

2100 M Street, N.W.  
Washington, D.C. 20037  
USA



Telephone (202) 785-4185  
Facsimile (202) 466-1286  
E-Mail [general@stewartlaw.com](mailto:general@stewartlaw.com)

## **Stewart and Stewart**

### Memorandum

**To:** FTAC  
**From:** Alan Dunn and Bill Fennell  
**Subject:** Brief Comparison of Section 301 and Special 301 Trade Laws  
**Date:** April 23, 2004

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#### **Summary**

**The Section 301 provisions of the Trade Act of 1974 are intended to address foreign unfair trade practices affecting U.S. trade. Section 301 may be used to respond to violations under bilateral and multilateral trade agreements that deny U.S. rights under those agreements. Section 301 also may be used to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce even if those practices do not violate the explicit terms of an international agreement.**

**“Special” 301 is a part of the Section 301 remedy that focuses on intellectual property rights (IPR) and that relies upon the same statutory enforcement authority in “normal” Section 301. Special 301 requires the U.S. Trade Representative (USTR) to go through the process of identifying countries that: (A) deny adequate protection for intellectual property rights (IPR) as provided for under any of a series of bilateral and multilateral agreements; or (B) deny fair and equitable market access for U.S. persons who rely on IPR. Countries identified under either of these provisions are then subject to investigation and enforcement proceedings under the normal Section 301 provisions. Just as in the case of a normal Section 301 action, the Special 301 provides for consultations that are designed to permit a resolution of the matter through negotiation. **If, however, such Special 301 negotiations fail, then a normal Section 301 action is triggered automatically, which can result in the imposition of trade sanctions by the U.S.****

## Description of Section 301

**Section 301 of the Trade Act of 1974**, as amended (hereinafter the Trade Act), **is a principal tool of enforcing U.S. international trade rights.** Section 301 provides the U.S. Trade Representative (USTR) authority to investigate a foreign government policy or practice and to take action if those foreign practices (a) deny rights of U.S. persons and interests under international agreements; or (b) unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce. 19 U.S.C. § 2411 (a) & (b). **The USTR may initiate a Section 301 action in response to a petition filed by interested U.S. persons** or may self-initiate. **Section 301 may be used to address any unfair trade practice**, including issues such as foreign market access for U.S. goods and services, equitable conditions for U.S. investment abroad, and effective protection of intellectual property rights. In any Section 301 investigation, the USTR must first seek consultations with the foreign government whose acts, policies, or practices are under the subject of the investigation. If the consultations do not result in a settlement of the matter, there is a range of remedial enforcement actions that may be taken under Section 301.

The range of potential enforcement actions is broad, encompassing any action that is within the power of the President with respect to trade in goods or services or with respect to any other area of pertinent relations with a foreign country. Specifically, the U.S. government may:

- (1) Suspend concessions given under trade agreements;
- (2) Impose duties or other import restrictions (which may constitute a suspension of concessions under one or more trade agreements);
- (3) Impose fees or restrictions on services;
- (4) Enter into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States; and/or
- (5) Restrict service sector authorizations.

While U.S. law does not require that the U.S. government wait until it receives authorization from the World Trade Organization (WTO) to take any of these types of enforcement actions, the U.S. has committed itself to pursuing the resolution of trade disputes with other WTO member countries through the WTO dispute settlement mechanism. Additionally, the WTO has ruled that taking any such actions against other WTO member countries without first securing approval under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes is, itself, a violation of the WTO Agreement. *See United States - Sections 301-310 of the*

*Trade Act of 1974*, WTO Panel Report, WT/DS152/R, adopted January 27, 2000, paras. 7.38-7.39. Thus, the U.S. government is highly unlikely to take any enforcement action against another WTO member country without first securing approval under the WTO Dispute Settlement Mechanism. Such approval normally would require that a WTO panel review the matter and rule whether the measures that are the subject of the dispute violate a member country's rights or obligations under the WTO. If, after reviewing the measures in question and the proposed U.S. enforcement actions, the WTO approves enforcement actions, the actions are, of course, no longer inconsistent with U.S. WTO obligations. **The WTO has specifically ruled that Section 301 is not violative of the WTO** on the grounds that the law does not require any unilateral action by the U.S. prior to WTO approval (*i.e.*, because the USTR has discretion to postpone any enforcement action until after all WTO dispute settlement proceedings have been completed and authorization to retaliate has been granted, the Section 301 law does not violate WTO). *See id.* at paras. 7.107, 7.109-7.113, 7.115.

### **Description of Special 301**

Section 182 of the Trade Act of 1974, as amended, created the Special 301 provisions which requires that the USTR identify those countries that deny adequate and effective protection for intellectual property rights established under international agreements, or that deny fair and equitable market access for persons that rely on intellectual property protection. 19 U.S.C. § 2242(a)(1)(A) & (B). Under the Special 301 review process, countries that have the most onerous or egregious acts, policies or practices and whose acts, policies or practices have the greatest adverse impact on the relevant U.S. products must be designated as "Priority Foreign Countries" (PFC). **If a trading partner is identified as a PFC and negotiations under Special 301 to eliminate the IPR violation or practices fail, then a normal Section 301 action is automatically triggered, which can result in the imposition of trade sanctions as described in the section above.**

In effect **Special 301 is simply a process that requires the U.S. government to identify countries that deny adequate protection for intellectual property rights, and that relies upon "normal" Section 301 for any potential enforcement actions that may be taken to address the IPR problem.**

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*NOTE: Emphases added by the Film and Television Action Committee*