the same "sanctions" the Organization would use in the case of a breach of legal obligations. Consequently, the Organization was really being given power to declare new obligations where none existed before. The South


African delegation wanted the remedies limited to the breach of clearly defined legal obligations. As for nullification not involving a violation of the Charter, it believed a provision calling for consultations would suffice.\textsuperscript{26}

The Australian and the United States delegates, now the joint-architects of the nullification and impairment article, responded at length. Both reiterated their conviction that obligations under the Charter could not, and inevitably would not, be honored in circumstances which defeated a member's basic expectations. The Australian delegate, Dr. Coombs, reemphasized the dangers of a depression, while the United States delegate, Mr. Wilcox, warned of the more general need to adjust to any new situation which would upset the Charter's "careful balance of the interests of the contracting States."\textsuperscript{27} Both argued that a provision authorizing withdrawal of obligations in such circumstances was merely a recognition of the inevitable. An express procedure for authorizing such measures would serve to control the readjustment. Without a neutral and authoritative arbiter of fairness, they warned, governments acting unilaterally might trigger a process of action and reaction that could unravel the entire agreement.

The South African delegate, Dr. Holloway, recognized these objectives, but he returned with the same question: would not the Organization's power to make recommendations and to authorize compensatory withdrawal of obligations amount to legal sanctions for conduct not in breach of the agreement? Control of readjustment was fine if one assumed a plaintiff with a valid claim for adjustment. But what about the defendant who did not agree that adjustment was in order? Cases would only come to the ITO, after all, when the defendant disagreed. From the perspective of such a defendant, the ITO would be exercising power to judge the defendant's otherwise legal conduct and to deter that conduct with recommendations and economic countermeasures.

The response of Australia and the United States acknowledged that the Organization's power to recommend solutions might affect otherwise legal conduct but insisted that members would be "under no specific and contractual obligations to accept those Recommendations."\textsuperscript{28} As for economic "sanctions,"

\textsuperscript{27} U.N. Doc. E/PC/T/A/PV/6, at p. 5 (1947).
\textsuperscript{28} U.N. Doc. E/PC/T/A/PV/5, at p. 16 (1947).
the spokesmen stressed that the Organization would merely be authorizing another member to act; in no sense would the Organization be imposing the countermeasures itself.

Dr. Holloway was not satisfied. He returned with another question. A new draft of the nullification and impairment provision had included, as one ground of complaint, government actions which "impeded . . . the promotion . . . of any of the Purposes of this Charter . . . ."29 Could the South African government enter a complaint against the Australian government on the ground that the Australian tariff rates were simply too high and were thereby "impeding" the increase of trade? Certainly increase of trade was one of the "Purposes" of the Charter, wasn't it?30

The Australian delegate seemed to agree that a complaint of this kind would be inappropriate, and he also confessed that the words of the article might be read to reach that result. He explained that the wording came from old trade agreements, in which such breadth had been deemed necessary to prevent the parties from devising new ways to circumvent tariff concessions. He had, in fact, given some thought to the South African objections, but had concluded that it was impossible to be any more precise and still cover all the situations that ought to be covered.

Finally, the Australian delegate chose to defend the provision on another ground:

[I]t would be a very great pity if, because we could not trust an international organization formed out of our own membership to interpret this clause intelligently and with sufficient discretion, we were to deprive ourselves of the opportunity of having our obligations reviewed in circumstances which made it impossible for us to carry them out.31

In short, the Organization was being given practically unlimited power after all, but such power was necessary and the Organization could be trusted not to abuse it.

The Australian delegate was apparently correct in his assessment of the situation, for the other delegations gave no indication that they feared the rather bold grant of authority that had finally been recognized. Except Dr. Holloway. His parting shot to the Geneva meetings deserves to be recorded:

I would like to say, Mr. Chairman, that of all the vague and wooly punitive provisions that one could make, this seems to

31. Id. at p. 25.
me to hold the prize place. It appears to me that what it says is this: In this wide world of sin there are certain sins which we have not yet discovered and which after long examination we cannot define; but there being such sins, we will provide some sort of punishment for them if we find out what they are and if we find anybody committing them. When it comes to that, we shall describe them as sins only when the Organization considers that they are not venial offences, but serious crimes; but we do not know under what circumstances the Organization might consider them to be serious. Nonetheless, seeing that there are such sins, and in spite of the fact that we do not know what they are, and in spite of the fact that we do not know under what circumstances we are going to apply any punishment to them, we shall still provide a sort of vague and general "sword of Damocles," if such a thing is possible, to hang over the head of all the people who may possibly commit this sin.

Then we come to what is the only definite thing in the whole Article: that is, the type of punishment which can be visited upon these offenders. It seems to me, Mr. Chairman, that this is something like Pirandello's play "Six Characters in Search of an Author," only it is rather the other way round. Here it is one punishment in search of six sins!

4. Nullification, Round Three: The Final Effort to Clarify

Dr. Holloway left the scene at this point, but his complaints had helped to trigger a redrafting effort that continued until the end of the ITO negotiations. There was a serious attempt to write a new substantive definition of nullification and impairment which would narrow the unlimited scope of the earlier drafts. When this failed, the delegates took another hard look at the remedy provisions. The result was little more than a reaffirmation of the original design.

Redrafting of the substantive definition began at the Geneva preparatory meeting. The author was Dr. Coombs of Australia. The London draft had defined nullification and impairment in a single phrase—a measure or situation which had the effect of nullifying or impairing "any object of this Charter." Dr. Coombs offered a text with two separate headings. A member could complain if (1) "any benefit accorded to it directly or indirectly by this Charter is being nullified or impaired," or (2) "the promotion by it of any of the Purposes of this Charter is being impeded." Dr. Coombs gave the following explanation of the first heading ("benefits"):

[W]e feel that the Article can be improved by referring specifically to the benefits which accrue directly or indirectly to

the Members as a result of obligations undertaken by Members either in the Charter or as a result of it.

I should like to emphasise that by the word “benefits” we conceive not merely benefits accorded for instance, under the provisions of Article 24 [a reference to tariff concessions], but the benefits which other countries derive from the acceptance of the wider obligations imposed by the Charter: that is the benefit which we, amongst other people, would derive from the acceptance of the employment obligation by major industrial countries [i.e., no more depressions], and the benefit which industrial countries would derive from the improvements in the standard of living resulting from the operations of Chapter IV to countries with under-developed economies. So I would like to make it quite clear that we have used benefit in this context in a very wide sense.34

The new “benefits” language seemed to clarify things for many delegations and to fit whatever examples they had in mind. To be sure, no one had yet offered satisfactory definition of just what “benefits” a government could expect to derive from a tariff concession—much less from the Charter’s broader principles. The delegates seemed ready to accept the fact that they would have to work that out in practice. The “benefits” definition survived without further change.35

The Australian delegation’s second heading (anything which “impeded” the “Purposes” of the Charter) was redrafted several times. The final Geneva draft referred to actions or situations which “impeded” the “attainment of any of the objectives” of the Charter, and in that form it was carried over into the GATT nullification clause drafted at the close of the Geneva meetings. When the ITO negotiations resumed later in the year at Havana, the draftsmen returned to this second heading in an attempt to limit it. The text was redrafted a few more times and then discarded on the ground that it had no discernable limits.36 The second heading seemed to have been intended mainly to make doubly certain that the special Australian concern about a worldwide depression was covered.37 The Australian delegation agreed

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34. U.N. Doc. E/PC/T/A/PV/12, at p. 7 (1947). The reference in the first paragraph to “obligations... either in the Charter or as a result of it” is presumably a reference to formal Charter obligations on the one hand and tariff concessions on the other.

35. The words “benefit accorded to” were changed to “benefit accruing to” in the June 12 meeting at the suggestion of the United Kingdom delegate, who said only, “[W]e should do better to make it read...” Id. at p. 19. An anonymous draftman subsequently decided that, while benefits would be “accorded” by the Charter, benefits could only “accrue” under the Charter. So “by” became “under.”


37. For what it is worth, the following is the Australian delegate’s explanation of the second heading when it was introduced at Geneva:
to its deletion on the condition that the "benefits" language of
the first heading be expanded to read "benefit accruing ... di-
rectly or indirectly, implicitly or explicitly."\textsuperscript{38}

In the last analysis, the "benefits" formula turned out to be
as broad as all the other substantive definitions. In truth,
there was no substantive definition. The meaning of the term
would have to be determined in actual cases.

The unlimited substantive scope of the nullification article
made its remedial provisions all the more important. The most
vexing issue concerned the ITO's power to issue recommenda-
tions. It was recognized that recommendations would constitute
a form of coercion, and many delegates were troubled by the
possible application of such coercion to measures that were in no
way illegal. Dr. Holloway's point had struck its mark.

At Geneva, the Australian and United States spokesmen had
given their categorical assurance that recommendations in such
cases would not be legally binding. It is safe to assume that at
least the key delegates operated on this assumption all along. It
soon became clear, however, that this "legal" answer was not
enough.

The first draft of the text for nonviolation cases authorized
the Organization to "propose such measures to Members as will
best assist the Members concerned and contribute to a satisfac-
tory adjustment."\textsuperscript{39} This very loose formula was necessary
in order to cover the Australian depression escape clause situation,
in which the Organization might want to suggest some sort of
multilateral readjustment. Nonetheless, the text quite clearly
allowed the more pointed type of proposal aimed at a single gov-
ernment's policy. This latter possibility caused a reaction. A
drafting subcommittee adopted an interpretative paragraph
which reported: "The Sub-Committee agreed that [the text in
question] does not empower the [ITO] to propose the suspen-
sion or withdrawal of a measure not in conflict with the Char-

\textsuperscript{38} ITO CHARTER, supra note 13, at art. 93(1) (emphasis added). Article 93 is reproduced in note 19 supra.
The text itself was changed by removing the words authorizing the ITO to "propose such measures" and substituting the gentler power to "make such recommendations." The prohibition was quietly reversed when the issue came to the parent committee. Although most of the committee still seemed concerned that the nullification section was too strong, the Belgian delegate objected that the prohibition against positive recommendations left no answer for nonviolation cases except to allow one or both sides to increase tariff barriers. The Belgian objection prevailed. The interpretative paragraph saying that the Organization was not empowered to "propose" the suspension or withdrawal of a legal measure was changed to say that the Organization was not empowered to "require" such action. No one had ever suggested that the ITO could "require" compliance with such proposals. The change had reduced the text to a harmless truism, a clear rejection of the subcommittee's attempt to limit the ITO's powers. Once again, the need apparently outweighed the risks.

The provision authorizing withdrawal of concessions in nonviolation cases survived with similar breadth. In an effort to permit the type of general readjustment which might occur in time of serious depression, the final text simply left it to the Organization to do the right thing. The Organization could release a Member or Members from legal obligations "to the extent and upon such conditions as will best assist the Members concerned and contribute to a satisfactory adjustment."

Interestingly, despite this breadth, the withdrawal provisions did not excite the same kind of fears that the recommending power had generated. Outsiders might have expected the negotiators to worry most about these economic countermeasures, for these appeared to be the weightiest "sanctions" in the ITO Charter. The negotiators knew better. By this time it had become clear that the principal form of coercion available to the ITO would be the normative stance it adopted toward a Member's conduct.

44. ITO Charter, supra note 13, at art. 95(3). Article 95 is reproduced in note 19 supra.
C. THE GATT NEGOTIATIONS

It had been settled for some time that the GATT would be absorbed back into the International Trade Organization once the latter came into existence. Accordingly, the substance of the General Agreement was supposed to differ as little as possible from the ITO Charter. The October 1947 text of the GATT's substantive legal obligations was taken practically verbatim from the just completed Geneva draft of the ITO Charter. Then, when the ITO texts were revised at Havana, the GATT Contracting Parties soon met to conform their own text to most of the changes.

The legal and organizational structure of the ITO could not be as easily copied. In order to skirt lengthy (and possibly unfriendly) ratification procedures, the GATT was cast as a "trade agreement" between the individual signatories. In addition, the legal obligations were declared to be "provisional," and they were also made subject to a broad reservation for inconsistent legislation existing on the date of the agreement. Finally, instead of creating a formal organization to administer the agreement, the signatory governments assigned all decisionmaking powers to themselves acting in concert. The only sign of a collective entity would be the words CONTRACTING PARTIES spelled in capital letters.

45. See, e.g., the Preparatory Committee resolution launching the GATT negotiations, Report of the First Session of the Preparatory Committee, supra note 24, annexure 10, section H, in which it was contemplated that the relevant ITO Charter provisions might simply be incorporated by reference. See generally GATT Article XXIX, setting forth the mechanics of the anticipated ITO merger.

46. The question of adopting new Havana texts took up most of the First and Second Sessions of the Contracting Parties, held in the spring and the fall of 1948. Adoption was not automatic; the process of selection allowed the United States and some other industrialized countries to withhold some of the concessions they had made at Havana. For a list of the 1948 modifying protocols, see 4 GATT, BISD 90-91 (1969).

47. The main purpose of trade agreement status was to enable the United States to enter GATT on the basis of executive authority to enter trade agreements, under the 1945 extension of the Reciprocal Trade Agreements Act, ch. 269, §§ 2-4, 59 Stat. 410 (1945).

48. The GATT was put into effect by means of a separate Protocol of Provisional Application which contained these limitations. For the text of the original Protocol, which has also been adapted for all new countries acceding to the Agreement, see 4 GATT, BISD 77 (1969).

49. The basic decision-making powers of the CONTRACTING PARTIES are set forth in GATT Article XXV. The author has chosen to ignore GATT typography and to use the simpler term "Contracting Parties" to describe both formal decisions and other activities without seeking to distinguish the two.
TRADE RETALIATION

The only disputes procedure in the General Agreement was a nullification and impairment provision copied almost verbatim from the Geneva draft of the ITO Charter. The text was essentially a stop-action photograph of a provision still very much in flux. The substantive definition of nullification still contained the second heading about impeding the "objectives" of the agreement, which was later to be deleted at Havana. It also contained a single remedy provision for all findings of nullification, without violation/nonviolation distinctions. There was no provision for appeal to the International Court of Justice, no doubt because the temporary, "provisional," and nonorganizational character of the General Agreement made such a relationship impossible.

When the GATT was reopened for conforming amendments after the Havana Conference, the nullification and impairment text was left unchanged. The committee examining post-Havana amendments explained that "it is considered that the form in which these articles appear in the Charter is not suitable for the General Agreement." The problem seems to have been the complicated organizational structure woven into the ITO disputes procedure. Inclusion in the GATT would have required a total rewriting, hardly worth the trouble for what little business there would have been in the year or two before the anticipated ITO ratification. Thus it was that the GATT acquired a half-finished text as the basis for its disputes procedure. Although the ITO Charter was dead within three years, the GATT has never gotten around to tidying up this particular bit of provisional drafting.

D. THE TEACHING OF THE NEGOTIATING HISTORY

The primary lesson to be learned from the GATT-ITO negotiations is that the precise text of the nullification and impair-

50. The text of Article XXIII is reproduced in note 3 supra.
52. GATT Doc. GATT/1/21, at p. 3 (1948).
53. There was an effort, in 1955, to create a formal organization to administer the GATT, involving a revision of Article XXIII procedures but not the substantive test. 1 GATT, BISD 45, 80 (rev. 1955). Although an agreed text was negotiated, the effort failed for want of United States ratification. See generally Hearings on H.R. 5550 Before the House Comm. on Ways and Means, 84th Cong., 1st Sess. (1956); H.R. Rep. No. 2007, 84th Cong., 2d Sess. (1957).
ment clause really says very little. Governments knew that unexpected (and maybe not-so-unexpected) events could upset the assumptions on which they had accepted the GATT-ITO legal obligations, and they wished to reserve a right to escape if such events occurred. The concept was somewhat like the idea of contract "frustration," except that even a little bit of frustration was supposed to earn an equal quantum of adjustment.

In their concern to protect all "benefits accruing . . . directly or indirectly, implicitly or explicitly," the draftsmen ended up protecting nothing. No one was asking for insurance against all disappointments. Someone would have to draw a line between what did and did not "deserve" adjustment. The critical admission was the confession by Dr. Coombs of Australia, the chief draftsman, that governments would simply have to trust themselves to "know it when they saw it." Thus, the nullification and impairment provision was not a definition at all, but rather a grant of common-law jurisdiction to fashion a definition as disputed cases arose.

A parallel lesson is that the dual formula of the GATT "definition" is of no real consequence. The second heading may appear to extend the scope of the provision to cases reaching beyond the "benefits" formula of the first heading, but there simply is no room for greater scope once it is recognized that the "benefits" heading by itself is a grant of unlimited jurisdiction. Whether because of this realization, or because of fidelity to the "true" understanding of this text reached at Havana, the GATT has never made anything of the second heading.

There is no evidence that the various components of the nullification and impairment procedure were designed with affirmative regulation of conduct in mind. The main source of substantive breadth was the self-protective concern for a large enough escape hatch. The recommending power that caused so much anxiety seems to have been only reluctantly accepted, primarily to avoid committing the ITO to retaliation in every nullification case. Consequently, it would be inaccurate to impute any concrete regulatory purposes to the precise language of the nullification and impairment provision.

Finally, it should be emphasized that the critical ingredient which made these loosely defined powers acceptable was, in Dr. Coombs's word, "trust." Perhaps a better word would have been "consensus." The draftsmen were clearly confident that their values and understandings would be shared by the community—or at least by that part of the community which would
make the decisions. They looked to that consensus as their ultimate guarantee against abuse of the Organization's powers. More importantly, they also looked to that consensus as the primary source of legitimacy for the powers themselves. In the last analysis, the GATT-ITO concept of nullification and impairment was simply a procedure for tapping that consensus, acceptable to the members of the community because they thought they knew the substance of the consensus and trusted it.

II. THE GATT NULLIFICATION AND IMPAIRMENT CASES

In the first 25 years of GATT operations (1948-1973), approximately seventy-five complaints were filed under the disputes procedure. Twenty-nine progressed to some form of third-party decision, interim or final. Of the rest, the majority were settled bilaterally.\textsuperscript{54}

\textsuperscript{54} For the author's compilation of the first 65 complaints (26 of which produced some sort of third-party decision), see Hudec, \textit{GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade}, 80 \textit{Yale L.J.} 1299, 1378-86 (1971). It should be emphasized that counting and classifying individual complaints requires a certain amount of rationalized arbitrary judgment; the numbers should be taken as no more than an approximate indication of volume.

The following is a list of more recent complaints complementing the table cited above. The title gives the defendant and the practice complained of, the parenthetical gives the name of the complainant and citation of the complaint if available, and the remaining part of the entry lists decisions and/or other dispositions as of December 31, 1973.

2. Danish Import Restrictions on Grains (United States, GATT Doc. L/3386 (1970)); settled, settlement not officially reported.
Technically, all these complaints involved "nullification and impairment," for under GATT Article XXIII both violation and nonviolation complaints are treated as claims of nullification. The overwhelming majority involved alleged violations of particular GATT legal obligations. The concept of nonviolation nullification and impairment figured importantly in only about seven complaints or decisions. This Part of the Article explores the interpretative background offered by those seven cases.

A. An Early Example: United States v. Cuba

The first formal Article XXIII complaint of any kind was a United States memorandum in late 1948. Cuba had issued a new regulation prohibiting all but a few established importers from importing textiles; the regulation also imposed complicated documentary requirements which made importing quite burdensome. The United States memorandum suggested briefly that the Cuban regulation might be in violation of GATT Article XI, but quickly went on to argue that, whatever the legal merits, the regulation had clearly stopped trade and had thus impaired the value of tariff concessions on textiles made in the October 1947 negotiations.

As viewed by the United States, the Cuban regulation presented a classic case of nonviolation nullification and impairment. Cuba had already indicated, in other proceedings, that it regarded its 1947 textile concessions as a mistake that exposed the Cuban textile industry to unbearable foreign competition. The regulation appeared to be an attempt to nullify those 1947 concessions by erecting an alternative barrier to imports. The United States left no doubt that it regarded the whole affair as an exercise in bad faith.

Cuba's defense made the case more difficult. Cuba maintained that the regulation was provoked by an outbreak of un-

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BISD 230 (1973); settled, Eighteenth Annual Report of the President, supra, at 23.
55. See GATT Doc. CP.2/43 (1948).
specified "sharp practices" on the part of fly-by-night importers, implying that the regulation was necessary to the enforcement of Cuban domestic law. If accurate, the Cuban defense would have raised the question whether action to correct a genuine local problem would nevertheless constitute impairment if it incidentally restricted legitimate trade as well. Would trade-restricting effects alone be sufficient to call for some adjustment? Or does a country receiving a tariff concession "take the risk" of some trade impediments caused by external events?

These questions were never answered in the Cuban case. The dispute was referred to a working party, and in a few days the parties reported a settlement. Cuba dropped the new regulation entirely, and the United States agreed to discuss modification of the 1947 concessions.

B. The Australian Subsidy Case

1. The Decision

The GATT's most famous decision involving nonviolation nullification and impairment arose out of a complaint filed in the summer of 1949 by the government of Chile. During World War II, Australia had granted a subsidy to domestic distributors of nitrate fertilizers whose resale prices were under wartime price controls. The subsidy underwrote the purchase of more expensive imports. The nitrate fertilizer group included both sodium nitrate fertilizers produced by Chile and ammonium sulfate fertilizers produced elsewhere. The subsidy system continued after the war. In 1947, when the subsidy was still in force, Australia granted a tariff concession to Chile, binding duty-free treatment of sodium nitrate. Then, on July 1, 1949, Australia terminated the subsidy for sodium nitrate fertilizers (the Chilean product), but continued the subsidy for ammonium sulfate fertilizers, thus creating for the latter an artificial price advantage of about 25 percent.

Chile asserted that the new subsidy policy "annuls or seriously threatens" the tariff concession received by Chile. (Chile also argued later that the subsidy discrimination violated the most-favored-nation obligation of GATT Article I, but this al-

57. GATT Doc. CP.2/SR.23 (1948).
58. GATT Doc. CP.2/43 (1948).
60. Article I requires that "favors" granted to a product originating in one country be accorded "unconditionally" to all "like products" originating in all other GATT countries. Chile argued that the two types
leged violation never figured seriously in the case.) Bilateral discussions failed, and in early 1950 Chile asked the Contracting Parties for a ruling under Article XXIII.61

In the plenary discussion that followed, the Australian delegate explained that the purpose of his government's action had been to discontinue subsidized sales of fertilizer to all purchasers except those farmers, mainly sugar farmers, whose produce was still under price control. Because of soil conditions in the sugar-growing regions, sugar farmers preferred ammonia-base fertilizers. One way to limit the subsidy to sugar farmers, therefore, was to limit it to the fertilizers they used. This action, the Australian delegate concluded, was strictly a matter of agricultural price policy and had no trade purpose. Australia joined in the request for a decision on the legal issues.62

The Working Party members were Chile, Australia, the United States, the United Kingdom, and Norway.63 The three neutral members wrote what amounted to a third-party decision.64 After rejecting Chile's claim of an Article I violation, the Working Party concluded that the subsidy policy had created a "prima facie case" of nonviolation nullification and impairment.65 The Working Party recommended that Australia

of fertilizer were "like products" because of their commercial substitutability. GATT Doc. CP.4/23 (1950). The Working Party ruled that the two products were not "like," on the ground that traditional tariff classification practice separated the two products. 2 GATT, BISD 191 (1952). The same theory was argued in the Norwegian Sardines case. See text accompanying note 80 infra.

63. GATT Doc. CP.4/SR.15 (1950). At this time the GATT had not yet developed a third-party procedure. In form, the Working Party was merely a negotiating body, in which the principals, with the participation of selected neutrals, were expected to work out their differences. In fact, the neutrals (and the Secretariat) simply took over.
64. 2 GATT, BISD 188 (1950).
65. The words "prima facie" are words of art, generally used in findings of nullification and impairment. The origin and meaning of the words are curious. They relate to the question of trade damage. Unlike GATT legal obligations, which are absolute, nonviolation nullification and impairment requires some finding of economic disadvantage. (No one would have argued, for example, that Chile's concession had been impaired by a subsidy limited to a use for which Chile's fertilizer was unsuited.) Australia made an issue of trade damage, arguing that farmers would not buy the Chilean product even without the 25 percent subsidy differential. GATT Doc. CP.4/SR.15 (1950). The Working Party had difficulty proving the contrary, because trade statistics for prior years were distorted by the remnants of wartime rationing. See 2 GATT, BISD 190-91 (1950).
consider removing the disparity in subsidy treatment. Australia filed a separate memorandum stating its dissenting views.⁶⁶ The dissent was not pressed before the Contracting Parties, however, and the Working Party's decision was ratified.⁶⁷ Later in the year, the parties reported that they had reached a settlement.⁶⁸

2. The Analysis of Nullification and Impairment

The Working Party opened its discussion of nonviolation nullification and impairment by stating a rule:

It was agreed that . . . [nullification or] impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate.⁶⁹

Applying the rule, the Working Party concluded that Chile

The Working Party seems to have taken the view that while statistical proof might be necessary to measure actual retaliation, the Contracting Parties should be able to give declaratory relief on the basis of less conclusive evidence—e.g., the probable commercial disadvantage of a 25 percent reduction in the price of the competing product. But, apparently, the Working Party was nervous about adding this novel proposition to an already novel decision. Instead, it chose simply to describe its finding of nullification as a "prima facie" finding, using the term "prima facie" with no explanation at all. In the plenary review, one delegate noticed the absence of statistical proof and criticized the issuance of a formal recommendation without it, but the objection was not pressed and the report was approved. GATT Doc. CP.4/SR.21 (1950).

The underlying issue was resolved in the next nullification case, Norwegian Sardines. See text accompanying notes 77-85 infra. Faced with a similar problem of statistical proof in a case involving a tariff differential of approximately 10 percent ad valorem, the Panel noted the problem and said:

Nor did the Panel feel that it was necessary for a finding of nullification and impairment under Article XXIII first to establish statistical evidence of damage.

GATT, 1st Supp. BISD 56 (1952). Notwithstanding this clear answer, the term "prima facie" continues to be used in most official references to nullification findings, and still without explanation.

The terms of the settlement were not reported. According to the recollection of observers, Australia promised to eliminate the remaining subsidy in stages.

⁶⁶. 2 GATT, BISD 195-96 (1950).
⁶⁸. GATT Doc. CP.5/SR.6 (1950). The terms of the settlement were not reported. According to the recollection of observers, Australia promised to eliminate the remaining subsidy in stages.
“had reason to assume” that the subsidy on one fertilizer would not be removed before the other. In support of its conclusion, the Working Party listed four factors:

(a) The two types of fertilizer were closely related;
(b) Both had been subsidized and distributed through the same agency and sold at the same price;
(c) Neither had been subsidized before the war, and the wartime system of subsidization and distribution had been introduced in respect of both at the same time and under the war powers of the Australian Government;
(d) This system was still maintained in respect of both fertilizers at the time of the 1947 tariff negotiations.70

The decision went on to distinguish two other situations. First:

[T]he Working Party considered that the removal of a subsidy, in itself, would not normally result in nullification or impairment.71

Then, in the next paragraph:

The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of the two competing products. In such a case, given the freedom under the General Agreement of the Australian Government to impose subsidies and to select the products on which a subsidy would be granted, it would be more difficult to say that the Chilean Government had reasonably relied on the continuation of the same treatment for the two products.72

The idea that nullification and impairment turns on what countries may “reasonably anticipate” does not come from either the text of Article XXIII or any of its official comments. The relevant text simply says that a contracting party is entitled to certain remedies if

any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . as the result of . . . the application by another contracting party of any measure whether or not it conflicts with the provisions of this Agreement.73

The ITO Charter used the same words, also without definition.

The “reasonably anticipated” formula was an attempt to explain the phrase “benefit accruing to [the injured party] under the Agreement.” In the case of a tariff concession, the concept seemed to involve the commercial benefits which would flow from the legal obligation limiting the tariff rate—or, perhaps

70. Id.
71. Id.
72. Id. (emphasis added).
73. For the full text of Article XXIII, see note 3 supra.
more accurately, the freedom from commercial disadvantages which those obligations promised. In the tariff concession itself, the government merely promised not to charge a duty higher than the specified rate. The “benefit” from this legal obligation was the reduction in the overall level of artificial commercial disadvantages facing the imported product. Conceivably, any new measure which had the effect of raising the level of artificial disadvantage might be said to “impair” that benefit. The Working Party’s “reasonably anticipated” formula stated a narrower test. There would be “impairment” only if the government claiming injury could not reasonably have anticipated the new measure.

The ordinary meaning of “reasonably anticipated” would be the actual predictability of the event. A plausible case could be made for such a standard. The purpose of the nullification and impairment remedy is to preserve the balance of the original exchange of values. If a particular disadvantageous measure is foreseen, the country receiving concessions will be able to discount the possibility in advance by paying a lesser value for the concessions affected. If that is so, then the actual occurrence of the foreseen disadvantage will not upset the balance, for it will already have been taken into account. Conversely, if the disadvantageous measure is not anticipated, the country receiving the concessions is more likely to pay full value and thus to suffer an imbalance when the commercial advantage is later reduced.

This “discounting” theory could have explained the Working Party’s ruling with regard to the change in subsidy policy. It might also have explained the dictum that Chile could not reasonably have expected the subsidy itself to continue, on the ground that Chile should have been alerted by common knowledge that wartime commercial subsidies are seldom intended to be permanent.

The discounting theory could not, however, explain the Working Party’s second dictum, the discussion of the hypothetical new subsidy on a competing product. The introduction of a totally new subsidy would hardly have been any more foreseeable than the change in subsidy policy which occurred in fact. Certainly no government would have discounted the value of a tariff concession on the basis of such a remote possibility. Nonetheless, the Working Party went out of its way to say that its ruling did not cover such a case, and to warn that the result in such a case might have been different.
The Working Party's second dictum was obviously intended to make it clear that the ruling rested on a narrow ground. The only distinction between the hypothetical new subsidy and the case itself was Australia's past practice with regard to the dual subsidy policy. The Working Party was trying to emphasize that its ruling rested on that particular conduct, and not on the mere fact that Chile had no warning of the change. The apparent significance of that conduct was that it amounted to an affirmative representation on which Chile had naturally relied. The theory of the ruling, in short, was the essentially normative judgment that Australia should be "responsible" for its particular reliance-inducing conduct.

Both the positive and negative sides of this narrower theory deserve comment. On the positive side, the interesting development was the Working Party's apparent belief that normative judgments of this kind were relevant to the issue of nullification. In theory, the nullification doctrine was supposed to represent a concern for the fact of reciprocity, without regard to the character of the actions or events which upset the balance. In practice, fault (or "responsibility") seemed to matter. Although the Working Party was not saying that findings of fault were essential, it was clearly saying that they counted in the balance.

On the negative side, the interesting feature was the Working Party's concern to disavow any decision on the hypothetical new subsidy. The concern seemed to rise from a perception that governments would view nullification remedies as an annoying form of interference in areas in which they were accustomed to freedom of action. This seems to have been the sense of the Working Party's somewhat puzzling reference to Australia's "freedom under the General Agreement." The statement was obviously not intended to suggest that the technical legal status of a government measure made a difference. Rather, the statement seemed to be an attempt to remind the audience that they were dealing with legally permissible conduct, and that one ought not to interfere lightly.

The Working Party was in fact confronting the same question of extralegal regulatory powers which the GATT-ITO negotiators had wrestled with and failed to resolve. The Australian reaction to the proceedings had become a concrete demonstration of the dilemma. In its dissenting memorandum, the Australian delegation took issue with the ruling on the ground that "treatment . . . going further than is provided for in the various
articles of the General Agreement . . . must be a matter for negotiation . . . .”74 If the Australian reaction were typical, governments were still not fully reconciled to the common-law regulatory powers they had voted.

The Working Party dealt with the dilemma by retreating to a more stringent substantive definition of nullification and impairment. Although the definition could still be phrased in terms of what governments might or might not “reasonably expect,” interference would in fact require further justification based on the defendant's own conduct. In the absence of such justification, governments might have to “expect” a certain amount of unexpected commercial frustration as a necessary risk of the business.

The particular normative issue involved in the Australian Subsidy case—responsibility for reliance-inducing conduct—is familiar in domestic legal systems, and the result would hardly have been surprising in a domestic law setting. The issue was not one to be taken for granted, however, in the government-to-government setting of the GATT. Governments typically pay close attention to the formal requisites of legal obligations and are not accustomed to giving legal effect to informal assurances or representations. The nullification provision offered a less awesome sort of remedy that might be used in protection of such reliance, but even that half step was far from predictable. It was actually a rather large step for the GATT community.

C. THE REVIEW SESSION DECISION: MORE ON SUBSIDIES

As things have turned out, most of the GATT's activity in the area of nullification and impairment has dealt with one version or another of the same informal, reliance-inducing behavior that was involved in the Australian Subsidy case. In the 1954-1955 Review Session, however, a direct follow-up to that case made it clear that other value judgments can easily become involved. The issue was raised by a still dissatisfied Australian delegation, apparently in the belief that there was a need for some clarification of the hazards perceived in the Working Party ruling. The Contracting Parties responded with a decision concerning “domestic subsidies” (those benefiting only domestic producers) which, somewhat perversely, extended the ruling a bit further:

74. 2 GATT, BISD 196 (1952).
The Working Party considered many proposals for strengthening the present provisions of the Agreement with respect to the use of subsidies. So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.\textsuperscript{75}

The statement is consistent with the theory of the Australian Subsidy decision. The certified "expectation" is limited to the case where the new subsidy is "on the product concerned." Apparently, the Review Session Working Party felt that a new or increased subsidy on a competitive substitute product would be distinguishable—the same conclusion suggested in the Australian Subsidy decision.

The affirmative ruling with regard to a domestic subsidy "on the product concerned" appears to recognize another important factor that might accompany reliance-inducing conduct. A tariff concession promises a reduction in the artificial cost barrier between foreign and domestic producers. A subsidy which restores the same artificial cost advantage obviously defeats the purpose of the concession. What seems to single out this particular action, however, is not its economic effect (subsidies on competing products might have the same effect), but its apparent motive. The act of reproducing exactly the same disadvantage, on exactly the same product, says something about the good faith of the defendant. Either the subsidy is a deliberate attempt to escape the tariff concession, or at least the effect is so obvious as to indicate the defendant's willful indifference to its commitment.\textsuperscript{76} In short, the Review Session decision seems to say that bad faith is also a relevant criterion of the test for nullification.

\textsuperscript{75} GATT, 3d Supp. BISD 224 (1955) (emphasis added). A later GATT study explained that the words "failing evidence to the contrary" meant "unless pertinent facts were available at the time." GATT, 10th Supp. BISD 209 (1962). \textit{See also} text accompanying notes 92-94 infra.

\textsuperscript{76} Although one is tempted to conclude that a "domestic" subsidy is always a trade policy device to give domestic producers some advantage over foreign competitors, it is possible to imagine nontrade motives such as assistance in interproduct competition with other domestic producers—e.g., assistance to coal mines in a depressed area being threatened by competition from other domestic energy producers. One can still speak of "bad faith" in such situations, in terms of a state of mind apparently impervious to the inequity of taking back exactly what was given in the bargain.
D. **The Norwegian Sardines Case**

The GATT's only other affirmative finding of nonviolation nullification and impairment was a 1952 ruling in a dispute between Norway and West Germany. The commercial problem was virtually a carbon copy of the problem in the *Australian Subsidy* case. Instead of two competing fertilizers, there were two biologically distinct but commercially competitive sardine products, one exported mainly by Norway and the other mainly by Portugal. Germany was imposing a higher tariff, a higher border tax, and more restrictive quantitative controls on the Norwegian sardine product.

The legal setting was a bit different. Norway had obtained tariff concessions on its sardine products in early 1951. Norway's negotiators had also asked for an assurance that in the future the Norwegian products would not be given less favorable treatment than Portuguese-type sardine products. The Norwegian negotiators reported that they had received such an assurance. It was not in writing, however.

Shortly thereafter, German legal experts concluded that a prewar trade agreement with Portugal was still in force, and that Germany was obliged to observe the trade agreement rate for the Portuguese variety of sardine, a rate lower than the concession rate on the Norwegian variety. The tariff rate was accordingly lowered. Norway immediately asked for the same rate, Germany refused, and Norway brought the matter to the GATT.

Norway began by arguing that Germany's differential treatment of the northern and southern sardines violated the most-favored-nation obligation of GATT Article I, on the ground that the two species were "like products." Although considerable attention was devoted to that legal claim, it was eventually rejected. Attention then shifted to the other ground of complaint, the "assurance."

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77. The Portuguese product, referred to by the Panel as *Clupea pilchardus*, was, under German labeling laws, the only true "sardine." GATT Doc. L/36 (1952). The Norwegian products were *Clupea sprattus* (sprats) and *Clupea harengus* (herring), which are apparently known by the names "brisling" and "silde" in Scandinavian countries.

78. See GATT Doc. SR.7/5 (1952).

79. GATT Doc. L/16 (1952).

80. The argument was basically the same as that advanced by Chile in the *Australian Subsidy* case, supra note 60. For the Panel's negative reply, see GATT, 1st Supp. BISD 53, 57-58 (1952).
The difficulty with Norway's assurance theory was that Germany, while acknowledging that the question of equal treatment had been discussed, would not agree that its negotiators had acceded to Norway's demand. According to participants interviewed by the author, the German delegation later softened its position to say it really did not know what had happened and could not locate the key negotiating personnel involved. No such assurance had been authorized by the responsible German officials, and no record of any such assurance existed. It was possible that a German negotiator had acted without authority.

The situation was distinctly uncomfortable for both sides. The German delegation faced the embarrassment of a runaway negotiating team. The Norwegian delegation, on the other hand, had made a formal written report of receiving an assurance despite its inability to obtain the customary written confirmation. The dispute was submitted to a Panel of neutral members. On balance, the evidence tended to show that Norway had obtained "something" from the German negotiators, but no one wanted to force the issue to a specific finding. The Panel found a way out of the impasse through the "reasonable expectations" formula of the Australian Subsidy decision. Germany was persuaded to accept a vaguely worded and somewhat contradictory finding in which the Panel would conclude (1) that conversations on the subject had occurred, (2) that the content of the conversations was unknown, but (3) that Norway "had reason to assume" from these conversations that equal treatment would be afforded. The third conclusion was enough to support the Panel's finding of nullification and impairment under the Australian Subsidy formula. The decision was ratified by the Contracting Parties, and the parties later reported a settlement in which Germany undertook to correct all but one percent of the tariff differential and to make satisfactory adjustments in the other areas. The Norwegian Sardines decision added little to the theory

81. GATT Doc. SR.7/5 (1952).
82. The Sardines complaint was the first Article XXIII case referred to a third-party tribunal. See GATT Doc. SR.7/5 (1952). The term "Panel" is taken from "panel of experts," designating a group of individual government experts acting in their individual capacities (as opposed to their capacities as government representatives) for the purpose of rendering impartial advice within their area of expertise.
83. The decision is reported in GATT, 1st Supp. BISD 53 (1952).
84. Id. at 30.
of nullification and impairment announced in the Australian Subsidy case. The critical element was once again the defendant's reliance-inducing conduct. The case was actually easier, because the conduct (whatever it was exactly) was presumably intended to induce such reliance.

There is some evidence in the decision that an alternative theory may have influenced the Panel's thinking. The theory begins by assuming that Norway never did succeed in obtaining a formal or informal assurance, but nonetheless did succeed in making it clear to Germany that it regarded equality of treatment as essential to the balance of the exchange. Germany could then have accepted the deal with this "condition subsequent." The acceptance would mean, not that Germany promised equal treatment, but merely that Germany acknowledged that an imbalance would be created by the failure to maintain equality. This type of negotiating result would lay a foundation for a claim of impairment if equal treatment were subsequently denied. One wonders whether the Panel itself was not thinking along these lines when it said:

[A]lthough no conclusive evidence was produced as to the scope and tenor of the assurances or statements which may have been given or made . . . it is reasonable to assume that the Norwegian delegation, in assessing the value of the concessions offered by Germany . . . and in offering counter concessions, had taken into account the advantages resulting from [equal treatment].

E. GERMAN DUTIES ON STARCH

A case which seemed to raise the "condition subsequent" issue came before a GATT panel in 1955. During the 1950-1951 tariff negotiations, the chief of the German delegation had delivered a letter to the Benelux delegation. The letter had stated that (1) the German delegation agreed that German duties on certain starch products "should be reduced as soon as possible to the level of the duties applied by Benelux"; and (2) the German government would open negotiations with the Benelux governments as soon as possible, with a view to achieving these tariff reductions.

Negotiations had subsequently taken place, but without success. In late 1954, Germany made it clear that the tariff reduc-

86. GATT, 1st Supp. BISD 59 (1952).
tions could not be implemented in the reasonably near future, because of certain German price-support programs. The Benelux governments protested this inaction and submitted a memorandum asking the GATT to investigate and make a recommendation.88

The Benelux governments took the position that the German letter amounted to an "undertaking" to reduce duties, but they did not offer any theory explaining the legal consequences of that "undertaking." The German government argued that the only "undertaking" in the letter was the promise to negotiate; in any event, it added, the letter was not "within the framework of GATT" because it had not been made part of the formal German schedule of tariff concessions, nor had it been deposited formally with the Secretariat.89

The dispute was submitted to a GATT Panel, which persuaded the parties to agree to a temporary settlement, and thus was never called upon to rule. The Panel did write a report, however, which included a few interesting findings of fact. The Panel found that the statement about reducing duties was a "promise," that the promise formed part of the balance of concessions in the 1950-1951 negotiations, and that Benelux was not expected to pay again for the additional tariff reductions promised.90

These findings all but announced the ruling the Panel would have made. They amounted to a clear case of nonviolation nullification and impairment. Germany had expressly acknowledged that the 1950-1951 exchange of concessions had been out of balance without the reduction in starch duties. Benelux had agreed to go ahead in anticipation of subsequent payment, but if that payment failed there obviously had to be a correction of the imbalance. The only difference from the Norwegian Sardines "condition subsequent" situation was that the acknowledged impairing event already existed, subject to a grace period for correction. The only issue left undecided by the Panel report was whether the grace period had expired.

F. FRENCH QUANTITATIVE RESTRICTIONS

A 1962 complaint by the United States presented a modern

89. GATT Doc. SR.9/30 (1955).
90. GATT, 3d Supp. BISD 77 (1955). The settlement involved a German undertaking to secure a degree of liberalization on the products concerned.
version of the "existing impairment" problem of the German Starch Duties case. The United States complaint concerned several quantitative restrictions imposed by France in violation of GATT Article XI. The French restrictions were the residue of postwar balance-of-payments quotas which France, like many other GATT members, was having difficulty eliminating completely. After more rigorous enforcement measures had proved unproductive, the GATT had retreated to a rather slow-moving "consultation" procedure to keep track of each government's progress toward removal. Adoption of this procedure had in effect suspended the hard prohibition of Article XI in favor of a de facto obligation to strive for improvement as fast as conditions allowed.\footnote{The brief decision which formally established the procedure appears at GATT, 9th Supp. BISD 18 (1960). For the United States proposal explaining the procedure, see GATT Doc. SR.16/10 (1960).}

Perhaps because of the de facto legal situation, the United States constructed its complaint with a dual legal theory. The complaint listed only those restrictions affecting products on which the United States had received a tariff concession in the 1960-1961 Dillon Round negotiations. The gravamen of the complaint thus became (1) nullification and impairment due to a violation of the general prohibition against quantitative restrictions and (2) specific impairment of the Dillon Round concessions.\footnote{GATT Doc. L/1899 (1962).}

In plenary discussion of the complaint, the French delegate acknowledged the Article XI violation but rejected the Dillon Round nullification claim on the ground that when the United States had paid for the concessions, it had full notice both of the existing restrictions and of the French policy toward future liberalization. The United States insisted on its Dillon Round claim, and apparently believed that this second claim was clear enough to justify asking for an immediate ruling from the plenary meeting. The meeting would not agree to override France's objection on the spot, and the parties agreed to refer the case to a Panel.\footnote{GATT Doc. SR.20/8, at pp. 104-11 (1962).}

The only issue in dispute before the Panel was the Dillon Round nullification claim. The United States had agreed to the Panel on the express understanding that the Panel would decide that issue.\footnote{Id. at p. 110.} Nevertheless, the Panel refused to decide it.
After noting the two parts of the United States legal theory (both of which were technically claims of "nullification and impairment"), the Panel merely ruled that the French restrictions had caused "nullification or impairment of benefits to which the United States is entitled under the General Agreement." It said nothing more. The nonresponsive ruling was enough, for the only action being sought was a formal GATT recommendation asking France to remove the restrictions, and either of the two theories would have supported such action.

The results of the case arrived in two installments. Shortly after the decision, the French agreed to remove some of the quotas and to liberalize others. Nothing further happened until 1972, when the United States renewed its demands for complete elimination of the remaining quotas. After the United States had filed a formal request for authority to retaliate, the French government agreed to remove all but one of the remaining restrictions.

The unresolved issue in this case—the claim of specific tariff concession nullification—might well arise again if the United States were to launch a series of new complaints in response to the 1974 Trade Act. Many of the foreign trade restrictions mentioned in the debates on the 1974 Act have been around for years, and tariff concessions have probably been negotiated on top of many of them. Attempts to claim nullification of such concessions, whether as an added ground or as the sole ground for an Article XXIII complaint, would most likely encounter the same notice objection raised by the French delegate in 1962.

The fact of notice, of course, is only the beginning of the inquiry. Specific negotiating assumptions may vary. Apart from actual discussion of the matter, the reasonableness of implicit "expectations" could be influenced by many circumstances—whether the obstacle is legal or illegal, whether it had previously been the subject of efforts at removal, whether it has since been intensified, and so forth. One thing is clear, however. Claims of tariff concession nullification based on such existing

95. GATT, 11th Supp. BISD 95 (1962). No mention of the issue was made during the plenary meeting which reviewed and adopted the Panel report. GATT Doc. SR.20/10 (1962). On the same issue, see note 75 supra.
97. See Eighteenth Annual Report of the President, supra note 54, at 23.
trade barriers will not create the open-and-shut case the United States assumed it had presented in the 1962 proceeding.

G. URUGUAYAN RECOURSE TO ARTICLE XXIII

The *Uruguayan Recourse* is the only Article XXIII complaint of its kind. It was less a conventional grievance than a diplomatic broadside aimed at the GATT's policy, or lack of policy, toward the poor developing countries. The case is interesting, because it is the only time the GATT has been presented with a nullification claim reaching beyond the contract-type inequities raised in connection with tariff concessions.

Uruguay filed its complaint in late 1961. The principal feature of the complaint was a chart showing 562 individual trade restrictions in fifteen countries, each affecting a major Uruguayan export product. The restrictions had been collected without regard to their legality under the GATT; they included every impediment Uruguay could find, with the exception of a few categories taken for granted, such as tariffs. All fifteen countries named in the chart were made defendants. They included all the major industrialized countries, plus Czechoslovakia.

Uruguay's theory was essentially nonviolation nullification and impairment—that the total mass of restrictions, without regard to their legality, constituted a "situation" which destroyed the overall balance of Uruguay's GATT obligations and benefits. The relief sought was removal of the restrictions.

The legal theory presented an interesting attempt to combine two separate strains of nullification doctrine. In the GATT-ITO negotiations, the draftsmen had gone to some lengths to legitimize the concept of overall imbalance as an excuse to escape obligations. In GATT practice, on the other hand, governments had concentrated on specific, contract-type inequities and had developed nullification findings as a form of regulatory pressure to correct those inequities. Uruguay was now trying to focus that same kind of regulatory pressure on a perceived situation of overall imbalance.

Uruguay compounded the difficulty of its legal position by

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99. In its arguments, Uruguay referred specifically to the "any other situation" language of Article XXIII: (c). See, e.g., GATT Doc. L/1679 (1961). To be fair, however, it should also be noted that Uruguay never developed the argument beyond the level of assertion.
refusing to act as a plaintiff. Despite constant prodding by the Panel, Uruguay refused to take a legal position on any of the 562 restrictions, and refused also to offer any specific information or trade data supporting the nullification and impairment claim on individual products. Uruguay maintained that trade and production data would have been distorted by the wide net of existing trade restrictions. Besides, the complaint involved the overall situation, not individual cases, and the overall situation was clear from the chart itself.  

The Panel decision disposed of Uruguay's theory of overall imbalance without even acknowledging that it had been advanced as a legal theory of nullification. The Panel report said:

In invoking the provisions of Article XXII the Uruguayan delegation repeatedly referred to the general difficulties created for Uruguay by the prevalence of restrictive measures affecting its exports and to the resulting inequality in the terms on which temperate zone primary producers participate in world trade. The Panel noted that it was not charged with the examination of broader issues falling outside the purview of Article XXII.  

Instead, the Panel treated all the restrictions on an individual basis, item by item. Manifest legal violations were identified, and recommendations to correct the violations were issued. As to the possibility of nonviolation nullification and impairment, the Panel report said:

While it is not precluded that a prima facie case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgment to be made under this Article.  

In other words, without specific information and an explanation of why each measure constituted impairment, the Panel could not adjudicate the nullification issue. For all practical purposes the nullification phase of the case was at an end.  

100. The Panel worked for several months trying to gather data and refine the issues. See GATT, 11th Supp. BISD 97-98 (1962). Although asked to do so, Uruguay never elaborated its legal theory.  
101. Id. at 102.  
102. Id. at 100.  
103. The case went through two further Panel proceedings. Uruguay asked the Panel to litigate many more issues each time, but for various reasons—chiefly Uruguay's failure to develop its case—the Panel confined itself on both occasions to a review of the progress made on its specific recommendations regarding confessed legal violations. A considerable number of violations had been eliminated by the time of
The key to understanding the Panel’s reaction is to recall that the remedy sought by Uruguay was a series of formal recommendations addressed to individual governments, asking them to remove the particular restrictions complained of. The prior nullification cases had based such remedies on a detailed account of the equities relating to the particular trade barriers in issue. Uruguay failed because it had not presented such a case.

Uruguay failed in two respects. First, the situation of overall imbalance, even if true, was simply irrelevant to the kinds of equities required to support recommendations in a nonviolation case. The teaching of the *Australian Subsidy* case was that GATT interference of this kind had to be justified by showing that the defendant government itself had done something to earn it. The fact that other governments were mistreating the plaintiff contributed nothing.

Second, the mere identification of a potentially trade-restricting measure was not enough to create such item-by-item equities. Exactly how much more the Panel wanted is not clear, for Uruguay had supplied nothing at all beyond its list. The evidence clearly fell short of supporting the particular normative characterizations of the defendant’s conduct made in the earlier cases—reliance-inducing conduct, a bad faith motive, or something of the kind. The possibility of establishing nullification on lesser grounds, such as the hypothetical concession-plus-disadvantage situation discussed in *Australian Subsidy*, was not in issue. On balance, however, the Panel’s insistence on “detailed submissions” presumably meant more than mere details of trade damage and tends to reinforce the implication of the *Australian Subsidy* decision that more particular inequities would probably be required.

The Panel was wrong in saying that complaints of overall imbalance were “outside the purview of Article XXIII.” Fully half the negotiating history of Article XXIII had been devoted to making absolutely certain that such “situations” were included. If Uruguay had simply been asking for a general release from obligations on that ground, without focusing regulatory pressure on anyone, the panel would have been obligated to adjudicate the claim.

What the Panel meant, one must assume, was that the overall imbalance problem was outside the purview of the regula-
tory instrument which Article XXIII had become. In fact, neither Uruguay nor anyone else was even remotely thinking of the escape function of Article XXIII at that point. To the author’s knowledge, no country has ever tried to use Article XXIII for that purpose. The reason, of course, is that scaling down obligations, by itself, never helps. For practical purposes, therefore, nonviolation nullification and impairment had indeed become what the Panel thought it was—an issue-specific regulatory instrument aimed at influencing otherwise legal behavior.

H. THE TEACHING OF THE GATT CASES

The cases interpreting the GATT’s doctrine of nonviolation nullification and impairment have peeled back only a corner of its potentially limitless substantive coverage. All but one of the complaints invoking the doctrine have been concerned with protecting the particular “benefits” governments expected to derive from exchanges of tariff concessions. Governments have generally ignored the possibility of claiming impairment of any larger “benefits” derived from the General Agreement. The only test of this larger possibility was Uruguay’s attempt to assert the largest “benefit” of all, the concept of overall balance.

The concentration on tariff concessions is understandable. The tariff concession is different from other GATT legal obligations, because it is the only obligation that is paid for in cash. The payment is made by lowering one’s own tariffs, a direct and easily identifiable action involving a measurable change of position. In contrast, general legal obligations are “paid for” merely by adopting and conforming to the same set of general obligations, a form of payment which usually involves little or no actual change of position and which covers such a broad spectrum of conduct that it is all but impossible to certify that full value has in fact been given.

The perception of concrete payment for tariff concessions sharpens the sense of deprivation when another government’s conduct frustrates the commercial advantage expected from that transaction. This perception also makes it easier to identify the frustration in the first place, for with payment taken for granted, the issue is narrowed to the adequacy of the return treatment afforded to particular concession products. This clearer and sharper sense of deprivation may itself be the stimulus to complain, or it may simply offer the most appealing normative framework for complaints triggered by other consid-
erations. In either event, the tariff concession becomes the focus of attention, and tariff concession “benefits” become the primary beneficiary of the supplemental protection contemplated by the nullification provision.

The GATT cases have made some progress in identifying the kinds of “benefits” which payment for a tariff concession is thought to earn. Perhaps the most important point made by those cases is that not all impediments to commercial opportunity are equally actionable. All the cases have looked for some additional wrong in the defendant’s conduct which would serve as a normative justification for asking the defendant to do something about the impediment. Although the GATT has never held squarely that this additional normative element will be required in all cases, its reluctance to interfere with otherwise legal conduct makes it likely that such normative issues would almost inevitably influence its view of what governments may “reasonably” expect. In practice, GATT governments have limited the use of formal Article XXIII proceedings to behavior which they deem wrong in some way.

The cases have identified two types of conduct by the defendant government which lead to classifying a particular trade impediment as actionable impairment of a tariff concession. The first is reliance-inducing behavior which has led the complaining party to regard absence or removal of the impediment as part of the return payment it has bargained for. With regard to explicit bargains or conditions such as those involved in Norwegian Sardines or German Starch Duties, this part of the nullification doctrine does no more than enforce various supplemental protections that the parties themselves have agreed to, albeit informally. As Australian Subsidy makes clear, however, the doctrine also extends to assigning fault or responsibility for unintended reliance-inducing behavior.

The second type of conduct which can render a trade impediment actionable as a tariff concession impairment is exemplified by the Review Session decision on subsidies. It was suggested that the basis of that decision was the imputation of “bad faith” to an action so clearly in conflict with the objective of a prior tariff concession. While in that case “bad faith” was evident from the nature of the subsidy action itself, it would follow that a trade-restricting measure of any kind—whatever its ostensible purpose—would be equally actionable if a similar motive could be proved.
Many complaints about allegedly "unfair" trade practices involve charges that resemble this second type of tariff concession impairment. The complaints typically concern local taxes or regulatory measures whose ostensibly neutral provisions bear particularly heavily on the type of products offered by foreign suppliers. Examples would include motor vehicle taxes which operate to single out foreign vehicles, or product-standardization requirements which cannot be met by production-line merchandise made abroad. Implementation of such measures following a tariff concession would raise the issue of nullification and impairment. A nullification complaint would present two related issues—the degree of "bad faith" required to be shown, and the GATT's ability to make the necessary judgment.

Based on past practice, it would seem that a nullification finding could rest on "wrongs" short of conscious and purposeful trade restriction. For example, the reliance-inducing conduct in the Australian Subsidy case was hardly egregious. At least equally compelling, it seems, would be a finding that the defendant government has adopted trade-restricting requirements without good reason, or has ignored some nonrestrictive but equally effective alternative measure. Indeed, the latter judgment may actually have been made sub rosa in the Australian Subsidy case itself, with regard to Australia's curious way of subsidizing sugar farmers.

The real difficulty of extending the nullification doctrine into this area would be the more practical problem of asking the GATT to exercise the necessary judgment. There will inevitably be some nontrade reason for the trade-restricting local regulation, and the GATT would have to say that it is not good enough. One can predict that some justifications, such as scientific judgments about risks to health, safety, or the environment, would be virtually immune from review. The GATT would be able to act only on matters as to which government officials would feel some confidence in their own judgment—matters such as relative administrative convenience or efficiency. Whether the GATT would actually be willing to undertake such judgments in a particular case would further depend upon the community consensus at the time, for an organization such as the GATT cannot second-guess national governments unless the community feels strongly that its judgment is legitimate. Admittedly, this qualification makes the protection offered by the nullification doctrine quite elastic. The common-law nature of the doctrine makes this inevitable.
It remains to ask whether the GATT's experience with tariff concession "benefits" sheds any light on the legal issues that would be raised by broader claims of nullification relating to other "benefits" under the Agreement. Such a claim might be provoked, for example, by a perfectly legitimate local regulation, with standards deliberately selected to exclude foreign suppliers. Such a regulation could be made analogous to a deliberate circumvention of tariff concessions. A complaining government could argue that the regulation deliberately circumvents the GATT prohibitions of direct exclusionary measures—Article XI on quantitative restrictions at the border, or Article III on internal restrictions—and thus nullifies or impairs the "benefits" accruing under those prohibitions.

If the complaining agent were a sovereign enforcing its rules against its own individual citizens, the analysis could probably end with that. A nullification and impairment claim, however, is merely a claim by one citizen against another. As understood in the tariff concession context, the normative basis of that claim is damage to the complaining party's own interests, by a failure of reciprocity. Thus, even though a regulation involves a "wrong" in terms of community norms, a nullification claim would require the further showing that the wrong has caused an imbalance of reciprocity. To make this showing the complaining party must demonstrate that it has paid for the "benefits" impaired—either that it has paid in full, or at least that it has paid more than it has received in return. In complaints involving impairment of tariff concessions, the complainant's reciprocal tariff reductions seem to be regarded as a substantial enough form of payment to carry the presumption that full payment has in fact been made. Larger claims of nullification will raise the issue of whether the mere signing of an agreement carries the same presumption of full payment.

In practical terms, the problem is that no GATT members are assumed to be in perfect compliance with the rules. In addition to occasional violations, there are numerous waivers of obligation for special circumstances,\(^\text{104}\) and a wholesale reserva-

\(^{104}\) For example, the United States has obtained a waiver of all GATT obligations under Articles II and XI to the extent necessary to avoid conflict with section 22 of the Agricultural Adjustment Act of 1933, 7 U.S.C. § 624 (1970). See GATT, 3d Supp. BISD 32-38 (1955). Interestingly, in recent years United States demands for liberalization of agricultural trade have been preceded by suggestions that the United States might consider abandoning its waiver, seemingly in response to the obvious reciprocity problem created by the waiver. See, e.g., Hearings on
tion for inconsistent mandatory legislation in force on the date of accession. To speak of an overall balance of legal compliance between GATT members, one would have to speak of equivalent degrees of noncompliance. Consequently, it is difficult to imagine that a complaint which singles out one particular type of noncomplying behavior could possibly carry the same presumption of imbalance that one finds in the narrower area of tariff concessions.

If this perception is correct, then complaints of impairment based on the larger "benefits" of the Agreement must include something more to show that the complainant itself is actually complying, or at least complying better. National officials seem to have no difficulty persuading themselves of such things, but someone trying to make a seriously objective judgment would encounter some interesting questions. First, what areas of activity have to be balanced? Are legal obligations and larger GATT policies all one system, or can a government insist on independent balance in particular areas? One might argue, for example, that the most-favored-nation obligation is sufficiently different from other GATT obligations that it can be balanced.


106. Logically, Article XXIII complaints involving legal violation should also be weakened by the same imperfections in the balance of legal reciprocity—especially since that cause of action, too, is defined as an action for nullification and impairment. To some extent they are, as is shown by the rather elaborate effort to involve tariff concessions in the French Quantitative Restrictions case. See text accompanying notes 92-95 supra. Indeed, the relative dearth of legal complaints in recent years by GATT members other than the United States, see note 54 supra, can largely be attributed to the recognition by most other GATT countries of the widening area of their own noncompliance. Views would differ as to the reason for the United States exception. Some would cite plain self-righteousness. Others might concede that present United States trade policy still fits the 1947 GATT design better than the policy of most other GATT members, though most would be quick to add that this fact is merely the consequence of who it was that dictated the rules in the first place.

The present difficulties notwithstanding, however, complaints of legal violation have generally been viable. It should be noted that legal obligations per se cover a finite area, and thus are more easily balanced than are the practices which could conceivably impair the "benefits" of those obligations. More importantly, perhaps, the fact of legal obligation adds a certain rule-is-a-rule momentum to the equation. But cf. items 9 and 10 in note 54 supra,
TRADE RETALIATION

Although most other GATT obligations relate to different forms of the same conduct—protection of domestic producers against foreign competitors—one might still argue for independent balance in particular areas, such as internal treatment of imports once they clear customs. At the very least, one assumes, a complaining government would have to show a somewhat better degree of compliance on its own part with respect to the specific practice complained of—for example, government procurement practices.\(^{107}\)

The second major question concerns the kinds of noncompliance that would have to be weighed in the scale. Should all nonconforming conduct be included, even if it is protected by waiver, reservation, or special “voluntary” arrangement? Where the claim is one of equitable imbalance, the larger scale would seem the most appropriate.

These questions almost certainly exceed the capacity of GATT litigation. If they are necessary questions, the conclusion must be that nullification claims invoking the more general “benefits” of the Agreement cannot realistically be litigated. GATT consequences aside, these questions also have relevance for unilateral national decisions. A decision that purports to rest on these larger claims of nullification must, if that rationale is to be taken seriously, address itself to the troubling question of reciprocity.

III. THE GATT EXPERIENCE WITH RETALIATION

The doctrine of nonviolation nullification and impairment has never been used to authorize retaliation. The GATT’s only case of formal Article XXIII retaliation was a 1952 action by the Netherlands in response to a confessed legal violation. The GATT has also managed to create an informal type of “retaliation” outside the procedures of Article XXIII. This Part examines the GATT experience with both kinds.

A. THE NETHERLANDS ARTICLE XXIII RETALIATION

The GATT’s only case of retaliation under Article XXIII was a 1952 decision allowing the Netherlands to impose a discriminatory quantitative restriction on United States exports of


\(^{108}\) See note 172 infra.
wheat flour. The retaliation had been provoked by an admittedly illegal United States quota on dairy products. The GATT decision permitted the Netherlands to reduce United States shipments of flour from about 72,000 metric tons to 60,000 metric tons, a loss of about one million dollars at 1953 prices.\footnote{109} The United States dairy product quotas were a \textit{cause celebre} in the GATT. In the views of other GATT members, the quotas had been imposed without any serious economic justification; as an indication of United States intentions, they seemed to spell doom for efforts to increase dollar export earnings in those years of a critical dollar shortage.\footnote{110} The United States GATT representatives did not try to defend the quota action, but instead promised every effort to secure its repeal.\footnote{111} When these efforts failed, respect for the GATT virtually demanded that someone retaliate, and the United States acquiesced in the proposed retaliation.\footnote{112}

The United States did contest the amount of the initial quantitative restriction proposed by the Netherlands, and a Working Party of neutral members was appointed to settle the difference. The Working Party decision\footnote{113} established two important precedents. First, the GATT asserted its power to control such retaliation by increasing the ceiling amount from the 57,000 metric tons proposed by the Netherlands to 60,000 metric tons. Second, in basing its decision on the conclusion that its own figure was simply the "more appropriate" of several reasonable figures, the GATT claimed broad discretion in the use of its reviewing authority to promote the most constructive solution.\footnote{114}

The Netherlands renewed the retaliation authority each year.

\footnote{109}{GATT, 2d Supp. BISD 28 (1953). The price calculations are based upon tables in \textit{International Wheat Council, Trade in Wheat Flour} 61 & table 24 (Secretariat Paper No. 5, 1965).} \footnote{110}{Extensive press releases were issued reporting the complaints. GATT Docs. Press Releases GATT/39-43 (1951).} \footnote{111}{See GATT Doc. Press Release GATT/91, at p. 13 (1952) (remarks of United States delegate).} \footnote{112}{GATT, 1st Supp. BISD 32, 62 (1952).} \footnote{113}{This position drew fire from several delegations in the plenary review. The chairman of the Working Party issued a supplemental statement at the following meeting. In substance, he explained that the GATT should have the power to choose the smaller of two "reasonable" penalties if to do so would promote a constructive solution. Possibly, the chairman meant to suggest that a smaller penalty might be "constructive" if, for example, it soothed the defendant's feelings of "too much" and thus allowed it to focus on getting rid of the restriction. GATT Doc. SR.7/16 (1952); GATT Doc. SR.7/17 (1952).}
for seven years. The quota was never actually enforced, how-

ever.\textsuperscript{115} This curious behavior said something important about

the purpose and use of retaliation. As viewed by the Nether-

lands, at least, the value of the retaliation lay in the fanfare of

announcing it and of getting the GATT to ratify it. After the

fanfare died down, the retaliatory restriction itself was of no

real help in persuading the United States Congress to repeal the
dairy product quotas. If the Netherlands restriction had been

enforced, about all it could have accomplished would have been

to require the Netherlands to buy more expensive wheat flour

from someone else. When the United States announced plans to

review the quotas on Edam and Gouda cheeses in 1959, one

could sense the relief in the prompt Netherlands announcement

that the retaliation would not be renewed for 1960 in light of this

“progress.”\textsuperscript{116} The lesson seemed to be that retaliation did offer

a way to make a very strong gesture of moral condemnation,

but that its continuing effect as a “sanction” was about equally
divided between plaintiff and defendant.

B. HOMEMADE RETALIATION: ARTICLES XIX AND XXVIII

Article XXIII is not the only provision of the General Agree-

ment authorizing “compensatory” increases in trade barriers. Other provisions allow governments to withdraw or suspend con-

cessions, unilaterally and without prior authorization, as a means

of restoring the balance of reciprocity when another member has

taken advantage of an escape provision. One example is Article

XIX, which permits governments to increase trade restrictions
temporarily to prevent “serious injury” from import competi-

tion; other governments affected by the escape action are auto-
matically free to make compensatory increases of their own. Article XXVIII, which allows governments to cancel tariff con-
cessions in periodic “open seasons,” contains a similar remedy

for the governments affected.

In theory, these unilateral compensation rights have no nor-
mative overtones. They depend upon no judgments as to the

rightness or wrongness of the escape action that has been taken. They are simply rights to effect value-neutral bookkeeping trans-
nations.

In practice, these compensation rights have acquired a

\textsuperscript{115} See Senate Comm. on Finance, 93d Cong., 2d Sess., Executive

Branch GATT Studies 156 (Comm. Print 1974).

\textsuperscript{116} GATT Doc. SR.15/7 (1959).
greater significance. Actual exercise of the rights is very rare, because the escaping government almost always achieves rebalancing by offering substitute compensation in the form of new tariff concessions of equal value. Actual resort to compensatory withdrawals tends to be reserved for situations in which the affected government feels that the escaping government has behaved badly. Given their rarity, such withdrawals do in fact acquire the overtone of sanction intended by the withdrawing government.

Compensatory restrictions under Articles XIX and XXVIII have occurred only five times. Each has partaken of the “retaliation” quality just described. The first two occurred in 1952 in response to two different Article XIX escape clause actions by the United States. One such action was by Turkey in response to an escape clause action on figs; the action was taken shortly after Turkey had filed a formal complaint urging that the United States action did not meet the requirements of Article XIX.\(^\text{117}\) The second was by Belgium,\(^\text{118}\) in response to an escape clause action involving fur felt hat bodies which had become the subject of a full-scale GATT proceeding.\(^\text{119}\) The United States had been found not guilty in that case, but the Belgian compensatory rights survived because of the escape action itself. Thus Belgium was free to exercise its own judgment in deciding whether to suspend concessions.

The third compensatory withdrawal involved another United States Article XIX escape, a 1962 action on carpets and glass. The EEC took the view that the escape action was unjustified and politically motivated, although it made no formal claim of legal violation. The EEC refused to discuss substitute compensation, and retaliated.\(^\text{120}\)

The fourth case of homemade retaliation involved the same two parties, in opposite roles, in the celebrated “Chicken War” of 1963. During the formation of the EEC common external tariff, the EEC had “unbound” a number of member country tariff

\(^{117}\) GATT Doc. L/57 (1952). For the underlying legal dispute, see GATT Doc. L/40 (1952) (Greek complaint); and GATT Doc. L/44 (1952) (Turkish complaint).

\(^{118}\) GATT Doc. L/9 (1952).

\(^{119}\) The decision is reported in a separate GATT publication, REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT Doc. 1951–3 (1951).

concessions under Article XXVIII. The unbinding itself had been perfectly legal, and the United States had acquired compensation rights as a matter of course. The EEC then chose to replace the bound tariffs with the infamous variable levy, a device which guaranteed that imported products would always be priced higher than domestic support prices. When the device touched United States exports of poultry, the United States concluded that the variable levy was indeed a most unreasonable way to behave. It rejected substitute compensation, and retaliated.\footnote{121}

Interestingly, the United States chose to rest its action as a matter of domestic law on a statute designed to punish "unreasonable" foreign trade restrictions, citing the variable levy as the justification for the action.\footnote{122} The variable levy, of course, had nothing to do with the GATT legal rights being invoked. Nonetheless, the choice of domestic law authority was correct in fact, because the real reason for the action (as in the other cases) was the underlying normative judgment.

A sequel to the Chicken War occurred in late 1974. In re-

\footnote{121} The United States proposal to retaliate produced a dispute over the appropriate quantity of retaliation. The dispute was submitted to an ad hoc GATT panel, which certified a middle figure of some 26 million dollars trade coverage. GATT Doc. Press Release GATT/819 (1963) (text of Panel decision). For a detailed account of the dispute, see 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROC-\footnote{122} As in the dairy products case, the Chicken War subsided, and in 1974 the United States lifted part of the retaliation as a gesture of good will prior to the opening of new multilateral tariff negotiations. N.Y. Times, July 3, 1974, at 39, col. 2. For an account of the impact of the retaliation up to 1973, see Lowenfeld, "Doing Unto Others . . ."—The Chicken War Ten Years After, 4 J. MARITIME L. & COMMERCE 599 (1973).

The dissonance between the requirements of GATT Article XXVIII and section 252(c) created an apparent conflict, for the statute could be read to require withdrawals against only the "offending" country while Article XXVIII clearly required most-favored-nation withdrawals to achieve its balancing objectives. The United States complied with Article XXVIII, and its action was challenged by an importer whose imports would not have been touched by a selective withdrawal against the EEC. After being defeated in the trial court, the Government's most-favored-nation position was sustained on appeal, on the theory that the statutory command to have "due regard" for international obligations allowed the President to observe Article XXVIII. United States v. Star Indus. Inc., 462 F.2d 557 (C.C.P.A., 1972), rev'd 320 F. Supp. 1018 (Cust. Ct. 1970). The irony of applying an international obligation which had little or no relevance to the stated domestic law reason for the action was never quite grasped.
In response to an Article XIX escape clause action by Canada imposing import quotas on cattle and beef, the United States invoked its right to impose compensatory restrictions under GATT, while justifying the action domestically as an exercise of retaliation under the statute involved in the Chicken War. The episode, which in deference to accepted nomenclature may be called the "Cattle War," is discussed in the concluding section of this Article.

C. **Homemade Retaliation as an Alternative to Nullification**

Homemade retaliation can be viewed as an adjunct to the nullification and impairment remedy. It is another means by which governments can attempt to apply normative pressure against conduct which is otherwise legal. Unlike the nullification remedy, of course, homemade retaliation is entirely unilateral. Its character as "retaliation" derives from what the government says about the reasons for its action, and governments are free (under GATT anyway) to say what they please. For this reason, homemade retaliation tends to have less impact than community-based nullification decisions. It is easy to use, however, and consequently could frequently be resorted to in times of legal unrest.

Because of its unilateral character, homemade retaliation has no discrete normative base. It can reach whatever "wrongs" a government feels are appropriate. The GATT itself exercises no legal control over the reasons for using homemade retaliation. If responsible policy-makers wish to ensure that such judgments have a sound basis in GATT policy, appropriate standards must be imposed internally. Control of homemade retaliation is a matter of domestic law.

IV. **Section 301**

A. **The Background of Section 301**

The United States Congress has generally regarded itself as the final (and only true) protector of reciprocity in foreign trade commitments. The Congress harbors a lingering suspicion that the Executive Branch can be persuaded on occasion to sacrifice United States economic interests for the sake of friendly political relations. This suspicion surfaces regularly in congressional appraisal of major GATT tariff negotiations. Each new grant of negotiating authority has typically been preceded by a
congressional tongue-lashing over the one-sided results of the previous negotiations.123

By the 1960's, this chorus had grown to include a second theme—the charge that other GATT members had not been living up to their general legal obligations, and worse, that the eager-to-please Executive Branch had been unwilling to assert United States legal rights against the violators.124 The criticism led to the enactment of section 252 of the Trade Expansion Act of 1962.125 The section directed the President to seek the removal of illegal restrictions, forbade the President from using tariff concessions to pay for their removal, and authorized retaliation in the event they were not removed. Section 252(c) also authorized retaliation in the case of legal but "unreasonable" restrictions, but in this case the statute instructed the President to have "due regard for the international obligations of the United States."126

Seemingly in response to this criticism, the United States brought three Article XXIII complaints in late 1962 as the Act

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123. For an illustration of such criticism of the 1967 Kennedy Round results, see Hearings on H.R. 6767, the Trade Reform Act of 1973, Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 591 (1973) [hereinafter cited as 1973 House Hearings]; Hearings on H.R. 10710 Before the Senate Comm. on Finance, 93 Cong., 2d Sess. 284 (1974) [hereinafter cited as 1974 Senate Hearings]. A recurrent theme of congressional criticism is that United States negotiators do not consult enough with United States business experts. See, e.g., id. at 224; cf. id., at 440-41; 1973 House Hearings, supra, at 370, 392-93.


126. The Senate Finance Committee report explaining the addition of subsection (c) stated that subsections (a) and (b), referring to "unjustifiable" foreign restrictions, would not authorize retaliation against "legally justifiable" restrictions, and thus implied that the authority in subsection (c) to retaliate against "unreasonable" restrictions had been added to cover such legal restrictions. S. REP. No. 2059, 87th Cong., 2d Sess. 2-3 (1962).

The Senate Report did not define "unreasonable." Both the text of subsection (c) and the accompanying report added the qualification that the "unreasonable" restrictions must "substantial[ly] . . . burden United States commerce," but the Report did not explain this term either.

Noting the requirement of "due regard" for international obligations, the Senate Report said only that "the amendment would not authorize any indiscriminate breach of international obligations of the United States such as our most favored nation treaties with regard to the products of other countries." S. REP., supra, at 3 (emphasis added). The implications were (1) that the section did not require conformity with international obligations, and (2) that the main concern was to avoid extending retaliation illegally to innocent third parties.
was nearing final passage, the first such GATT complaints by the United States since 1956. Each was resolved without retaliation. In 1963, the Administration paid the rest of its dues by converting the Article XXVIII tariff adjustment in the Chicken War dispute into a case of "retaliation" under section 252(c). This was the only time section 252 was used until the Cattle War retaliation in late 1974.

Congressional criticism reemerged after the 1967 Kennedy Round agreement. This time it included an attack on the GATT itself. GATT obligations seemed not to cover some of the new trade practices devised by the EEC; other GATT provisions appeared outdated by more recent wisdom. In addition, there seemed to be a growing reluctance within GATT to enforce those obligations which were clear.

Moral outrage and self-righteousness aside, the criticism had some basis in fact. The economic world of the 1960's had come to include new powers such as Japan, the EEC, and a surprisingly well-organized coalition of developing countries, each with demands not fully anticipated by the 1947 GATT blueprint. The GATT (and particularly the United States) had adjusted to these new demands by deferring, and ultimately shelving, legal objections to some of the new trade practices that had emerged.

127. One was the French Quantitative Restrictions case. See notes 91-97 supra and accompanying text. A companion complaint involved similar residual balance-of-payments restrictions in Italy; it was settled before the GATT proceedings had moved very far. GATT Doc. SR.20/8 (1962).

A third complaint against Canada, involving antidumping duties on potatoes, was filed on November 9, 1962, GATT Doc. SR.20/8 (1962). A Panel report supported the United States claim, GATT, 11th Supp. BISD 88 (1962), and the duties were later terminated. See Hearings, supra note 96, at 613.

Although the formal GATT proceedings took place after the 1962 Act had been passed on October 11, the initial, bilateral discussions required by Article XXIII:1 would have had to take place earlier. The first two complaints had moved far enough by September 20 to be noted on an agenda for the Twentieth Session. GATT Doc. L/1830 (1962).

128. See text accompanying notes 121-22 supra.

129. See, e.g., Staff of the Senate Comm. on Finance, 91st Cong., 2d Sess., Analysis of Certain Issues Raised by the General Agreement on Tariffs and Trade 3, 9-10 (Comm. Print 1970); Hearings on Citrus Exports Before the Subcomm. on Agricultural Exports of the Senate Comm. on Agriculture and Forestry, 92d Cong., 1st Sess. 117-24 (1971). In 1973, the Executive Branch was asked by the Senate Finance Committee to prepare studies on thirteen separate issues under GATT; most of the issues concerned "unfair" trade practices commonly cited in complaints against foreign governments. See Senate Comm. on Finance, 93d Cong., 2d Sess., Executive Branch GATT Studies (Comm. Print 1974).
Instead, the GATT increasingly turned to "pragmatic" solutions that would adjust the competing interests. Viewed from the perspective of the Congress, of course, all these accommodations were violations gone unpunished.

The new wave of congressional criticism found a target in various Administration trade bills tabled in the late 1960's, and eventually centered on the comprehensive bill which was to become the 1974 Act. Initially the Administration sought to meet this criticism with the traditional response. Officials of the executive Branch made a systematic survey of GATT legal violations affecting United States trade, identified those cases which appeared worthwhile, and began to prosecute them—first bilaterally, then in GATT. From 1969 to the end of 1973, the United States filed no less than ten complaints before the GATT. Results were achieved in many of the cases, including a stunning success in a follow-up to the French Quantitative Restrictions case of 1962. These actions, and particularly the successes, were duly reported to the Congress.

The litigating results did not fully answer the GATT's critics. Indeed, the litigation itself had confirmed some of the charges of paralysis. The litigating successes had all been achieved by means of settlements, without much independent aid or stimulus from the GATT legal machinery. In one case

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130. For a more detailed study of these developments by the author, see Hudec, GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade, 80 YALE L.J. 1299, 1343-68 (1971).
131. The existence of the survey was reported to the author by several government participants.
132. See note 54 supra.
133. See Seventeenth Annual Report of the President of the United States on the Trade Agreements Program—1972, at 22-23; Eighteenth Annual Report of the President of the United States on the Trade Agreements Program—1973, at 20, 23. In response to a congressman's "show me" question asking for GATT's top ten achievements during the preceding two years, the Executive Branch included the successful results in the three United States complaint actions. 1973 House Hearings, supra note 123, at 419-21.

Some of the bilateral consultations also produced noteworthy results. See Annual Reports, supra. See also Senate Comm. on Finance, Executive Branch GATT Studies, supra note 129, at 157-59.
134. The existence of the Article XXIII complaints procedure did provide a legitimate channel for United States pressures. The difficulty was in obtaining any clear results from the third-party decisionmaking apparatus. In an early case involving EEC discrimination regarding citrus imports, the United States succeeded in blocking a 1969 waiver to authorize the discrimination, see GATT, 17th Supp. BISD 61 (1969), but, when the discrimination reappeared under the cover of an "interim" free trade agreement, the United States was unable to force a legal ruling on the validity of the agreement, leading a United States delegate at one
against the EEC, a legal deadlock had provoked open discussion of whether the GATT could any longer render neutral judgments on complaints of discrimination.\textsuperscript{135}

The continued criticism of GATT led to a dual response in the new trade bill. The first element was section 121, directing the President to seek reform of the GATT. As enacted, the section lists twelve specific targets of reform, including the GATT's decisionmaking machinery.\textsuperscript{136} Various other sections of the bill sought to regularize and upgrade the quality of United States participation in GATT.\textsuperscript{137} In a sense, the entire bill was part of this strategy, for its main purpose was to authorize the President to participate in a new round of Multilateral Trade Nego-

point to protest that it was "a disservice to the GATT for the Contracting Parties to fail to deal adequately with so flagrant a violation." GATT Doc. SR.28/2 (1972). In another case involving clearly illegal quotas by the United Kingdom, a GATT Panel heard the case and then wrote an unusual "interim report" which merely "noted" the United States legal claim without ruling on it, and then went into an extensive analysis of trade damage, apparently in an effort to narrow the claim. GATT, 20th Supp. BISD 230 (1973). Since the United Kingdom quota case, and others, were settled on terms satisfactory to the United States, one cannot say the procedure did not "work." The point is merely that it showed little independent vigor.

In the one ruling the United States succeeded in obtaining from the GATT—the Jamaican Preferences case, see note 54 supra—the Panel found that the United States claim was technically correct, but then recommended a waiver for Jamaica to regularize its existing practice. In fairness to the GATT, it should be noted that the United States claim rested on a highly technical rule that no one had even noticed at the time Jamaica acceded to GATT, nor for several years thereafter.

\textsuperscript{135} \textit{Hearings on Citrus Exports}, supra note 129, at 118, 123-24. An indication of GATT attitudes toward the disputes procedure in general may be gleaned from the list of plaintiffs in recent cases. For example, of the ten most recent cases cited in note 54 supra, the United States filed eight. Roughly the same ratio obtained in the 1960's. \textit{See} Hudec, supra note 130, at 1378-86.

\textsuperscript{136} The general charge on decisionmaking is "the revision of decisionmaking procedures in . . . [GATT] to more nearly reflect the balance of economic interests," apparently a call for weighted voting. Trade Act of 1974, § 121. As a proposed solution, the section is naive. As a rumble of discontent, it is certainly audible.

Item 9 in the list calls for "any revisions necessary to establish procedures for regular consultation among countries and instrumentalities \[i.e., the EEC\] with respect to international trade and \textit{procedures to adjudicate commercial disputes among such countries or instrumentalities.}" Trade Act of 1974, § 121 (emphasis added).

\textsuperscript{137} Section 121(d) provides for payment of the United States contribution to GATT by direct appropriation, rather than out of the State Department's general budget for international conferences. Sections 122 to 125 provide clear domestic authority for the United States to perform a variety of GATT housekeeping actions essential for effective day-to-day participation in GATT. \textit{See}, \textit{e.g.}, note 168 infra.
Trade retaliation aimed at many of the "nontariff barriers" causing the criticism.\textsuperscript{138}

The second element was section 301.

B. The Standards of Section 301

Section 301 is a revised and strengthened version of the old section 252. In scope, it covers not only import restrictions, but also other discriminatory acts or policies, export subsidies, and export embargoes.\textsuperscript{139} The new section authorizes a greater quantity of retaliation than section 252.\textsuperscript{140} Finally, it seems to give the President substantially greater freedom to ignore international obligations when using his retaliatory authority.\textsuperscript{141}

Committee explanations of section 301 emphasized that it was designed to "complement" the GATT reform mandate—section 121 and other, more general, grants of negotiating authority—by strengthening the President's hand in negotiations.\textsuperscript{142} Meanwhile, however, neither the Executive nor the Congress wished to trust GATT's present enforcement machinery to protect United States interests. The legislative history shows a rather clear, if not always specific, desire to make section 301 retaliation independent of GATT obligations.

The Executive Branch version of section 301 contained an instruction requiring the President to "consider the relationship [of proposed retaliation] to the international obligations of the United States. . ."\textsuperscript{143} The Executive Branch analysis explained:

While subsection (b) requires the President to consider the relationship to international obligations before he takes action under subsection (a), this requirement shall not constitute

\textsuperscript{138} The essential provisions are sections 102 and 151.

\textsuperscript{139} Section 301(b) also makes clear that the section covers restrictions on services related to trade. The present analysis concentrates on the provisions dealing with import restrictions, the "unjustifiable" and "unreasonable" practices covered by subsections 301(a)(1) and (2).

\textsuperscript{140} With the exception of one subsection limited to agriculture, section 252 merely allowed the President to withdraw trade agreement concessions, thus limiting retaliation to a tariff increase up to the 1930 Smoot-Hawley rates. Section 301(a)(B) permits the President to impose "duties or import restrictions" without any stated limit as well as fees or restrictions on services.

\textsuperscript{141} Compare note 126 supra with text accompanying notes 143-51 infra.


\textsuperscript{143} H.R. 6767, 93d Cong., 1st Sess., § 301(b), reprinted in 1973 House Hearings, supra note 123, at 50 (emphasis added).
a limitation on the legal scope of the President's authority to take action in the national interest. However, it is intended that the President shall depart from international obligations only in rare cases where adequate international procedures for dealing with unjustifiable or unreasonable actions are not available.\textsuperscript{144}

The analysis stated explicitly that the President would be allowed to apply the criteria of section 301 unilaterally.\textsuperscript{145}

The House bill\textsuperscript{146} retained the requirement that the President consider international obligations. The committee report did not include the Executive Branch explanation, but there was a paragraph expressing doubts about the availability and neutrality of GATT enforcement procedures, and recognizing the possible need for unilateral action.\textsuperscript{147}

The House bill also contained an interesting mechanism related to the possibility of action outside GATT rights. Section 302 of the bill required the President to report all retaliatory measures to Congress "together with his reasons therefore." The retaliation could be overridden by a simple "resolution of disapproval" by either House.\textsuperscript{148} In the view of some participants, the reporting and review procedure was to serve as a check on section 301 powers by requiring normative justifications that would stand the scrutiny of publication and public debate.

The Senate Finance Committee deleted the requirement to consider international obligations. The one such obligation specifically criticized by the committee was the rule, observed in the Chicken War, requiring the withdrawal of tariff concessions under Article XXVIII to be on a most-favored-nation ba-

\begin{itemize}
  \item \textsuperscript{144} \textit{1973 House Hearings, supra} note 123, at 133. \textit{See also id.} at 361 (testimony of the Special Representative for Trade Negotiations).
  \item \textsuperscript{145} \textit{Id.} at 133.
  \item \textsuperscript{146} The bill which passed the House carried a new bill number, H.R. 10710, 93d Cong., 1st Sess. (1973).
  \item \textsuperscript{147} Your committee is particularly concerned that the decisionmaking process in the GATT is such as to make it impossible in practice for the United States to obtain a determination with respect to certain practices of our trading partners which appear to be clear violations of the GATT. For example, it is highly unlikely that the United States could obtain a GATT decision that the various preferential arrangements which the European Community has created with both developed and developing countries are inconsistent with article XXIV \ldots. The committee believes that it is essential for the United States to be able to act unilaterally in any situation where it is unable to obtain redress through the GATT against practices which discriminate against or unreasonably impair U.S. export opportunities.
  \item \textsuperscript{148} H.R. Rep. No. 93-571, \textit{supra} note 142, at 66-67.
  \item \textsuperscript{148} H.R. 10710, \textit{supra} note 146.
\end{itemize}
The committee went on to lodge a more sweeping criticism against the substance of several GATT obligations, and to repeat the House committee's doubts about GATT enforcement procedures. Finally, the Senate committee also deleted the reporting and review procedure of the House bill, on the ground that it would weaken the credibility of retaliation threats. The Senate amendments prevailed.

This general legislative background is clearer than the language of section 301. As finally enacted, section 301 does not contain any direct assertion of independence from GATT obligations. The text of section 301(a) relevant to import restrictions provides:

> Whenever the President determines that a foreign country or instrumentality—

1. maintains unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States or which burden, restrict, or discriminate against United States commerce, [or]

2. engages in discriminatory or other acts or policies

149. S. Rep. No. 93-1298, supra note 142, at 166. Interestingly, the Senate committee's stated purpose in deleting the "international obligations" reference was exactly the same as its main concern when it included similar language in the 1962 Act—the protection of innocent third parties. See note 126 supra. For still a third approach to this problem by the House Committee, see note 167 infra.

The Senate committee decided, however, to allow the President to retaliate on a most-favored-nation basis if he wished. Id. 150. S. Rep. No. 93-1298, supra note 142, at 166. Concerning GATT obligations, the committee said:

In addition, the Committee felt that there would be situations, such as in the case of unreasonable foreign import restrictions where the President ought to be able to act . . . under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade. Many GATT articles, such as Article I (MFN principle), Article III (taxes affecting imports), Article XII (balance of payments safeguards), or Article XXIV (regional trade associations) are either inappropriate in today's economic world or are being observed more often in the breach . . . .

151. Id. at 167-68.

152. Section 301(b), the former locus of the "international obligations" language, now merely instructs the President to "consider the relationship of such action [i.e. retaliation] to the purposes of this Act." The purposes are broad enough to allow the President to "consider" GATT legal consequences if he wishes. They include:

1. . . . to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade;

. . . .

3. to establish fairness and equity in international trading relations, including reform of the General Agreement on Tariffs and Trade.

which are unjustifiable or unreasonable and which burden or restrict United States commerce,

. . . .

the President shall take all appropriate and feasible steps within his power to obtain the elimination of such restrictions . . . and he [may, inter alia, raise duties or impose other import restrictions].

The President's authority to apply section 301 criteria by his own unilateral decision presumably rests on the opening words —"Whenever the President determines that . . . ." The criteria to be applied in identifying actionable trade restrictions come primarily from the qualifying words "unjustifiable" and "unreasonable." The word "unjustifiable" gives no independence from GATT rules, for it is expressly defined in both committee reports as a reference to violations of international law and obligations. The only word which can serve as the source of substantive criteria beyond the GATT rules is the word "unreasonable."

The statutory definition of "unreasonable" is obscured by a rather unusual drafting lapse. The pertinent part of section 301(a)(1) purports to state two requirements which must be met before the President may order retaliation against a trade restriction not in violation of GATT obligations. The restriction must (1) be "unreasonable," and (2) either "impair the value of trade commitments made to the United States," or "burden, restrict, or discriminate against United States commerce." When one turns to the committee definition of "unreasonable," however, one finds that it merely restates the two parts of the second statutory criterion:

"Unreasonable" refers to restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements, or which otherwise discriminate against or unfairly restrict or burden U.S. commerce.

It would appear, in short, that the two separate requirements in

153. Subsections (3) and (4) of section 301(a) relate to export subsidies and export embargoes.
154. "In this section 'unjustifiable' refers to restrictions which are illegal under international law or inconsistent with international obligations." H.R. REP. No. 93-571, supra note 142, at 65. The same operative words appear in S. REP. No. 93-1298, supra note 142, at 163.
155. H.R. REP. No. 93-571, supra note 142, at 65. The Senate committee report omits the words "unfairly restrict" from the final phrase—most likely a staff member's handiwork to avoid the unusual syntax of the statutory language: "restrictions . . . which . . . restrict." S. REP. No. 93-1298, supra note 142, at 163.
the text of section 301 are but the same dual test, stated twice. Neither the slight differences in wording nor the separate drafting histories yield any differences in meaning that would qualify that conclusion.157

The drafting history tells us a few things about what the draftsmen were after in this twice-used language. The exact text of section 301(a)(1) first appeared in the original Executive Branch bill.158 The explanation of “unreasonable” in the analysis accompanying that bill had said that the word refers to restrictions or policies which are not necessarily illegal but which, for example, nullify or impair benefits within the meaning of GATT Article XXII.159

The House committee report substituted a paraphrase of Article XXIII—“benefits accruing to the United States under trade agreements”—for the direct reference to the Article itself. It then eliminated the “for example” and in its place constructed the residual part of the definition—“or which otherwise discriminate against or unfairly restrict or burden U.S. commerce.” For some reason, the only words the committee draftsmen could think of to describe the more general concept exemplified by the GATT nullification doctrine were words that were already in service elsewhere in the text of section 301(a).

Two preliminary conclusions seem warranted. First, the nullification and impairment language in the committee defini-

157. The reference to impairing “the value of trade commitments” in the text of section 301 appears to have come from old section 252(a), which began, “Whenever unjustifiable foreign import restrictions impair the value of tariff commitments made to the United States . . . .” The draftsmen appear to have tried to save that language for section 301 (for continuity, or whatever other reasons statutory wording is retained). The original language of section 252 appears to have been a variation (or vulgarization) of the GATT term “impair the value of tariff concessions,” a common way of referring to Article XXIII impairment of tariff concessions. Changing the words “tariff commitments” to “trade commitments” merely broadens the term to cover all kinds of impairment —i.e., impairment of any “benefit accruing under the Agreement.” (Technically, both the statutory text and the committee definition include impairment under any trade agreement, not just the GATT.)

The “burden, restrict or discriminate” formula in the text of section 301 has a less direct antecedent in the term “substantially burden United States commerce,” used in sections 252(b) and (c). The term was not further defined in 1962. The slight wording variation in the Senate committee report has been commented on in note 156 supra. As for the House committee’s addition of the word “unfairly” to the word “restrict,” see note 160 infra.


159. 1973 House Hearings, supra note 123, at 133.
tion of "unreasonable" is in fact a reference to the Article XXIII concept of nonviolation nullification and impairment. Second, the rest of the definition appears to be an effort to describe some broader concept which, while going beyond Article XXIII nullification, shares some common quality with that doctrine. Thus the second part of the definition must be read with emphasis on the word "otherwise," so that the terms "burden," "unfairly restrict," and "discriminate against" became particular words of art defining that common quality.

One might at this point look to the Article XXIII nullification doctrine for some guidance as to the content of this larger concept. As observed in Part I, however, the nullification doctrine was really not a doctrine at all, but rather a grant of jurisdiction authorizing the GATT community to render equity judgments. The content was simply the community's sense of fairness, otherwise undefined.

The exercise of that jurisdiction in practice, however, provides a small bit of meaning which begins to tie things together. The main point to emerge from GATT practice is the fact that nullification has come to acquire a fault connotation—some normative characterization of the defendant's conduct justifying imposition of legal remedies. Although the GATT's notions of fault are not definable either (except as actually applied), the very fact that fault is part of the definition is important, for it says that trade consequences alone are not determinative.

This is probably all that the draftsmen of section 301 meant to express. They were trying to define the quality that would make otherwise legal trade restrictions actionable. They had used the word "unreasonable" as a starting point. The truth is that they never got any farther. When it came to defining "unreasonable," the draftsmen were able to identify GATT nullification doctrine as one kind of wrong (an interesting confirmation, by the way, of how governments perceive that ostensibly value-neutral doctrine). But since there might be other kinds of wrong (Dr. Holloway would have said "sins"), the draftsmen had to leave room for them. Thus the "otherwise" clause. All it means is "otherwise unreasonable." That was why the draftsmen felt compelled to say it twice.160

160. In the House committee's definition of "unreasonable," the addition of the word "unfairly" to the statutory word "restrict" can be counted as a third attempt to ensure that the core concept would be clear. The count can be carried further, See, e.g., note 147 supra ("unreasonably impair").
In sum, there are three conclusions to be suggested concerning the meaning and purpose of the word "unreasonable" in section 301(a). First, it means what it says—that is, a judgment is required that the restriction (or conduct associated with it) is normatively wrong in some sense. Everything else about section 301 supports this conclusion. Section 301 is placed in Title III of the Act, captioned "Relief from Unfair Trade Practices." Unlike the more covert Article XXIII doctrine, section 301 is openly and unashamedly punitive in purpose. There is not a word in the legislative history suggesting anything to the contrary.161

Second, the normative content of the word "unreasonable" is important, even if it cannot be defined. A serious danger in a statute of this kind is the possibility that it will be interpreted to cover any trade impediment that exporters find annoying. As a recent Tariff Commission study found, exporters will complain about almost anything that costs money.162 Legislators are sometimes nearly as indiscriminate in the trade barrier complaints they endorse.163 Words such as "burden" or "restrict" in this statute could appear to authorize such breadth if read literally. If the statute is to be kept from getting completely out of hand, the Executive must have the power to decide whether something is "wrong" enough to justify the disruptive consequences of retaliation.

Third, the normative content of "unreasonable" is not governed by any reviewable standard—except, possibly, a requirement that the President demonstrate that he has actually made such a judgment.164 Presidential decisions would probably

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161. Indeed, comparison of section 301 with section 125(c) makes the sanctioning quality of the former doubly clear. See note 163 infra.
163. Cf. note 172 infra and accompanying text.
164. Executive actions in this area typically meet the requirement of a "determination" with a list of "whereases" in proclamation boilerplate repeating the statutory language. See, e.g., Proclamation No. 3564, 28 Fed. Reg. 13248 (Dec. 6, 1963) (Chicken War retaliation under section 252).

The failure to retain the reporting requirement of the House bill, see text accompanying notes 148-51 supra, was unfortunate, for such a requirement would have created a much needed internal restraint on intemperate action. The Executive Branch may adopt such a reporting practice on its own. Reasoned justification for action (or inaction) may become necessary in fulfilling the section 301(d) requirement that the Special Representative for Trade Negotiations report semiannually to Congress on private complaints; the public hearing requirements of both sections 301(d) and (e) may have a similar effect.
not have been reviewable even if the statutory authority had been tied to GATT Article XXIII. Searches for sins outside the legal rules inherently suffer this defect. If one wants the search, one must accept the fact that the only safeguard is “trust” in the decisionmaker.

C. GATT CONSEQUENCES: THE LEGAL FRAMEWORK

The breadth of Presidential authority under section 301 makes it clear that the GATT experience with nullification and impairment cannot be of controlling force under United States law. It does not follow, however, that GATT legal considerations will have no importance in shaping issues and decisions under section 301. The statement of Executive Branch intentions with regard to section 301\(^{165}\) remains the most reliable indication of how section 301 discretion will in fact be used. With a major trade negotiation already in motion,\(^{166}\) the United States will have every reason to limit aggressive behavior in the near future, and to confine what aggression is necessary to regular GATT channels if at all possible. Even in the long run, the strength or weakness of GATT legal support should remain a critical factor in decisions under section 301. One assumes that any actual or threatened retaliation by the President will claim consistency with GATT if it can. Those who object to proposed action, on the other hand, will invariably call attention to whatever GATT-violation costs the action entails, and negative decisions will almost certainly invoke such GATT costs as a “factor” of decision.

The GATT consequences of section 301 actions can be very substantially affected by the particular way in which the action is framed for international consumption. As the phenomenon of homemade retaliation illustrates, there is a certain amount of room to manipulate the GATT legal structure of such actions separately from the domestic legal structure. Basically, there are three different ways a section 301 action involving “unreasonable” trade practices could be framed for purposes of GATT.

One form of section 301 action would be homemade retaliation itself. The executive Branch indicated that it considered

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\(^{165}\) See text accompanying note 144 supra. For assurances to the same effect in the prepared testimony of the Special Representative for Trade Negotiations, see 1973 House Hearings, supra note 123, at 361; 1974 Senate Hearings, supra note 123, at 308.

\(^{166}\) See note 4 supra.
Article XXVIII withdrawals to be covered by section 301, and it fought quite hard to keep the retaliatory authority of section 301 flexible enough to include the type of most-favored-nation withdrawals allowed by that Article. The ability to use Article XXVIII rights (and presumably Article XIX rights) would mean that the curious kind of "retaliation" involved in the Chicken and Cattle Wars is still possible.

Retaliation of this kind would obviously be the cleanest from the GATT point of view. There is no question as to the right to retaliate, or the right to act unilaterally. The amount can be

167. Executive branch analysis of section 301(b) explained a provision authorizing retaliation on most-favored-nation (MFN) basis by observing that "cases might arise which warrant retaliation on a MFN basis, for example, under GATT Article XXVIII." 1973 House Hearings, supra note 123, at 361.

The House Ways and Means Committee modified section 301(b) to limit retaliation solely to the offending country in cases of "unreasonable" (i.e., not illegal) foreign restrictions, apparently in the belief that, since such retaliation might not be consistent with the GATT, it was unwise to extend illegal retaliation to the trade of innocent third countries. See H.R. Rep. No. 93-571, supra note 142, at 67.

The Executive Branch asked the Senate Finance Committee to reverse this limitation, citing the need to have section 301 authority flexible enough to be used in cases where international obligations required most-favored-nation action. See 1974 Senate Hearings, supra note 123, at 528. The Senate agreed, reserving the power to veto most-favored-nation application. See Trade Act of 1974, §§ 301(b), 302; S. Rep. No. 93-1298, supra note 142, at 166-67.

168. Interestingly, the 1974 Act contains another separate provision, section 125(c), allowing the President to increase duties or other import restrictions whenever such action is appropriate to exercise United States rights under a trade agreement. As worded, the section would duplicate section 301 by authorizing action not only under GATT Article XXVIII but also under Article XXIII. The original Executive Branch explanation of section 125(c) (then section 402) noted the presence of section 301 authority and explained that this separate section was necessary to deal with "other circumstances." The "other" cases mentioned were Article XXVIII withdrawals (again) and a curious kind of collective Article XXIII retaliation in which the United States would be retaliating to help enforce the rights of other countries. 1973 House Hearings, supra note 123, at 367. The sense of the distinction between sections 301 and 125(c) seems to be, not the GATT legal authority involved, but the spirit in which it is used. There could hardly be a more perfect demonstration of the fact that "retaliation" is a state of mind, and that almost any action will qualify, or not, depending on its articulated purpose.

Regarding the suggestion of collective retaliation, although the words of Article XXIII do authorize the Contracting Parties to release obligations of "a contracting party or parties . . . as they determine to be appropriate in the circumstances," this language clearly relates to the "any other situation" problem, see text accompanying notes 23-24 supra, and could not fairly be read to include collective sanctions, particularly in view of the decision to limit such remedies to "compensatory" measures, see text accompanying note 19 supra.
disputed, but that is true in all cases.

Homemade retaliation will be limited to whatever compensation rights have accrued because of an Article XIX or XXVIII escape action. The quantum of retaliation allowed by such rights may, of course, be a good deal less than the “unreasonable” trade practice itself might warrant. In most cases, however, the fact of retaliation will be the important thing, and any residual concerns about volume can be met by characterizing the action as a “warning shot across the bow.” In truth, the quantum of retaliation is largely irrelevant. The only useful purpose of retaliation is to demonstrate, and dramatize, the injured government’s irritation by means of a concrete act. The volume of press coverage is far more important than the volume of economic damage. Indeed, if there is any reason to worry about volume, it should be to keep the volume down in order to minimize the cost of being saddled with the retaliation after tempers have cooled.

A second GATT legal framework for action under section 301 would be the claim that a tariff concession has been nullified or impaired within the meaning of Article XXIII. Recent United States complaints in GATT have taken care to include claims of tariff concession impairment whenever possible, even when, as in the French Quantitative Restrictions case, there was also a

169. For example, the volume of retaliation in the Chicken War was limited by the approach of Article XXVIII to “balancing” tariff concession reciprocity. The United States had a right to withdraw tariff bindings on products whose aggregate volume of EEC-to-United States trade was equal to the volume of United States-to-Germany trade in the poultry products covered by the German concession which had been withdrawn by the EEC. The two figures were to be calculated on the basis of the trade statistics that would have been available to the parties when the original compensation negotiations occurred. Only by accident would these calculations have produced an equivalent trade impact on both sides. In no circumstances could they have taken account of the wider EEC agricultural policy that was really at issue. For a further description of the Chicken War measurement issues, see the authorities cited in note 121 supra.

One presumes that the more punitive purposes of section 301 would look to retaliation measured according to the Article XXIII standard for GATT legal violations, if not more. Although Article XXIII retaliation is also merely “compensatory,” see text accompanying note 19 supra, the GATT decision in the Netherlands Article XXIII action, see text accompanying notes 109-16 supra, took a broad view of injury. The decision took into account (it said) not only the direct trade loss resulting from the United States quota, but also its discouraging effect on Netherlands export efforts in other products, and its even larger impact on Netherlands efforts to overcome balance-of-payments difficulties. GATT, 1st Supp. BISD 62-63 (1953).
clear legal violation of broader scope. Such claims generally offer the strongest normative base for GATT legal action of any kind. In nonviolation cases, the claim of tariff concession impairment is really the only established theory there is.

It should be possible to channel many grievances into this narrower type of tariff concession claim. If there were, for example, a grievance based upon some legal but "unreasonable" local regulation affecting a wide range of products, United States officials could simply search out one or more tariff concessions arguably nullified by the offending regulation. Action could be taken internationally on the basis of the particular concessions, while the domestic law justification under section 301 could focus on the unreasonableness of the offending regulation itself. As in the case of homemade retaliation, such limited action might present both the problems and the advantages of offering too little retaliation.

The third type of section 301 retaliation would be an action based solely and squarely on the declared "unreasonableness" of an otherwise legal trade barrier. This is the type of action that most congressmen probably had in mind when they considered section 301. It is, of course, the most questionable form of retaliation by GATT standards. Without a tariff concession claim, the United States would be forced to defend its action as a case of nullification or impairment of other "benefits" accruing under the General Agreement. As observed in Part II, the size and scope of such claims are forbidding. Questions of neutrality aside, it is still doubtful that the present GATT could adjudicate them.

International acceptance of the nullification and impairment justification for section 301 actions will depend on the procedures followed. The obvious way to establish a nullification claim, of course, would be to bring an Article XXIII proceeding in GATT. Section 301 does not discourage the President from taking this route, but it does seem to be trying to suggest that unilateral action can also have a degree of international legitimacy if it is based on recognized standards. This perception of quasi-legitimacy may be marginally plausible in cases where the standard applied is an express legal obligation. It has almost no validity, however, in the case of unilateral claims of nonvio-

170. See text accompanying notes 91-97 supra. See also the complaints in Netherlands Antilles Preferences and United Kingdom Dollar Area Quotas, note 54 supra.
lation nullification and impairment. The nonviolation concept is not a standard at all. It is simply a grant of jurisdiction, to the GATT community as a whole, to render judgments of equity. By removing the appointed decisionmaker, unilateral action removes the principal source of legitimacy underlying the GATT nullification and impairment remedy.

This is not to argue that unilateral action is unthinkable in cases of the nonviolation type. As noted in Part II, the GATT’s ability to deal with claims of nonviolation nullification and impairment will be only as effective as the cohesiveness of the community’s consensus allows it to be. There may well be a time when cohesiveness fails, and when the GATT remedy for such claims is in fact nonexistent. If that should happen, a government might well conclude that it must take unilateral action to protect interests of the kind normally protected by the nullification doctrine. In doing so, however, a government will add nothing to the legitimacy of any particular substantive claim by reciting the words “nullification and impairment.” The action will be pure self-help.

D. GATT Consequences: Some Sample Problems

The degree of actual conflict between section 301 and the GATT will be determined, in the last analysis, by the nature of the substantive claims made under section 301. One can get a rough idea of the range of possible complaints by examining the inventory of complaints laid before the Congress during consideration of the 1974 Act. The Senate Finance Committee’s discussion of section 301 contains a good part of that inventory:

Foreign discrimination against U.S. commerce includes a multitude of practices such as discriminatory rules of origin, government procurement, licensing systems, quotas, exchange controls, restrictive business practices, discriminatory bilateral agreements, variable levies, border tax adjustment, discriminatory road taxes, horsepower taxes, other taxes which discriminate against imports and many other practices which have been amply documented in studies such as the four volume U.S. Tariff Commission Nontariff Barrier work completed for the Committee on Finance.

Subsidies may also distort trading patterns. They may take a wide range of government and private actions. . . .

Standards—that is, laws, regulations, specifications and other requirements with respect to the properties or the manner, conditions, or circumstances under which products are produced or marketed—may also be highly discriminatory. A classic example of a discriminatory standard involves a Euro-
pean organization called the European Committee for Coordination of Electrical Standardization (CENEL). As this arrangement developed it virtually excluded U.S. products from the European market. According to the Special Trade Representative, the CENEL Agreement affects $1 billion in U.S. exports. The European Community is expanding its rules-of-origin requirements to cover many more products. If diplomatic efforts and trade negotiations fail to bring about equity and reciprocity for U.S. commerce, the acts and barriers described above should be subject to retaliation.171

The Finance Committee statement is not exhaustive, nor does it indicate the specific complaints the committee had in mind under the various general headings. Indeed, some of the claims suggested by the list might not survive a careful application of section 301 itself.172 The list is fairly representative,


172. Two substantive propositions could be argued for as threshold tests of “unreasonable” restrictions under section 301. First, the restriction must be measurably worse than the United States practice in the same area—on the ground that Congress would never classify its own measures as unreasonable. Under this test, one might have some difficulty with the Finance Committee’s reference to “government procurement”—the term used for the preferential treatment of domestic suppliers in government purchases. For years the world’s most visible trade barrier of this kind has been the Buy-American Act of 1933, 41 U.S.C. §§ 10a-c (1970). Although an argument can be made that United States open-bidding procedures are superior to the more informal methods practiced elsewhere, STAFF OF SENATE COMM. ON FINANCE, 93d CONG., 2D SESS., SUMMARY AND ANALYSIS OF H.R. 10710—THE TRADE REFORM ACT OF 1973, at 90-91 (Comm. Print 1974), both the general argument and its particular application would require careful scrutiny in each case. See Wilson, supra note 171, at 444-50. The Finance Committee’s reference to various kinds of subsidies would appear to require similar reservations.

Second, a restriction should not be found “unreasonable” until the decisionmaker can identify at least one more reasonable alternative. Under that test there is a problem with “border tax adjustments.” The term refers to the practice of equalizing certain internal taxes, such as manufacturer excise taxes, by levying an equivalent charge on imports, and reversing the process by exempting or remitting the tax for exports. The Tariff Commission study cited by the Finance Committee concluded, as have most other independent analyses, that such adjustments may create a short-run trade distortion to the extent that the entire amount of the local tax is not passed forward in the price—the assumption on which 100 percent border adjustment is based. The study also concluded, however, that the distortion would involve only a small part of the tax, and further, that since the price effect would vary according to market conditions, the distortion could not be measured in practice. See U.S. TARIFF COMM’N, TRADE BARRIERS (pt. 2) 50-57, 69-70 (Report to the Subcomm. on Int’l Trade of the Senate Finance Comm. 1974). In short, while a full 100 percent border adjustment may cause trade distortions, it is impossible to devise anything more accurate.

On the whole, it is difficult to resist the conclusion that the list of trade barriers cited in the Finance Committee statement was compiled
however, of the range of GATT legal problems section 301 could present.

Some items on the list would clearly require a GATT violation in order to retaliate. For example, "border tax adjustments"—the remission of certain internal taxes on exports and the imposition of such taxes on imports—are expressly authorized by several GATT provisions. As GATT theory now stands, such adjustments are not even regarded as a distortion of trade. Similarly, "government procurement"—the term used to describe the almost universal practice of favoring domestic suppliers in government purchases—is expressly exempted from the relevant obligations of Article III, except those concerning taxes. Although restrictive procurement practices are unquestionably a trade distortion, the express Article III exemption should, in the absence of contrary understandings, remove any basis for claiming that such practices have impaired the value of a tariff concession. The exemption would also make short work of any claim that procurement practices impair larger "benefits" accruing under the Agreement itself.

The EEC's variable levies, long a favorite target of United States retaliation law, would present several different GATT issues, depending on how retaliation was justified. The GATT has declared on several occasions that it was unable to rule on the legality of variable levies. The President might attempt to justify section 301 retaliation, therefore, on the basis of a unilateral determination of illegality. If the GATT issue were thus forced, the odds would be against the United States position. There is no express language in the Agreement covering variable levies, and, in a contested case among major powers, 

from the list of complaints sent over to the Tariff Commission for study, and not from the four volumes of quite balanced information sent back.

173. GATT Articles II:2(a), VI:4, Ad Article XVI.
174. The theory assumes that the entire tax paid by the local producer is shifted forward in the price. See note 172 supra.
175. GATT Article III:8(a). The exemption has been interpreted not to apply to taxes. Belgian Family Allowances, GATT, 1st Supp. BISD 59 (1953).
176. The issue was raised, and avoided, in Uruguayan Recourse to Article XXIII, GATT, 11th Supp. BISD 100 (1963).
177. Section 252(b) of the 1962 Act virtually ordered such a finding. The subsection applied, inter alia, to "nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements." Section 301 eschews this bill of attainder approach; variable levies themselves have ceased to be the paramount grievance.
principles of strict construction would most likely prevail.178

Alternatively, the President might follow the Chicken War precedent by determining that variable levies, legal or not, are "unreasonable." As a matter of domestic law, the 1974 Act must be taken to have approved the Chicken War precedent and incorporated it into section 301.179 If the United States still owns unsatisfied Article XXVIII compensation rights,180 retali-
ation could once again be justified in GATT under the homemade retaliation formula of the Chicken War. There would be no possibility of claiming nullification and impairment of a tariff concession, however, for the concessions were all withdrawn long ago. The only possible nullification and impairment claim would be the much broader argument that the variable levy is inconsistent with the spirit of GATT obligations concerning quantitative restrictions, and thus impairs the "benefits" which ought to accrue under those obligations. The conclusion to Part II examined the general difficulties that governments will encounter in establishing impairment of reciprocity relating to these larger "benefits." With respect to variable levies in particular, a United States claim would seem especially weak, for in 1955 the United States itself demanded, and received, an indefinite waiver of the relevant GATT obligations pertaining to its own program of agricultural trade restrictions. That waiver is still in effect.

181. The theory of such a claim would rest on the fact that variable levies, like quotas, operate to preclude price competition between imports and domestic products. Claims of this kind are not as persuasive as they might seem, however, because the GATT itself is not a very tight system. Nothing in GATT prohibits a government from excluding trade altogether by means of a very high tariff, provided the tariff is unbound, as are the EEC tariffs on variable levy items. Nor does the GATT prevent the exact equivalent of a quota in the form of a "tariff quota," a tariff which rises to a higher rate (which could be exclusionary) after a certain quantity of imports enter. The policy behind the legal preference for tariffs over quantitative restrictions seems to have been a rather pragmatic judgment that, on the whole, the concentration of all protectionist policy in the tariff would make protection generally less rigid in the long run—partly because tariff reductions are easier to negotiate, and partly because, as a practical matter, governments do not usually set even their highest tariffs so high as to be insensitive to significant price movements. Even though very high tariffs and tariff quotas defeat some of these expectations, the GATT policy tolerates them simply out of a need to draw a line somewhere. Rough as this line is, it could be argued that the variable levy crosses that line, because it is designed to remove all possibility of present or future price competition. As noted above, it would be somewhat less than an a fortiori argument.

In addition to their anticompetitive effect, quotas entail other problems which also underlie the GATT prohibition—chiefly the almost inevitable discrimination among foreign suppliers in the administration of quantitative controls. The variable levy operates through a price mechanism that appears to avoid many of these problems. To this extent, the case against the variable levy is even weaker.

182. See GATT, 3d Supp. BISD 32, 141 (1955) (text of waiver and accompanying Working Party report). One might urge an even broader reciprocity defense by observing that the GATT membership as a whole has always had difficulty living up to the rules concerning agricultural
The trade barriers suggested by the Finance Committee's references to "discriminatory road taxes," "horsepower taxes," and the CENEL electrical "standards" are all examples of the problem, discussed in Part II, concerning basically legitimate local regulations that operate to restrict trade. Such trade-restricting effects can give rise to claims of nullification if some degree of bad faith or arbitrariness can be shown. The main difficulty is proof.

The road tax question illustrates the difficulty. In 1956 the United States filed a GATT complaint concerning the "fiscal horsepower" formula of the French road tax, a system of classification based on factors such as weight and engine size which operated to place United States automobiles in a higher tax bracket than French automobiles of a similar value. The complaint noted that the tax rate jumped sharply at the breaking point between the two brackets, and pointed to some evidence in the legislative history of the tax showing that the breaking point had been chosen with an eye to its effect on French automobiles. The United States took the position that the tax violated GATT Article III, and that, in addition, its trade effect caused nullification and impairment of the benefits of tariff concessions. France replied that the complaint was "legally not acceptable." Initially, the tax was explained as a luxury tax, one which the French government classified for internal purposes as an income tax. This justification provoked a debate over whether the gap in the coverage of expensive French automobiles was within normal margins of tolerance for administrative necessity. Later, France added to the explanation by pointing out that the basic classification system was designed to account for differences in road wear, a defense which was promptly challenged on technical grounds related to road engineering.

A recent recognition of this situation appears in the Ministerial Declaration opening the current round of GATT trade negotiations, in the form of a directive to include, as regards agriculture, an approach to negotiations which, while in line with the general objectives of the negotiations, should take account of the special characteristics and problems in this sector. . . .


185. The road wear argument became a major issue during the Kennedy Round discussions. The relevant GATT trade negotiation documents are still classified.
Throughout the discourse, the problem of excessive gasoline consumption by large United States automobiles kept appearing as another justification for the tax.\textsuperscript{186}

As noted in Part II, the GATT's competence to second-guess national governments on matters of this kind is limited. Consequently, it may well be difficult to sustain a GATT claim of bad faith and arbitrariness, no matter how clear the claim may appear to the President and his advisers. The 1956 complaint by the United States remained in deadlock, and the United States did not seek a ruling.\textsuperscript{187} When the matter was raised again in the 1963-1967 Kennedy Round negotiations, France agreed to modify the tax, but only as part of a separate bargain in return for a United States promise to eliminate its American Selling Price (ASP) method of customs valuation.\textsuperscript{188} Unfortunately, the agreement failed because the United States Congress refused to enact the necessary legislation.\textsuperscript{189}

The road tax case also recalls a second problem which may affect many of the items on the Finance Committee's list—the possibility that the past history of a practice may seriously limit claims of nullification and impairment. Since 1956, at least, the United States has been on notice that France regards "fiscal horsepower" as the finest tax invention since the gabelle, a fact which should make it impossible to claim that subsequent tariff concessions have been impaired by operation of the tax.\textsuperscript{190}

\begin{footnotes}
\footnote{186. For example, in 1956 the French representative suggested that the high tax rate on upper bracket automobiles might be removed if gasoline rationing, then being considered, were put into effect. Needless to say, the current energy crisis might well promote this rationale to first place.}

\footnote{187. The United States indicated in the 1956 meeting that it intended to pursue further bilateral consultations. GATT Doc. SR.11/16 (1956). The complaint was never brought back to the GATT.}

\footnote{188. Agreement Relating Principally to Chemicals, Supplementary to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, GATT, 15th Supp. BISD 8 (1968). The commitment on road taxes was to adjust either the progressivity or the formula, or both, in order to remove the "particularly heavy" incidence on vehicles with "engines of a high-cylinder capacity." Belgium and Italy made the same commitment regarding their own taxes. Id. at 14.}

\footnote{189. See 1973 House Hearings, supra note 123, at 1704-10, 1742-44.}

\footnote{190. To be sure, France was also on notice that the United States regarded the tax as illegal, but, in the absence of any recognition by France that this was so, there would have been no basis to expect future}
sad history of the Kennedy Round agreement may not have the same precise legal significance, but, by calling attention to equivalent United States practices, it will certainly suggest a kind of equitable estoppel to claims resting on impairment of reciprocity.

One cannot end the inventory of current grievances without discussing what is probably Grievance Number One—the general outbreak over the last decade of discriminatory bilateral trade agreements, and particularly the network of questionable "free trade area" agreements between the EEC on one side and virtually all the remaining countries of Western Europe, the Mediterranean basin, and Africa on the other. The United States has attacked the legality of several EEC agreements on the ground that they do not commit the parties to a prompt elimination of substantially all internal trade barriers as required by GATT Article XXIV. The GATT's inability to decide these complaints was perhaps the major justification given for making section 301 independent of GATT procedures.

As in the case of variable levies, the GATT problems in this area would vary according to the legal theory employed. Having already announced its position that many such agreements are illegal, the Executive Branch has in effect already made the determination that such agreements are "unjustifiable" under section 301. If a neutral decisionmaking body could be found to hear the legal claim, the issue would turn on whether Article XXIV means what it says when it calls for a complete plan and schedule leading to the requisite internal trade liberalization.
If a literal approach were taken, the United States should prevail. The price of prevailing, on the other hand, might be the dissolution of the GATT. Rather than face that consequence, governments affected by United States retaliation might simply refrain from challenging that action.

Executive Branch testimony in the Trade Act hearings indicated that the United States was prepared to bypass the legal issue and claim nonviolation nullification and impairment with regard to these alleged "free trade area" agreements. The claim would present some interesting questions. The economic effects of the new discrimination created by a regional agreement are certainly serious enough to support a claim that prior tariff concessions have been impaired, and the action is clearly a trade policy action designed to achieve that purpose. As a matter of practice, however, GATT members have never made such claims, even when presented with the massive new discrimination caused by the original EEC, the European Free Trade Association, and the recent enlargement of the EEC to include the United Kingdom. Moreover, Article XXIV: 6 seems implicitly to exclude such claims. It provides that outsiders may acquire a right to compensation if members of the new customs union nullify old tariff concessions in the process of forming their new common outside tariff; it further provides that compensation negotiations should give credit for tariff decreases made by other members as part of the same customs harmonization process. The assumption that these adjustments in the outside rates will produce a new balance of reciprocity for outsiders seems necessarily to assume that no further reciprocity problem is caused by the new discrimination inside the union.

If this analysis is correct, it could be argued that a claim of "nonviolation" nullification and impairment cannot be made against the new discrimination created by these agreements. If the claim concedes the legality of the agreement, it concedes that the new discrimination is not impairment. It might be possible to argue, however, that the burden is on the defendant—that Article XXIV does not shelter the economic effects of new discrimination until the agreement is actually found to comply. (Enter appropriate legal maxim.) It would follow that a deadlock over the question of legal compliance would not establish the ex-

cuse and that a nonviolation claim would lie in the case of such a deadlock. 197

E. A Preview of Section 301: The Cattle War

The cattle War began in late 1973 when depressed cattle prices in the United States caused a surge of exports to Canada. The Canadian government responded first with a tariff surcharge which did little to slow the United States exports. The surcharge was removed in early 1974, but shortly thereafter a court decision allowed United States cattle producers to resume using a growth hormone prohibited by Canadian health regulations, 198 and Canada thereupon embargoed all imports from the United States until the United States government could establish an acceptable procedure for certifying absence of the prohibited substance in animals exported to Canada. The embargo lasted from April to August; the delay was viewed by many as a disguised trade restriction. That view was reinforced when Canada imposed import quotas on beef and cattle as soon as the health embargo ended. 199 After further negotiations proved unsuccessful, the United States called public hearings under its trade retaliation statute, citing the entire history of the Canadian import policy and charging in addition that the new Canadian quotas were "highly restrictive." 200 On November 16, the United States imposed quotas of its own on Canadian exports of cattle, beef, veal,

197. A similar argument was made recently over a much smaller issue—whether the EEC, upon declaring unilaterally that one of its free trade areas had been fully "achieved," could discontinue the biennial reporting required of governments operating under "interim" Article XXIV agreements. The United States, having taken the position that the agreement in question still did not comply with Article XXIV, argued that reporting must continue until the GATT formally approved the agreement. The EEC disagreed, but the issue was deferred pending some anticipated modifications of the agreement in question. GATT Doc. L/4109 (1974).

To the author’s knowledge, the GATT has not given formal approval to any of the Article XXIV agreements negotiated since the EEC was formed in 1957. The EEC itself stopped reporting some years ago, without objection.


199. The Canadian view of the facts was stated in a press release of October 25, 1974, issued by the Canadian Department of External Affairs. The view of the United States cattle producers is presented most extensively in the transcript of the hearings conducted by the Trade Information Committee, Office of the Special Representative for Trade Negotiations, Docket No. 74-1 (Oct. 25, 1974).

swine, and pork. The loss to Canada was estimated at 109 million dollars.\footnote{201}

Canada took the position that its action was an escape clause measure authorized by GATT Article XIX.\footnote{202} Under Article XIX:3, the United States automatically acquired the right to "suspend...substantially equivalent concessions or other obligations," whether or not Canada's action actually conformed to Article XIX requirements. The United States did not even mention Article XIX, however, in its domestic law justification. The United States quotas were imposed under section 252(a) of the Trade Expansion Act of 1962, a subsection which required a finding that the Canadian restrictions were in violation of international commitments.\footnote{203} The proclamation imposing the quotas stated that Canada's restrictions violated GATT Article XI, the general prohibition against quotas.\footnote{204} Although nothing was

\footnote{201. Proclamation No. 4335, 39 Fed. Reg. 40741 (1974). The trade loss is computed in United States Department of Agriculture Press Release No. 3322-74 (Nov. 18, 1974). It may be noted that the existence of two-way trade in the North American cattle market allowed the United States to strike directly against the producers protected by the Canadian quotas, thus giving some reality to the "sanction" in this instance. This is not possible in the typical retaliation case, for the producers being protected by new trade restrictions are usually too weak competitively to be exporting anywhere.}

\footnote{202. GATT Doc. L/4072/Add.1 (1974). Article XIX permits governments to suspend any "obligation" found to be causing serious injury and is understood to permit the imposition of quotas. See, e.g., GATT Doc. L/819 (1958) (United States Article XIX quotas on lead and zinc). Article XIX:3 likewise refers to suspension of "concessions or other obligations," and thus the Article appears to authorize the compensatory quota response made by the United States.}

\footnote{203. Pub. L. No. 87-794, 76 Stat. 872 (1962). Subsection (a), the only provision of section 252 to authorize quotas rather than tariff increases, required a finding that the foreign trade restriction was "unjustifiable." The term "unjustifiable" was generally understood to require a finding of legal violation. See note 126 supra. Section 252 has been repealed by section 602(d) of the Trade Act of 1974, and has been replaced by section 301 of that Act. Under section 301, retaliatory quotas may be imposed whether or not the foreign trade restriction is illegal. See text accompanying notes 139-41 supra.}

\footnote{204. Proclamation No. 4335, 39 Fed. Reg. 40741 (1974). The proclamation stated:

WHEREAS, Canada has imposed unjustifiable restrictions on cattle and meat imports from the United States;

WHEREAS, such restrictions violate the commitments of Canada made to the United States, including the provisions of Article XI of the General Agreement on Tariffs and Trade . . . .

The "restrictions" referred to could only be the Canadian quotas then in force, for the proclamation went on to explain that the United States quotas were being imposed "in order to obtain the removal of such unjustifiable restrictions."}
said about Canada's Article XIX escape clause justification, the finding of an Article XI violation was necessarily a finding that the Article XIX defense was invalid.

When the United States reported its action to GATT a few days later, no mention was made of the claimed Article XI violation. Instead, the United States merely called attention to Canada's Article XIX escape clause justification, and described its own quotas as a suspension of equivalent concessions—the formula used to describe Article XIX:3 compensation rights. Since the Article XIX:3 rationale did not require a finding of violation, there was no occasion for GATT inquiry into that issue. The result was thus another example of action presented as punitive retaliation under United States domestic law, while justified as nonpunitive compensation under GATT law.

Although the Cattle War retaliation was technically an action under section 252, it can also be regarded as a preview of United States practice and procedure under section 301. The preview is disquieting.

First, the action afforded an opportunity to see how the President would make unilateral determinations that another government's actions are in violation of international obligations. From the rather scant data available, it does not appear that Canada's Article XIX claim could have been rejected out of hand. According to the calculations on which the United States based its own measure of retaliation, the surge of United States cattle exports which began in late 1973 would have resulted in a four-fold increase over the previous peak year.205 On the critical issue of "serious injury" to a domestic industry, Canada had reported that it was implementing a program of "deficiency payments" to prevent a drastic cutback in Canadian cattle production, and that quotas were needed to make the program feasible.206 While these

205. Over 90 percent of the trade damage claimed by the United States related to exports of live cattle. The United States estimate for 1974 exports without quotas was 334,000 head. Trade Information Committee, supra note 199, at 52, 58. The largest total for any year prior to the export surge was 84,000 head in 1971. The total for 1973 was 215,000 head, of which 150,000 were exported in the last quarter. The Canadian quota was approximately 83,000 head, based on the 1969-1973 average of United States exports. Id. at 20-22.

Canadian witnesses argued that the late 1973 surge was due to market distortions rather than normal market forces. In response to a government price freeze in the summer of 1973, United States producers had held cattle off the market. When the freeze ended in September, there was a market glut of overfed cattle and exports to Canada resulted. Id. at 56. See also Press Release, supra note 199.

206. See Press Release, supra note 199.
were only pleadings, they did seem to make a prima facie case that needed answering.

The Executive Branch did not answer. It simply ruled that the quotas violated Article XI. There was no formal explanation of why Canada's defense had been rejected, nor even any mention that such a defense existed. Although it is true that the right of retaliation against Canada did not depend on a finding of violation (because of the compensation rights of Article XIX:3), it is nevertheless troubling that the difficult issues involved in establishing this claimed violation could so easily be brushed aside.

Second, the Cattle War decision offered an opportunity to see what if any relevance would be accorded to parallel practices of the United States when considering whether foreign actions are "unreasonable" or "unjustifiable." At least superficially, there was a strong resemblance between the 1974 Canadian quotas and a 1964 statute passed by the United States Congress. The 1964 statute ordered quotas on imports of meat whenever such imports exceeded 110 percent of the average market share held by imports from 1959 to 1963. The Canadian quotas limited United States imports to their 1969-1973 average. Without a detailed statistical analysis, it is not possible to know whether the two actions were in fact similar. As far as one can tell, however, no such comparison was attempted. The United States computed its retaliation rights solely on the basis of the larger trade flows which began in late 1973.

The fact that governments sometimes employ double standards in international trade relations is nothing new, nor is the problem peculiar to the United States. Unfortunately, punitive

207. See note 204 supra.
209. The comparison would have to be made in terms of the impact of imports on local producers. While gross measures such as percentage market shares, rates of import growth, and the like, might be attempted, it would be difficult to get very far without some way of comparing the economic health of the respective industries, particularly in terms of cost-price relationships.
210. See note 205 supra.
statutes such as section 301 act as a magnet for the worst of these tendencies. A concerted effort will be needed to hold such tendencies in check.

There is no reason to assume that the Cattle War provides the only possible model of decision under section 301, or that all government officials want it to be. Section 301 offers substantial opportunity for participation by interested private parties. Hard questions of the kind involved in the Cattle War can be asked and argued. Participants can also argue for procedures and forms of decisionmaking that encourage responsive answers. Interested congressmen can play a similar role, if they can be persuaded to do so. Section 301 will probably never work well, but it will work better or worse depending on the quality of participation offered.