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Constraining and supporting effects of the multilateral trading system on US unilateralism

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Constraining and supporting effects of the multilateral trading system on U.S. unilateralism

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Abstract

The subject of this paper is Section 301 of the Trade Act of 1974 of the United States, a statute that for the past 35 years has allowed the U.S. to unilaterally handle its trade disputes. More specifically, the paper examines the constraining and supporting effects of the multilateral trading system (GATT and WTO) on the effectiveness of Section 301 in general (127 cases), and of retaliatory threats and sanctions in particular (44 cases). In contrast with previous empirical papers, the emphasis is on the gradual interaction between both instances, with special attention to the escalation of the multilateral dispute and the timing of retaliatory threats and sanctions (if any). The paper shows that contrary to conventional wisdom, Section 301 has been less about ‘aggressive unilateralism’ (Bhagwati and Patrick 1991) than about reinforcing the multilateral trading system and the U.S. agenda in it. Section 301 proceedings and retaliation were often used in contravention of international trade law; but they were also used as tools to enforce multilateral rulings or to advance the multilateral agenda upon non-Members or on new issues. To address the effectiveness question, a qualitative response model is used. Results confirm the hypothesis prevalent in the extant literature that a process of escalation at the GATT/WTO is correlated with a higher success rate of Section 301 investigations in changing the target country’s policy. However, the impact is not linear; a settlement is more likely early in the bargaining stages rather than after a ruling is issued by a GATT/WTO panel. The empirical estimation is based on a comprehensive dataset on all Section 301 cases and on the related GATT/WTO dispute(s); and on 45 case studies outlined in the Appendix which, supplemented by the case studies of Bayard & Elliott (1994), are the basis for the coding of the dependent variable.

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Constraining and supporting effects of the multilateral trading system on U.S. unilateralism

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List of Abbreviations

| | |
|------------------|---|
| DSU | short for Dispute Settlement Understanding (Understanding on rules and procedures governing the settlement of disputes) |
| EC | European Communities |
| ECJ | European Court of Justice |
| EU | European Union |
| FTA | Free Trade Agreement |
| GATT | General Agreement on Tariffs and trade |
| IPR | Intellectual Property Right |
| Lisbon Agreement | Lisbon Agreement for the Protection of Appellations of Origin and their International Registration |
| OECD | Organization for Economic Co-operation and Development |
| TBT Agreement | Agreement on Technical Barriers to Trade |
| TRIPS Agreement | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| USTR | United States Trade Representative |
| VER | Voluntary Export restraint |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

Constraining and supporting effects of the multilateral trading system on U.S. unilateralism

1 Introduction

Back in 1974, when it enacted Section 301 of the Trade Act, the United States adopted a legalistic approach to foreign trade barriers, which facilitates the systematic study of disputes. While Section 301 was initially designed to channel private sector demands, cases started being filed *ex officio* by the United States Trade Representative when it was given the authority to do so by Congress in 1984. If at the beginning, the cases that were actionable at the multilateral level were taken to the GATT (there was a mandate to do so), soon the interaction between the two fora was in both directions.

The conventional wisdom regarding Section 301 is that the instrument allowed the U.S. to have a trade diplomacy based essentially on ‘aggressive unilateralism’, to gain trade concessions “at the point of a gun” (Bhagwati and Patrick 1991), to the detriment of the multilateral rules-based trading system. The truth is that the constraining and supporting effects between these fora went both ways. For instance, if some 301 cases were successfully solved once they were taken to the multilateral level, Section 301 was extensively used to enforce GATT rulings in its weakest years.

This paper aims at disentangling two main issues: the interaction between unilateral and multilateral proceedings in U.S. disputes, and the effectiveness of such an interaction. To tackle this research agenda, the construction of a comprehensive study was undertaken of all Section 301 cases, with the systematic detection of all the possible overlaps between Section 301 and GATT/WTO disputes in terms of procedures, dates, and rulings. The dataset was complemented with 45 detailed case studies.

The dataset was then used to evaluate the determinants in the effectiveness of Section 301 procedures in achieving the liberalization or dismantling of alleged trade barriers by target countries. A special emphasis was put on the variables related to ‘aggressive unilateralism’, retaliation threats and sanctions; and on the escalation of trade disputes at the multilateral level.

The remaining of the paper is organized as follows. Section 2 includes a brief note on Section 301. Section 3 states the basic problem posed by having multiple fora of adjudication and dispute settlement and the approaches in the extant literature. Section 4 details the choices made in the construction of the dataset. The last four sections relate to the empirical estimation. Section 5 includes stylized facts and descriptive statistics regarding Section 301 cases, Section 6 presents the econometric strategy, Section 7 the empirical results and Section 8 draws lines for future research. Concluding remarks are included in Section 9.

2 Section 301 of the Trade Act of 1974

Section 301 of the Trade Act of 1974 grants discretionary authority to the United States Trade Representative (USTR) to respond to foreign practices that burden or restrict U.S. commerce. In particular, the United States may unilaterally decide to retaliate against a country that has not complied with its requests. From June 1975 to date there has been a total of 126 Section 301 cases (four of them divided in two periods) covering a broad range of trade policy issues, including border measures (tariffs and quotas), subsidies, State-trading companies, intellectual property rights protection and enforcement, technical standards, sanitary and phytosanitary measures.

A Section 301 case may be initiated at the petition of an interested company or industry, or, since October 1984, *ex-officio* by the USTR.¹ If the first consultations with the foreign government do not result in a settlement, and the investigation involves a trade agreement, such as NAFTA or the WTO, the USTR must use the dispute settlement procedure available under that agreement. In general, amendments have been made to “enhance the credibility of section 301 threats through the setting of deadlines, and the identification of circumstances that shall result in retaliation if negotiations prove unsatisfactory” (Bayard & Elliott 1997). The major amendments were made in 1988. Although they strengthened the authority of the USTR, they were advanced by the U.S. Congress in *opposition* to the USTR (Bello 1989).

Bello stresses three major lines of reform. First, “critically important authority under the statute was transferred from the President to the USTR”, a move opposed by the USTR. Second, before 1988 the executive branch had the power to decide whether or not to further pursue some ‘response’; in 1988, the U.S. Congress mandated the USTR to take action (which essentially meant to retaliate) in cases of violation of a trade agreement or in ‘unjustifiable’ cases (i.e. cases in violation of international agreements, as opposed to ‘unreasonable’ or ‘discriminatory’ practices)². Bello recalls that the USTR, however, “scored a political victory of sorts because the original mandates to retaliate were very broad and the original exceptions were quite narrow”.³ Third, tight deadlines were specified. For example, for cases under the GATT, the only deadline for action is thirty days following the conclusion of a GATT dispute, which for Bello implies that

¹ Refer to Puckett & Reynolds (1996) and U.S. House of Representatives (2001) for details on the evolution of the Section 301 statute, its amendments and its ‘case law’.

² A number of exceptions apply, notably Congress required the USTR to consider the impact of inaction on the *credibility* of the whole system in its decision not to retaliate. Section 301, in its current version (19 USC 2411), in §2411(a)(2)(B)(iv) of the Trade Act of 1974 refers to the exception in “extraordinary cases, where the taking of action (...) would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions” of Section 301.

³ Judith Bello starts the sentence with “our office scored ...” as she served as General Counsel and Deputy General Counsel at the USTR between 1985 and 1989.

“even if no petition under Section 301 is filed, one can use the threat of filing a Section 301 petition as leverage in seeking to resolve the problem”.⁴

Possible retaliatory actions include suspending trade agreements concessions; imposing duties or other import restrictions, imposing fees or restrictions on services, entering into agreement with the target country to eliminate the offending practice or providing compensatory benefits for the United States, and/or restrict sector service authorizations.

A Section 301 procedure is reputed successful when the target country decides to dismantle the measure or policy at issue, or offers some compensatory action that further liberalizes its exchanges with the U.S. Outcomes may be successful regardless of whether retaliatory sanctions were threatened or applied.

Last but not least, the Section 301 statute has been itself targeted at the WTO. A panel considered that “a law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may [...] constitute an ongoing threat and produce a ‘chilling effect’ causing serious damage” (WT/DS152/R para. 7.88) to both Members and the market-place itself. The panel clarifies:

The point is that neither other Members nor, in particular, individuals can be reasonably certain that a [unilateral determination of inconsistency] will not be made. Whereas States which are part of the international legal system may expect their treaty partners to assume good faith fulfilment of treaty obligations on their behalf, the same assumption cannot be made as regards individuals.⁵

However the disputed sections were deemed not inconsistent with WTO agreements. China later observed that this panel established the so called ‘chilling effect test’ in determining whether or not a discretionary legislation is inconsistent with WTO provisions.⁶

3 Theory and literature review

This section sets out the basic outline of the problem, and reviews the arguments in the extant literature applicable to that problem. No original theory is presented; the existing theories are discussed and presented in a way that lends them to empirical testing.

⁴ In addition, in 1988, additional practices were included as actionable and the USTR was required to monitor and enforce settlement agreements (U.S. House of Representatives 2001, p. 109).

⁵ Para.7.91. The ‘chilling effect’ term is used more than once. Para 7.81: “In a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable ‘chilling effect’ on the economic activities of individuals”; para 7.91: “The risk of discrimination was found in GATT jurisprudence to constitute a violation of Article III of GATT – because of the ‘chilling effect’ it has on economic operators. The risk of a unilateral determination of inconsistency as found in the statutory language of Section 304 itself has an equally apparent ‘chilling effect’ on both Members and the market-place even if it is not quite certain that such a determination would be made” (*United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R adopted 27 January 2000).

⁶ *United States – Customs bond directive for merchandise subject to anti-dumping/countervailing duties* (WT/DS345/R, p. C-10, fn. 17).

3.1 The basic problem

The basic investigation focuses on the determinants of the effectiveness of Section 301 procedures in general, and on the role of the multilateral trading system in particular, in settling the dispute. It is easier to establish the setting of Section 301 and its interaction with the multilateral dispute settlement mechanism by referring to the resolution of disputes among private parties within nations.

Within nations, besides the classic ‘trial’ setting, most jurisdictions contemplate simplified procedures for the resolution of disputes, often called proceedings, which do not involve a full trial on the merits of the case. The parties to the dispute, the ‘petitioner’ and the ‘respondent’, engage in consultations aimed at settling privately their differences.

If no agreement is reached, a lawsuit can be filed before a Court⁷ with proper jurisdiction. The parties to the dispute become the ‘plaintiff’ and the ‘defendant’. The plaintiff commences the lawsuit by filing a complaint⁸ that sets forth “the alleged wrongs committed by the defendant with a demand for relief”.⁹ The plaintiff and the defendant present their arguments at the trial. The Court adjudicates the dispute on its legal merits and provides for the appropriate legal or equitable damages and remedies.

Section 301 fulfills a role similar to the statutes that regulate pre-trial proceedings, as it sets out a formal procedure open to the United States for the bilateral settlement of trade disputes involving specific practices of foreign countries. After the initiation of a case, the United States and the foreign country engage into informal consultations aimed at settling bilaterally the dispute.

If bilateral consultations fail, or if the United States is not satisfied with the solution offered by the target country, or with the implementation of commitments, the United States can take the case to GATT/WTO for formal consultations (open to third parties) or adjudication (by a panel ruling). This, as long as GATT/WTO has jurisdiction over the case, i.e. the target country is a GATT/WTO contracting party, and the disputed practices are covered by the provisions of the multilateral trade agreements. At that level, the trade dispute is akin to a lawsuit, as international law is applied and a third agent is involved besides the plaintiff and defendant countries, the ‘panel’, acting as a Court.

But similarities end there. Additional layers of complexity are added at each level of the domestic, bilateral and multilateral procedures potentially involved in Section 301 cases.

First, the U.S. legitimacy and credibility is not at its highest in all cases, because the USTR is not alone in prioritizing the cases pursued under Section 301, and in practice it does not pursue

⁷ Or an administrative agency.

⁸ Summons, claim, pleadings, action.

⁹ Wikipedia.

all cases with the same intensity and force. The U.S. private sector and the U.S. Congress also have a say. Under the original Section 301 of 1975, cases were initiated exclusively following a petition by U.S. private interests; in 1985 (case 49 onwards), the USTR was authorized to initiate cases *ex officio* but private parties still could make use of the law, which they did in 77 out of 126 initiated cases. The USTR has the option not to initiate or to suspend a case after a private petition, but inaction must be explained to Congress, which keeps a “watchful eye” all along (Hudec 1993, p. 41, 48).¹⁰ The private petitioner or the USTR might also decide to withdraw the case; in practice, cases withdrawn by the private petitioner are usually not further pursued by the USTR. Lastly, the authority to self-initiate was constrained by the U.S. Congress in 1988 with the Super 301 and Special 301 legislative amendments that mandated the USTR to prioritize and pursue “unfair trade practices” and intellectual property priority practices.

Second, the statute leads to a clear asymmetrical structure of power, since Section 301 proceedings are only open to the United States. Foreign countries cannot use that Statute to initiate a dispute against U.S. practices; they are always on the infamous ‘bench of the accused’.¹¹

Third, the statute is a source of what was labeled a ‘chilling effect’ in the power structure and markets by allowing (and, under certain circumstance, mandating) the USTR to unilaterally retaliate against the ‘offensive’ foreign practice.¹² In the realm of justice, this action is akin to an unlawful vendetta applied under the primitive Law of Talion.¹³ In international relations, this tit-for-tat strategy has been amply analyzed both in game theory and in practice.¹⁴ This action is often (but not always) taken after bilateral consultations and before any GATT/WTO procedure.

¹⁰ When the USTR decides *not to initiate* a case, a formal notice explaining the reasons to do so is published in the Federal Register, although it is hard to tell the exact number of cases that the USTR decided not to initiate. In a few cases, the USTR decided to *suspend* the case to concentrate on parallel multilateral negotiations on matters related to the dispute, for example during the Tokyo Round, which lasted 74 months from September 1973 to April 1974. In other cases, the case was suspended for political considerations. The suspension of a case is also motivated and published in the Federal Register.

¹¹ To be fair, Section 301(d)(3)(D) states that “for purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the U.S. for foreign nationals and firms shall be taken into account to the extent appropriate”. Bayard & Elliott (1994, p. 28) interpret this provision as “[allowing] foreigners to defend themselves against U.S. complaints by showing that the U.S. has similar trade impediments”.

¹² Refer to fn. 5. The ‘chilling effect’ has its roots in U.S. constitutional law. The Webster’s New World Law Dictionary defines ‘chilling effect’ as follows: “In constitutional law, the inhibition or discouragement of the legitimate exercise of a constitutional right, especially one protected by the First Amendment to the United States Constitution, by the potential or threatened prosecution under, or application of, a law or sanction.” Webster’s New World Law Dictionary. 2006. Wiley Publishing, Inc., Hoboken, New Jersey. Used by arrangement with John Wiley & Sons, Inc in yourdictionary.com.

¹³ The Law of Talion (*lex taliionis* or “law of retaliation”) exists both in the Bible and the Torah: Bible’s Genesis 9: 6, “whoever sheds a man’s blood, by man shall his blood be shed”; Torah 21: 22–27 “an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot” (Wikipedia).

¹⁴ As recently as September 3, 2009, Pascal Lamy, Director General of the World Trade Organization, in a speech to the Federation of Indian Chambers of Commerce and Industry (FICCI) in New Delhi in which he addressed the challenges posed by the subprime economic crisis on the “endgame of the Doha Round” referred to the ‘chilling effect’ in general terms (not in relation to Section 301):

“Add to this that some countries have increased tariffs, instituted new non-tariff measures, and initiated more anti-dumping actions. Some of the measures that have been introduced to stimulate economies contain provisions that favor domestic goods and services at the expense of imports. True, most of these measures are allowed under WTO

Fourth, the interaction between Section 301 and GATT/WTO goes in both directions, giving relevance to the fact that the dispute is covered by a multiple hierarchy of rules. Multilateral agreements grant rights but also impose obligations to contracting parties. This implies that in its bilateral proceedings under Section 301, the United States options are constrained by its international obligations. For example, retaliation, if declared unilaterally and applied in a discriminatory manner would be GATT/WTO-illegal pending an authorization for the suspension of concessions (either by the Council under GATT or by an Arbitration Panel under the WTO). Non-discriminatory increased tariffs above the MFN bound rate are also strictly regulated. And as a matter of fact, several GATT/WTO cases were initiated by target countries against U.S. retaliatory threats. In a sentence, at the GATT, and all the more so at the WTO, “*right* perseveres over *might*”,¹⁵ so that in their institutional design and in practice, these fora are bound to reinforce AND constraint the U.S. actions under Section 301.

Fifth, GATT/WTO procedures for consultations and panels are open to third parties. This implies that GATT/WTO disputes often end up in sorts of ‘class actions’, in the form of one case with more than one plaintiff or of several parallel cases on the same measure. This undoubtedly gives momentum and legitimacy to the U.S. complaints. But the reverse might happen as well, pro-defendant third-parties claiming a substantial commercial or systemic interest in the case might request to participate in the case, thus potentially affecting the balance of powers.

Sixth, the GATT/WTO system itself is not entirely ‘legalistic’, but rather ‘economistic’; the “key value underlying its odd legal design is reciprocity” (Hudec 1993, p.7). According to Hudec, reciprocity is embedded in the “vague” ‘nullification and impairment’ procedure, which is both broader and shallower than conventional enforcement procedures; broader in that it encompasses ‘non-violation’ complaints (thus going against purely legalistic approaches), and shallower in that the ultimate remedy is simply the withdrawal of equivalent concessions (as opposed to the plain elimination of the ‘unlawful’ practice). Dispute settlement procedures are there “to correct imbalances in the benefits” rather than to “enforce obligations for the sake of enforcement”.

3.2 Theoretical approaches¹⁶

The theoretical literature focuses on modeling how the agents act in this complex dispute settlement mechanism. The key question that this paper is addressing is the effectiveness of unilateral trade policies, in particular the impact of retaliatory threats, in the context of a rules-based multilateral trading system. In this section, I review selected arguments in the literature of

rules. True, also, that none of them has triggered so far a tit-for-tat chain retaliation. But there is no denying the fact that they have had some trade chilling effect.”

(http://www.wto.org/english/news_e/sppl_e/sppl133_e.htm).

¹⁵ Lacarte-Muro & Gappah (2000, p. 401), emphasis in the original, comment applied to the WTO.

¹⁶ This section draws heavily on Benavente, Dupont & Mariani (2008), except for Section 3.2.2.

the major 'schools of thought' in the field of International Relations in order to infer testable hypotheses, laid out in the next section.

3.2.1 Realist approaches

In the realist approach, the specific rules and institutional settings are secondary to the actual dispute since the overall power structure among countries is the key to understanding how international disputes are settled.

Although some realist scholars make the argument that the overall power structure of the international system, which includes military power, is what affects the patterns of trade (Gilpin 1987), others differentiate economic from military power. The central realist contention is that trade can be accurately modeled as a prisoners' dilemma game and that retaliatory strategies are successful in these contexts (Krasner 1976). In particular, political economy realists tend to argue that a State with a large internal market will be more effective in exerting some impact through aggressive trade policies because of the high costs that retaliation would bring to its opponents.

Goldstein and Krasner, for example, argue that the U.S. should retaliate by using a twofold strategy: "first, the United States should pursue a Tit for Tat strategy with states that clearly violate explicit GATT rules. Conciliation and unimplemented threats, the mainstay of existing policy, will not work. Rather, the United States should retaliate against such violations" (Goldstein and Krasner 1984). This argument is based on Axelrod's finding that a Tit for Tat strategy in an iterated prisoners' dilemma is the most successful strategy for this type of game. Their focus on economic power as a key element in the success of retaliatory strategy is clear: "the United States is in an ideal position to play Tit for Tat because of its large domestic market" (ibid, p. 284). When the state receiving the threat is dependent on the internal market of the state issuing the threat, retaliatory strategies will lead to an adjustment of protectionist policies and promote liberalization.

3.2.2 Bargaining theory

There is an important branch of the political science literature on strategic interactions that gives theoretical support to the distinction between the effectiveness of threats as opposed to sanctions. Drezner dubs this the bargaining 'folk theorem': "in those situations when sanctions are most likely to work, they are least likely to be imposed" (Drezner 2003, p.645-648).¹⁷ He argues that

¹⁷ Drezner 2003, p.645-648, includes a literature review on authors agreeing with the 'folk theorem': Rubinstein, Ariel (1982), Perfect Equilibrium in a Bargaining Model, *Econometrica* 50(1): 97-110; Eaton, Jonathan, and Maxim Engers (1999), Sanctions: Some Simple Analytics, *American Economics Review* 98(2): 409-414; Smith, Alistair (1996), The Success and Use of Economic Sanctions, *International Interactions* 21(3): 229-245; Morgan, T. Clifton, and Anne C. Miers (1999), *When Threats Succeed: A Formal Model of the Threat and Use of Economic Sanctions*, presented at the 95th Annual Meeting of the American Political Science Association, Atlanta, Ga.; and Lacy, Dean, and Emerson M. S. Niou (2000), *A Theory of Economic Sanctions*, Unpublished manuscript, Duke University, Durham, N.C.

since retaliation represents a “deadweight loss of utility for both the sender and target, in the form of disrupted economic exchange”, there is an incentive for both countries to settle the dispute, as long as the sender prefers the *statu quo* and/or the target prefers to concede over incurring the cost of retaliation.

Drezner (1999) develops a complete information model in which the target concedes if the sender prefers a deadlock to backing down.¹⁸ In the baseline model, one should only observe threats or very brief imposition of sanctions. In the refined version, sanctions can be an equilibrium outcome, provided the demand is indivisible and expectations of future conflict are high (in which case both parties fear to be left in a weakened bargaining position). Empirically, the model predicts that when sanctions are actually imposed, the outcome is a sustained deadlock. The cases of economic coercion that generate concessions will end at the threat stage and are thus more difficult to observe.

3.2.3 Two-level Games

In the two-level game approach, the specific rules and institutional settings cannot ignore domestic politics as the special interest groups in each nation are the ultimate drivers of national positions in the disputes.

The realist explanations of the determinants of the effectiveness of aggressive trade policies only offer a partial picture of reality. A number of scholars follow Putnam’s model of two-level games, where domestic concerns affect a State’s negotiating position internationally, and focus on domestic politics processes that may affect the effectiveness of retaliatory threats (Putnam 1988).

In this line of reasoning, domestic interest groups affect a State’s negotiating position internationally. Whenever there is solid domestic support either against a foreign measure or over a given proposed retaliatory threat, credibility and the international bargaining position of the state are enhanced (Milner 1997). The central research problem in this approach, therefore, is to identify what causes domestic actors to rally around aggressive trade policies.

Several issues have been analyzed in the literature. Odell focuses on more general variables directly inferred from Putnam’s model. He argues that the success of retaliatory threats such as those contained in Section 301 is a function of two key factors: internal consensus in the sender of the threat and the likely net political loss of complying with the threat to the Executive of the threatened state. Domestic politics in both States – issuer and receiver of the threat – are thus analyzed (Odell 1993).

Lohmann and O’Halloran, though not focusing directly on the effectiveness of threats, develop a more specific model arguing that protectionist policies are more likely when the

¹⁸ Drezner, Daniel W. (1999), *The Sanctions Paradox: Economic Statecraft and International Relations*, Cambridge University Press, referred to in Drezner 2003, p. 647.)

government is divided and when economic conditions are poor (Lohmann and O'Halloran 1994). One could extrapolate from this focus on protectionism and argue that retaliatory strategies will be more successful in changing the opponent's behavior the higher the level of domestic support.

However, these arguments focusing on two-level games do not address the role of the international trade system and, more particularly, the impact of international institutions. Zeng corrects some of these shortcomings by putting forward what he calls a modified two-level game. She argues that "the United States will find it more difficult to extract concessions from its complementary, rather than competitive, trading partners due to the greater degree of domestic division in the former than in the latter" (Zeng 2002). She accepts the idea that the degree of domestic support to a retaliatory action affects the likelihood of its success, but argues that domestic support will be higher whenever the opponent is also a direct competitor. Observable implications of this theoretical framework are straightforward: retaliatory measures against U.S. competitors, in particular Japan and the European Union, should be more successful than retaliatory actions against non-competitors.

3.2.4 Institutional approaches

Institutionalist theorists stress the importance of institutions such as GATT/WTO in determining the dispute outcome. The previous theoretical approaches say very little about the way international trade rules and institutions constrain state action on the realm of conflict resolution. This is at odds with a large body of literature in international relations that assesses the impact of international institutions on state autonomy. From an institutionalist perspective, international regimes – such as the multilateral trading system – have an important constraining effect on behavior over the long-run (Martin and Simmons 2005). Institutions provide a legal framework, diminish transaction costs and provide information, thus reducing uncertainty and fostering cooperation (Keohane 1984).

Many applications of institutionalist theory to issues of trade liberalization have corroborated the view that international institutions have an impact on state action. Lipson, for instance, argues that "the presence of a trade regime is unmistakably felt in U.S. trade legislation", with the internalization of a number of GATT norms and standards (Lipson 1982). Empirical studies also show that international institutions promote stability and reduce volatility in trade flows and policies (Mansfield and Reinhardt 2006).

Despite the vast amount of scholarly work on the role of international institutions, particularly trade institutions, there is still a gap in the literature in what concerns the impact of international trade institutions on the effectiveness of retaliatory threats, which this article aims to correct. A general hypothesis can be put forward to assess whether retaliatory threats are more likely to succeed in changing the target state's behavior when they are supported by international rules. Following institutionalist theory, it can be argued that retaliatory threats become more

credible once they are corroborated by principles or, even more so, by specific rulings following a dispute settlement procedure.

However, the way the GATT or the WTO affect state behavior may not work necessarily linearly. A game-theoretic model proposed by Reinhardt is particularly useful to analyze how the involvement of GATT/WTO in a dispute may affect the considerations of target states and lead to a change in policy. By modeling a situation where a plaintiff tries to alter the policy of a defendant through either retaliation or adjudication in an international institution, Reinhardt shows that there is an equilibrium in which defendants change their policy (settle) early in the dispute (Reinhardt 2001). The key element that encourages an early settlement is the uncertainty concerning the outcome of the adjudication and the possible costs imposed by non-compliance to what is perceived as a legitimate ruling. Even a defendant who would be noncompliant to the adjudication's ruling has an incentive to settle early, either to avoid retaliation by the plaintiff – which would occur with stronger resolve in the case of a favorable ruling – or to avoid the costs of not complying with the adjudication.

The interesting aspect of Reinhardt's model concerns the effects of rulings issued by GATT/WTO panels. A panel ruling removes the element of uncertainty present in the bargaining process and therefore eliminates whatever incentives the defendant has to settle. Compliant defendants will abide by the result whereas noncompliant ones will not change their policy. The issuing of a ruling by a panel is thus anticlimactic, narrowing the bargaining possibilities available to the parties. As Reinhardt puts it, "adjudication works because of the anticipation (and not the realization) of a ruling" (Reinhardt 2001, p.175).

The retaliatory threat made by the United States when it launches a Section 301 investigation offers an interesting context to test Reinhardt's model. By cross-referencing the outcomes of Section 301 investigations with variables measuring different levels of GATT/WTO involvement, it is possible to observe whether the prospect of adjudication by an international institution is likely to compel the target state to dismantle its protectionist practice; and whether the actual issuing of a ruling diminishes the likelihood of compliance by the target state.

3.3 Previous empirical research

Section 301 of the U.S. Trade Act has merited extensive research from economists and political scientists, although only a few have used econometric tools. Low (1993), Ryan (1995), Sykes (1992), Bhagwati & Patrick (1990) and Hudec (1990) have analyzed in depth the U.S. statute but don't include econometric models in their research. These authors focus on the criticisms that can be made to Section 301 as a market-opening tool from the foreign and multilateral perspectives.

3.3.1 Bayard and Elliott (1994)

Chapter 4 in Bayard & Elliott (1994) includes an econometric evaluation of 72 Section 301 cases, aimed at drawing general conclusions about the conditions leading to market opening outcomes.¹⁹ With the exception of Sherman 2002, all subsequent papers, including this one, draw on this seminal paper. The dependent variable is binary (success/failure) and the estimation is probit.

Their analysis is based on bargaining theory and the assessments of the benefits and costs of compliance or defiance to the U.S. and the target country (McMillan 1990). The main factor in determining a particular outcome is the difficulty of the goal, but they state that they were not able to define a variable for it (p. 83); so they focus on the target country's vulnerability to retaliation, which they proxy with the exports of the target country to the U.S. over its GNP and the foreign country's history of counter-retaliation;²⁰ and on the value placed by the U.S. on the outcome, which they proxy with the bilateral trade balance.

They also test 'credibility-enhancing' measures that could give leverage to the negotiating process, including the amendments of 1985 and 1988 and the issuance of a retaliatory list.²¹ Finally, they test whether a GATT panel finding of non-compliance gives any leverage to the U.S. and control for cases involving border measures.²²

The main results (robust to different specifications in this and future papers) are the strong explanatory power and expected sign of the target's export dependence, the bilateral trade balance and the border measure dummy; as well as the unexpected and significant negative sign on the retaliation and GATT variables.²³

3.3.2 Elliott and Richardson (1997)

In 1997, Elliott & Richardson expand Bayard & Elliott's database to 87 cases, including cases that were not 'formal' Section 301 cases.²⁴ They add two explanatory variables which end up significant with the expected sign, an index variable labeled *Bully* aimed at capturing some degree

¹⁹ Details on the variables used in the econometric papers presented in this subsection are given in Section 4 on the construction of the dataset.

²⁰ A dummy variable that applies to the European Communities, Canada and China.

²¹ The amendments allowed the USTR to initiate cases *ex-officio* and mandated it to take action in particular cases.

²² They argue that "traditional border measures –tariffs and import and export quotas on goods– may be relatively easier to negotiate because they are more transparent, objectives are easier to define, and because such barriers are more likely to be clearly GATT-illegal " (p. 85), as opposed to other barriers such as subsidies, state trading and technical standards.

²³ These variables are retained and updated in the database with slight modifications and discussed in detail in Section 4 (*Outcome dummy*, *TPA*, *Trade bill*, *Border measure*, *GATT ruling*, *Retaliation*, *Counter-retaliation history*, *Trade balance* and *Export dependence*).

²⁴ Cases in which the USTR pursued *informal* consultations and negotiations but that were not initiated as Section 301 cases.

of resistance to U.S. concerns by frequently targeted countries (and of persistence on the part of the U.S.), and a dummy for USTR-initiated cases.²⁵

Most importantly for the purposes of this paper, none of the reported regressions includes a single variable linked to retaliatory threats or sanctions or to GATT or WTO cases (the WTO was two years old when the paper was published).²⁶

The paper introduces the ordinal version of the dependent variable (four possible outcomes: failure, nominal, partial and large success) while keeping its binary version,²⁷ and adopts the (binomial) probit, tobit and multinomial logit approaches.²⁸ Their results on the probit regressions are in line with Bayard & Elliott (1994), with the added explanatory power given by the *Bully* and *USTR-initiated* variables. The main result from the multinomial regression is that the failure and nominal success cases cannot be significantly distinguished from each other.

3.3.3 Zeng (2004)

Zeng uses the database developed by Elliott & Richardson, without the cases that were not formally investigated, to which she adds one explanatory variable reflecting the complementary or competitive structure of the bilateral trade of the U.S. with each target country. She develops an explanation that emphasizes the influence of the trade structure on the pattern of coalitional support in the country issuing the threat and argues “that the U.S. enjoys greater domestic unity and hence enhanced threat credibility when trade with the partner country is competitive (i.e. when the U.S. and its trading partner export the same set of products) than when trade is complementary (i.e. when the U.S. export very different commodities from those it imports from the target country)”. She reports the binomial probit results, which reveal a strong and significant impact of her variable of interest, *Competitiveness*.²⁹

Her results on the other regressors are consistent with the previous two papers. In particular the GATT ruling dummy gets a significant *negative* sign, a result already obtained by

²⁵ *Bully* is calculated as the number of cases against the target country in years t , $t-1$ and $t-2$ as a percentage of total cases in those years, discussed in Section 4 as *Frequent target*.

²⁶ The *Retaliation* dummy used in B&E 1994 was dropped because it was not significant (p. 230, fn. 17); there is no mention of the *GATT ruling* dummy.

²⁷ In the database, the variables added by E&R 1997 are *Outcome ordinal*, *Frequent target*, *USTR-initiated*. B&E 1994 had set a dummy for all cases initiated after 1984, once the USTR was given the authority to self-initiate (labeled *TPA*). Dummies for measures in agriculture, subsidies, intellectual property, etc. were not significant in different specifications tested but not reported.

²⁸ The binomial and ordered logit results are not reported because they were similar to the probit and multinomial logit respectively (p. 227, fn. 11; p. 237, fn. 23). For the tobit regression they use 36 cases in which the trade at stake had been confidently measured, and use the estimated amount of trade reclaimed as the dependent variable (set as 0 for failures and as all the trade for large successes). They find no evidence of heteroskedasticity based on the ‘size’ of the case or on the bilateral trade balance.

²⁹ *Competitiveness* is an index variable: (1) the number of overlaps between the top 20 commodities the U.S. exports to and the top 20 it imports from the target country on each case is calculated, (2) the raw score (an ordinal variable) is adjusted in relation to that of the country with the most overlaps in a particular year (p.71-72). The source information is from U.S. Foreign Trade Highlights. She also experimented with the ordered probit approach but does not report the results (p.77).

B&E 1994. She explains this odd result by referring to the literature on deterrence and the theory on ‘entrapment’, according to which, applied to trade disputes, a GATT ruling favorable to the U.S. may encourage a more confrontational approach to the dispute (p. 74).³⁰ Her regressions do not include variables linked to retaliation.

Zeng does not expand the database to new cases (several additional 301 cases had been settled by 2004), but she remarks a “post-1995 period when states seem to be increasingly invoking a strategy of ‘aggressive multilateralism’ to settle trade disputes through the innovations of the World Trade Organization”. In her concluding remarks, however, she expects Section 301 to continue to be used in the future.

3.3.4 Sherman (2002)

Sherman (2002) is in a different category as the dependent variable is not the degree of effectiveness of the U.S. in achieving its liberalization goals. Sherman’s interest is in the factors that influence the selection of states as targets for Section 301 proceedings. He argues that the likelihood to be targeted is linked to a state’s regime type; democratic states are predicted to have a higher probability of being targeted. His dependent variables are targeting incidence (a binary variable) and targeting frequency, not the outcomes on each case. He shows that more open and competitive political systems are more likely to be targeted under Section 301. Of the included variables, only a state’s regime type and the size of its trade relationship with the United States have consistently significant effects across alternative model specifications.

3.4 Goal of the paper and summary of testable hypotheses

Each of the theoretical approaches stresses different aspects of the dispute procedures and suggests a focus on different determinants of the outcome in the dispute. Existing econometric studies on Section 301 effectiveness do not focus on the impact of retaliatory threats and sanctions, on one part, and of the different forms of involvement that GATT/WTO may have in an adjudication process. Bayard & Elliott 1994 is the only paper that includes variables in connection to both these effects (retaliatory threat and GATT favorable ruling dummies), Elliott & Richardson 1997 omits them both, and Zeng 2004 includes the GATT ruling variable only.

Regarding retaliation, for example, the existence of events of sanctions being imposed is regarded as an enhancer of the credibility of the U.S. in its retaliatory threats. As Bello (1989) put it “if one never shoots those arrows (...) then the threat is simply an ineffective bluff”.

³⁰ Ka Zeng was kind to provide a copy of her database, in addition to *Competitiveness* and the B&E (1994) and E&R (1997) variables, it includes three additional variables that were tested and then dropped for not being significant, included in Section 4 as *Alignment*, *Regime* and *GDP per capita* (her variable SUPER 301 is identical to B&E’s *Trade bill*, it divides the dataset into two periods, but does not single out Super 301 cases as the variable *Super 301* in Section 4 of this paper does).

On the other hand, the level of ‘involvement’ of GATT/WTO may include just the confirmation that the issue at hand is actionable under GATT/WTO agreements and may therefore be dealt with by the international institution. It may also incorporate informal consultations that may take place before an adjudication procedure starts. It may further include the initiation of a panel and, finally, a ruling. Under the WTO, additional levels are considered such as appeals and arbitration panels on the period of implementation of ruling and on the level of suspension of commitments in compensation for the non-compliance with a ruling.

By focusing on these gradual steps of involvement by GATT/WTO, it might be possible to directly assess which stages are more likely to generate a settlement and, in particular, observe the effects of a ruling. However, by building on a bargaining model of GATT/WTO negotiations, the general claim is refined in order to analyze in which specific moments of the bargaining process a successful outcome is more likely to occur.

Benavente, Dupont & Mariani (2008) distill these perspectives into four testable hypotheses reproduced here:

H1: Retaliatory strategies will be more successful in changing opponent’s behavior when the State receiving the threat is more dependent on the internal market of the State issuing the threat.

H2: Retaliatory strategies will be more successful in changing opponent’s behavior when they are channeled through multilateral trade institutions.

H3: Investigations launched under Section 301 are more likely to succeed in having the target state dismantle its protectionist practice in the early stages of GATT/WTO involvement in the adjudication.

H4: Investigations launched under Section 301 are less likely to succeed after the GATT/WTO adopts a panel report on the adjudication.

4 Construction of the dataset

The paper aims at disentangling the constraining and/or supporting effect that the world trading system has had in the effectiveness of Section 301 proceedings –which might include unilateral retaliatory threats and sanctions– since 1975. This goal dictates both the choice of cases and the associated right-hand side variables. This Section describes in great detail the source of the information retained for the qualitative variables, as well as the criteria used in the coding of the different quantitative variables that will be used in the empirical analysis of the remaining sections.

4.1 Observations: criteria in the selection of cases

The full database includes 127 observations for 126 cases, the last observation substituting for four cases against EC member countries bundled into one single EC case. After the exclusion of 10 cases, the empirical estimation includes 117 cases.³¹ Detailed cases studies for 46 cases are included in Appendix I. Appendix II includes a list of cases that the USTR decided not to initiate.

4.1.1 Complete database: 127 observations

The full database includes a total of 127 observations (rows). The initiation of a case is published by the USTR in the U.S. Federal Register (FR). Each case is assigned a docket correlative number (such as “USTR [Docket No. 301–103]”), which appears in the database as *USTR number*.

The docket numbers go from 1 to 122 from July 1, 1975 to date.³² The five additional cases correspond to four dockets with double entries (cases 62, 63, 92, 100) and to case 28a EC Specialty steel domestic subsidies that bundles four cases initiated against France, Italy, UK and Belgium (cases 28, 29, 31 and 33).

Each of the four cases with double entries refers to a specific measure of a particular country; but the corresponding Section 301 and, if any, GATT/WTO procedures are divided into two separate periods with no overlap and distinct outcomes. Three of these cases were reopened by the USTR after they had been officially terminated or suspended; in the FR notices, an “a” was added next to their original docket numbers. Finally, eight sets of cases with distinct numbering are related in a similar manner, i.e. they pertain to a single measure of a single country. They are also taken as separate cases, although that choice is less controversial as the USTR assigned different numbers to them in the first place.

The cases linked to each other are:

| | |
|---------------|--|
| (13, 36) | Japan Leather and Non-rubber footwear (same measure); |
| (17, 19) | Japan Cigars and Pipe Tobacco (same panel); |
| (20, 51) | Korea Marine sector insurance; |
| (26, 71) | EC Canned fruit production subsidies; |
| (28a) | EC Specialty steel subsidies (28 France, 29 Italy, 31 UK, 33 Belgium); |
| (54, 81) | EC Enlargement compensation (Portugal and Spain); |
| (58, 87, 122) | Canada Softwood Lumber; |
| (60, 83) | EC Third Country Meat Directive (same dispute); |
| (62, 62a) | EC Hormone-treated beef; |
| (63, 63a) | EC Soybeans oilseed; |
| (92, 92a) | China Intellectual property rights; |
| (100, 100a) | EC Banana Regime. 33 |

³¹ I am grateful to Ka Zeng for kindly providing a copy of her dataset, which itself draws on the database developed by Bayard & Elliott in 1994 and updated by Elliott & Richardson in 1997.

³² For the last case, 122 Canada Softwood lumber, initiated in April 2009, the numbering was not kept as the case was given the Docket No. USTR–2009–0011. In the database though, it appears as case N°122. The previous case, 121 Ukraine IPR lasted from March 12, 2001 until February 3, 2006; it was the single case initiated under the Presidency of George W. Bush (in office from January 20, 2001 to January 20, 2009)

³³ To facilitate the sorting of the cases in the database, under *Sorting number* they were assigned the numbers 13.2, 17.2, 62.2, 63.2, 92.2 and 100.2, etc.

4.1.2 Database for the empirical analysis: N = 117

A total of 117 cases are retained for the empirical analysis (N = 117). Some cases which had been excluded from previous empirical analysis were reincorporated: cases 27, 30, 38, 58, 87, 122 and 28a (which substitutes for cases 28, 29, 31 and 33). The cases that remain excluded are: 10, 21, 32, 39, 46 and 90.

Cases 27-31 and 33, a series of cases on specialty steel domestic subsidies against four EC countries (France, Italy, UK and Belgium, bundled in 28a), Austria and Sweden had been excluded from previous empirical analysis³⁴ on the basis that these were 'escape clause' cases, in which the main U.S. statute used by the administration was Section 201 on safeguard measures.³⁵ However, a thorough investigation of these cases showed that the safeguard measures were contested by some of the affected countries (the EC and Canada retaliated against them). Most importantly, they were supplemented with countervailing duties (targeted by definition)³⁶ and a series of bilaterally negotiated voluntary export restraint agreements (VERs). And formal consultations were requested under the GATT dispute settlement procedures. The final outcome – which admittedly was not all the making of the Section 301 cases – was a vast restructuring of the steel sector in the targeted (and other) countries.

Bayard & Elliott (1994) had excluded case 38 Taiwan Non-rubber footwear because the USTR made a formal determination that no injury on U.S. interests had been found from the disputed measures. But the U.S. obtained a few commitments from Taiwan in the investigation prior to this determination, so the case was reincorporated by Elliott & Richardson (1997). Also, B&E (1994) and E&R (1997) excluded cases (58, 87) Canada Softwood Lumber, on grounds that Section 301 had been used for administrative purposes only, but later events have shown that these cases involve a major dispute between Canada and the U.S. with additional layers of complexity. The last Section 301 case, case 122 initiated in 2009, is yet another chapter in this dispute.

Six cases remain excluded. Cases 10 EC/Japan Steel agreement, 39 Korea Steel wire rope subsidies and trademark infringement, 46 EC Satellite launching services and 90 Indonesia Pencil slats were initiated and then withdrawn by the USTR for lack of merits or other reasons. In case 21 Switzerland Eyeglass frames, the U.S., not Switzerland, changed its legislation. In case 32 Canada Export credit financing for subway cars, countervailing duties were applied following a different statute, not Section 301.

4.1.3 Case studies

B&E (1994) includes detailed case studies up to case 91, although the authors warned that 4 of them were too recent for a proper assessment of outcomes. This paper expands the case studies to the whole set of 126 cases. Appendix I includes detailed updates on the cases recently terminated at the time B&E wrote their book, that is (60, 83), 88, 89 and 91; on the cases reincorporated in

³⁴ Bayard & Elliott (1994); Elliott & Richardson (1997), Zeng (2004).

³⁵ Safeguard measures are import restrictions, i.e. increased tariffs or quantitative restrictions applied globally to all trade partners, not targeted specifically (at least in principle). These measures are also regulated at the multilateral level, they are taken "to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry". Safeguard measures were available under Article XIX of the GATT, although "infrequently used" as 'grey area' measures such as voluntary export restraint arrangements (VERs) were preferred. "The WTO Safeguards Agreement broke new ground in prohibiting 'grey area' measures and setting time limits ('sunset clause') on all safeguard actions" (quotes from the WTO website).

³⁶ "The WTO Agreement on Subsidies and Countervailing Measures disciplines the use of subsidies, and regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge an extra duty (a 'countervailing duty') on subsidized imports that are found to be hurting domestic producers" (quote from the WTO website).

the empirical evaluation (27-31, 33) and (58, 87, 122); and on the more recent cases, 92 onwards, including 62a.

4.1.4 Petitions not formally investigated

Appendix II includes a list of petitions for which the USTR decided not to initiate an investigation. This list includes the 8 cases considered by E&R as well as 6 other cases for which FR notices were found. Although a great amount of time and effort was put at the task of uncovering these cases, this appendix is with high probability still far from exhaustive and complete.

4.2 Dependent variable: coding of the outcomes

*Outcome ordinal**, *Outcome dummy*^{*37}

The assessments of the outcomes of each case are based on all the information available, FR notices, USTR reports, GATT/WTO cases, etc. The assessments are those of B&E for cases 1 to 91, except for the excluded cases, which were not assessed, and except for cases 38, 83, 88, 89, 93, 98 for which E&R assessments (posterior) were retained.³⁸ The assessments on cases 27-31, 33, 58, 62a, 63a, 87 and 92 onwards are my own. Some level of subjectivity cannot be ruled out, although a brief and complete summary of each of the latter cases, reflecting the basis of the assessment, is included in Appendix I.

Outcome ordinal is an ordinal variable consisting of the tabulation into four outcomes of the responses by targeted countries to the initiation of an investigation by the USTR. It measures the degree to which the U.S. was successful in achieving its negotiation objectives in each case. Four possible outcomes are considered, coded 0 to 3: (0) failure: the targeted country does not change its policy; (1) nominal success: the targeted country agrees to dismantle the measure in question, or offers some compensatory scheme, but does not implement its commitments; (2) partial success: the barrier is partially dismantled, or some compensatory action is offered which does not amount to U.S. requests; (3) large success: the measure is largely dismantled.

Outcome dummy is a binary variable coded 1 for those cases in which the United States was largely or partially successful and 0 otherwise (nominally successful or a failure).

These two variables are the most important ones, since they are the main dependent variables in the empirical analysis. It must be stressed that the fact that the U.S. prevails in a multilateral dispute does NOT systematically imply that the case is considered a success. Following B&E, the case is considered a success only when the alleged barrier has been partially

³⁷ The variables included in the database are listed in italics at the beginning of each subsection. An asterisk is added next to the variables that can be used in the empirical analysis.

³⁸ Elliott & Richardson experimented with the sensitivity of their results to success-failure classification on some controversial cases by changing the verdict in two cases against Japan, 48 Semiconductors and 93 Auto-parts, which are considered nominal successes.

or largely dismantled by the target country. However, the two cases in which the U.S. prevailed and the targeted country agreed to a compensation agreement were considered a partial success. The same for the two WTO cases in which the ‘suspension of concessions’ was authorized by an arbitration panel, as it can be considered that the U.S. got even with the target country.

4.3 Right-hand side variables (columns)

The right-hand side variables can be divided in four subsets: variables related to the Section 301 case; variables related to the corresponding GATT/WTO case; variables related to retaliation; market variables.

4.3.1 Variables drawn from the Section 301 case files

Factual information on each case

Title, Target, Case set, USTR number, Sorting number, Chronological number, FR citations

The factual information on each case was gathered mainly from the Federal Register of the United States, with occasional support from other sources. Each case refers to a specific alleged barrier, the case *Title*, in a particular country, the *Target country*.

USTR number and *Case set* correspond to the Docket number of the case, and the set of related cases, if any, to which that case belongs; for example, 87 and (58, 87, 122) for Canada Softwood lumber 1991-96. *Sorting number* is identical to *USTR number* except that cases related to each other are given a correlative number, so that cases (58, 87, 122) become (58, 58.2, 58.3) and (62, 62a) become (62, 62.2). *Chronological number* refers to the number assigned to the case in the chronological order of the initiation date.

FR citations includes all FR citations on the particular case.³⁹ Scanned pages in PDF format of all FR volumes since 1936 are available online at the website of William S. Hein & Co., Inc;⁴⁰ and PDF files of FR volumes from 1995 onwards are available at the U.S. Government Printing Office website.⁴¹ A USTR summary on Section 301 cases dated August 2002 included a number of these FR references.⁴² For the remaining notices, both Hein’s and GPO’s websites have good search engines; FR notices were generally found by searching for references to the docket case number, the initiation FR notice or the content of the case. The docket number was not always sufficient as it is not always mentioned in the FR notice; in addition, the notices for years 1975 to 1995 are scanned files often of poor quality, not easily searchable for specific content.

³⁹ 66 FR 18346 means volume 66 page 18346 of the Federal Register. Each volume corresponds to a calendar year; for example volume 40 corresponds to year 1975 and volume 74 to 2009.

⁴⁰ <http://heinonline.org/FR>

⁴¹ www.gpoaccess.gov/fr

⁴² A printed copy dated 9 August 2002 was used. The file is not on the USTR website anymore but Liberty Park, USA foundation posted an earlier version of this same file (up to case 116, not dated):

<http://www.libertyparkusafd.org/lp/Hamilton/US%20Trade%20Representative%5CSeccion%20301%20Cases.pdf>

Gathering all the relevant FR notices for each case was extremely laborious and time consuming, close to four full months were spent at finding and processing the relevant information in the database and the case studies. In spite of the diligence, time and effort put at the task, I could not claim that all relevant FR notices were found. It did not help that very few indirect sources of information on Section 301 cases cite the FR notices, not even the USTR reports.

On target countries

*Target number**, *Transatlantic**, *North-South**, *Frequent target**, *FTA**, *Regime**, *Competitiveness**, *Alignment**

Following the literature,⁴³ U.S.-EC disputes and disputes against developing countries were singled out with two dummies, *Transatlantic* and *North-South*. The categorization of the United Nations on developed/developing countries was used.

The variable *Frequent target*, is equivalent to the variable *Bully* in B&E, E&R and Zeng. It is a continuous variable calculated as the number of cases against the target country in years t , $t-1$ and $t-2$ as a percentage of total cases in those years. It is intended to measure whether the target country has been frequently believed to be imposing unjustifiable protectionist measures or to be violating a trade agreement.

FTA is a dummy that takes the value 1 in the cases against Canada as of case 80 (8 cases) and in the unique case against Mexico (1998). Case 24 Argentina Leather hides involved the breach of a bilateral agreement but this case has not been singled out as such.

Regime is an index variable, ranging within the values $[-10, 10]$ and reflecting the regime type of the target country. This variable was updated from the database used in Zeng (2004) with Polity III⁴⁴. Zeng added this variable “to control for the possibility that democratic pairs may be more likely to pursue free trade policies or that they resolve trade disputes more effectively” following the literature on international cooperation and dispute settlement.⁴⁵

Competitiveness is the main explanatory variable used by Zeng. It is based on an “ordinal measure of the degree of competitiveness with the U.S. in a particular year” measured as the “number of overlaps between the top twenty commodities the U.S. exports to and the top twenty commodities it imports from particular countries”. Competitiveness is then constructed as an index variable that goes from 0 to 10: the raw score is adjusted in relation to that of the country

⁴³ Reinhardt, Busch and others.

⁴⁴ The index is constructed by subtracting the target country’s autocratic index from its democratic index. With that measure, Canada, the EC and Japan score 10, China -7, Taiwan goes from -7 in 1986 to 6 in 1992, and the record low, of -9, goes to Argentina in 1979, at which year case 18 Marine insurance was initiated.

⁴⁵ Refer to Zeng p. 76 and fn. 32, p. 262-261 for a review of this literature. The same variable is used as an explanatory variable in Sherman (2002).

with the most overlaps in a particular year (Zeng p. 43, 71-72).⁴⁶ The source of the information has been discontinued, therefore the variable has not been updated and is included for completeness.

Alignment (Zeng 2004) is defined as a “trichotomous variable measuring the target’s security relationship with the U.S. based on the degree to which the target has either an antagonistic [coded 1], neutral [coded 2] or cordial [coded 3] relationship with the U.S.” (Zeng 2004, p. 77).⁴⁷ This variable has not been fully updated because it was dropped in Zeng’s study; it is included in the database for completeness.

Initiation and termination

*Initiation date, Termination date, Length of the case**

In the database, *Initiation date* corresponds to the date of the filing of the complaint by the private sector, if there was one; or by the date of initiation of the case as mentioned under the subsection “dates” of the FR notice; or by the date of the FR notice if no initiation date is mentioned, in that order. Initiation notices were found for all 126 cases.

Termination date usually corresponds to the official termination date, if there was one, and yet with exceptions. First, not all cases have been properly terminated by the USTR. The USTR usually terminates a case after some satisfactory solution has been achieved, but it might also suspend a case, for example to monitor the implementation of some bilateral agreement reached to solve the case, or decide that the appropriate action is to take the case to the multilateral dispute settlement mechanism (GATT or WTO).

Consequently, the database, under *FR notices*, includes letters attached to particular notices with the following meaning: (I) initiation notice, (T) termination notice, (A) the notice reports that an agreement was reached but the case was not officially terminated, (S) the case was suspended and never officially terminated, (GATT) or (WTO) the case was taken to the GATT or the WTO and can be considered as terminated later at that level, although the Section 301 case as such might never be officially terminated.⁴⁸ Second, the case might be considered as terminated some time after the official termination date.

⁴⁶ The source used by Zeng was the U.S. Foreign Trade Highlights series by the Office of Trade and Industry Information of the International Trade Administration of the Department of Commerce. The website of the ITA informs that the series was recently discontinued (<http://www.trade.gov/td/industry/otea/OTII/OTII-index.html>).

⁴⁷ The coding follows the scheme developed by Hufbauer, Schott and Elliott, *Economic Sanctions Reconsidered: History and Current Policy*, 2nd ed., Institute of International Economics, Washington D.C 1990 (Zeng 2004, p. 263, fn. 34). Up to case 98 (not all cases though), the coding is as follows: Antagonistic: China, USSR; Neutral: Argentina, Brazil, EC, Guatemala, India, Portugal, Spain, Thailand; Cordial: Canada, Japan, Korea, Norway, Taiwan. The additional cases against these countries were coded similarly. The coding is pending for Australia, Austria, Colombia, Costa Rica, Honduras, Indonesia, Mexico, Pakistan, Paraguay, Sweden, Turkey, Ukraine.

⁴⁸ A number of cases were taken to the GATT or the WTO and were also officially terminated, in which case (T) is attached to the relevant notice, although the date of that particular notice may or may not be the termination date retained in the database.

For example, case 87 Canada Softwood lumber was officially terminated October 19, 1994 (59 FR 52846) but the Softwood Lumber Agreement of May 29, 1996, effective April 1, 1996, was presented as a “satisfactory resolution” to 301-087 in 61 FR 28626.

Case 98 Canada Country music cable station was officially terminated on February 6, 1996 (61 FR 5603), but negotiations only ended on March 7, 1996, when the USTR announced that CMT and the New Country Network had signed an agreement to form a single Canadian country music network.

Case 85 India IPR was formally terminated in February 1992 (56 FR 7824); but effective May 19, 1992 GSP eligibility of India was removed for imports of pharmaceutical, chemical and related products worth about \$60 million (out of \$524 million of duty-free GSP imports) (57 FR 19067, sunsonline.org); and benefits on certain chemicals added to GSP in June 1992 were withheld from India, increasing the trade for which GSP was suspended to about \$80 million (57 FR 26969, fact sheet to Congress Jul 94), actions explicitly taken in retaliation for the Section 301 case.

For the few cases related to each other, in the database the first case is not always considered settled before the second case is initiated (the termination date on the first case is not necessarily anterior to the initiation date of the second), although it might have been the case “officially”. The opposite might be true as well.

To illustrate, case 26 EC Canned fruit production subsidies was officially terminated together with its follow-up case 71 in October 1989 (54 FR 41708), although an agreement had settled case 26 in December 1985 under the GATT, the date retained for *Termination date* in case 26.

Length of the case, in years, is calculated as (*Termination date* minus *Initiation date*) divided by 365.25.

Self-initiation, ‘Super 301’ and ‘Special 301’

*TPA**, *USTR-initiated case**, *Trade bill**, *Super 301**, *Special 301**

The Trade and Tariff Act of 1984, enacted October 30, 1984, included the so-called Trade Promotion Authority (TPA in short), by which the USTR was authorized to self-initiate investigations. Before that date, the initiation of a case had to follow a petition from a private-sector plaintiff. B&E (and several authors since) have made the case that the credibility of the U.S. resolve in solving Section 301 cases was enhanced after the enactment of the TPA. Following that literature, the dummy *TPA* is coded 1 for the cases solved before October 30, 1984.

The related dummy *USTR-initiated* is coded 1 for cases initiated *ex officio* by the USTR. USTR-initiated cases are not only more “credible”, it can be argued that they are probably more “legitimate” than those initiated following the particular interest of a private petitioner.

Following B&E and other authors, *Trade bill* is a dummy variable coded 1 for the cases initiated after August 23, 1988, date of enactment of a series of amendments to the Trade Act of 1974. In particular, Congress established the clause known as ‘Super 301’ that mandated the USTR to identify and take action against “priority foreign trade practices” that had the greatest

effect on restricting U.S. exports.⁴⁹ That statute is also believed to have enhanced the credibility of the U.S. Super 301 expired in 1990 and was re-enacted by Executive Order in 1994, 1997 and 1999, but only seven practices (cases 73 to 78 and 115) were prioritized under Super 301, singled out with a 1 under the dummy variable *Super 301*.

Other cases dealing exclusively with intellectual property rights protection and enforcement were initiated based on another amendment to the Trade Act in 1988, known as 'Special 301'.⁵⁰ Nine cases have been initiated against targets listed as 'priority foreign countries'; for these cases the dummy variable *Special 301* is coded as 1.

Special 301 cases cover the broad spectrum of provisions embodied today in the TRIPS agreement of the WTO, although five cases were prior to that agreement (84, 85, 86, 89, 91) and thereby instrumental in the negotiation of the WTO agreement, and three were against non WTO-members (92, 92a, 121).

Case 117 of 1998 against Paraguay is the only Special 301 case against a WTO member, i.e. post TRIPS, although developing countries were given five years, until 2000, to fully implement the agreement, so that TRIPS was not entirely enforceable on Paraguay in 1998.

Nine other cases on IPRs were not Special 301 cases, five were initiated prior to that Statute (cases 49, 52, 61, 68, 82), and four were posterior (103, 104, 106, 116). The total of 19 IPR cases,⁵¹ out of 126 (15% of the cases) clearly shows that intellectual property protection has been a constant U.S. foreign trade priority since 1985, when the U.S. opened its first IPR Section 301 case against Brazil, which was also the first case initiated *ex-officio* by the USTR.

Although this paper aims at stressing the impact of GATT/WTO on U.S. trade policy, there is no doubt that Section 301 and Special 301 were instrumental in getting the TRIPS Agreement negotiated at the WTO in 1995 in the first place. Several WIPO agreements were in place at the time, but their membership was far from universal, and neither the agreements nor WIPO gave its signatories much clout to solve their IPR disputes.

The Special 301 mandate is still active, every year the USTR issues a report with countries listed as 'priority foreign countries', pursuant to the law, although in practice two other categories have been created, the 'priority watch list' and the 'watch list'. These days, most of the mandatory follow-up on priority foreign countries is done directly at the WTO and not under Section 301.

All Super and Special 301 cases were USTR-initiated, with one exception: case 84 Thailand IPRs was based on a private petition, but Thailand would be identified as a 'priority foreign country' under Special 301 shortly after the petition and before the formal initiation of the case (56 FR 20060) so that the case appears as a Special 301, petition-initiated case.

⁴⁹ Section 310 of the Trade Act of 1974, as amended by Section 1302 of the Omnibus Trade and Competitiveness Act of 1988 (enacted August 23, 1988).

⁵⁰ Section 182 of the Trade Act of 1974, as amended by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988.

⁵¹ Of which 18 were retained in the empirical estimation, as case 39 Korea Steel wire rope subsidies and trademark infringement was withdrawn.

A column with explanations or comments on any of the variables above-mentioned is included in the database. For those cases for which nothing needed to be added, the corresponding cell was left blank.

Type of measure

Sector, Agriculture, Border*, Subsidy*, Investment*, Intellectual property*, Government procurement*, Competition policy*, Discrimination*, Industry number, Economic stakes*

Sector is an indicator variable that includes the following (mutually exclusive) categories: general (0), agriculture (1), manufactures (2) and services (3). Out of this indicator variable, the dummy *Agriculture* was created to follow the literature on trade which includes it as a control variable due to the special standing of agriculture in issues such as production and export subsidies or food safety, which arguably make these cases more difficult to settle.

In addition, a series of self-explanatory dummies which are not mutually exclusive are included in the database: *Border, Subsidy, Investment, Intellectual property, Government procurement, Competition policy, Discrimination*.

Border is a dummy variable scored at 1 if the trade barrier in dispute is a tariff or an import or export quota and 0 otherwise. This variable, which has been systematically used in previous empirical analyses, is intended to capture “traditional trade cases”, which are assumed to be more easily solved than other more “complex” measures (in areas such as intellectual property rights or services).

Discrimination is a dummy variable coded 1 if the case involved discrimination towards U.S. companies compared to the target or to third countries’ companies.

Economic stakes is a continuous variable given in US\$ millions. The information contained under this column comes from different sources. One major problem is that the figures given are not homogenous. The information was not found in 19 cases.

The stakes on a case are usually given in terms of the total value of potential exports, but these are measured either as the average value of U.S. exports in past years (for instance for measures implying some ban of imports from the U.S.), or in terms of the total value of the target country domestic market for the product subject to the dispute, which is then taken as the “potential market” for U.S. exports.

Other measures are given in terms of “revenue loss”, or of “market share loss” (for example when trade diversion to third markets is suspected as a consequence of export subsidies).

To keep the database as objective as possible, a range of values is given under *Economic stakes*, aimed primarily at distinguishing “small” from “big” cases, and sources are detailed in a separate column. The main sources of information are B&E and E&R for cases up to 91, the

petition (the text of the petition was included in the FR initiation notice for cases 1 to 24) and Hudec GATT case studies.⁵²

Lastly, *Industry number* gives a two to four-digit ‘industry number’. The information was found in the internet, has not been double checked nor updated and is included in the database for the sake of completeness.⁵³

4.3.2 Variables drawn from the associate GATT case

Several variables related to GATT/WTO are included in the database. While most of them take values for all Section 301 cases (for example membership to GATT/WTO), some include blanks. However, for a majority of the binary variables, the cells get a zero when technically a ‘not applicable’ would be more appropriate. For example, non-Members and Members get a 0 under consultations if the case was not taken to the GATT, which is correct for Members (and yet, under the condition that the case was ‘actionable’), but less so for non-Members against which going to the GATT was just not an option.

The most valuable information on GATT was found in Hudec (2003),⁵⁴ while that on WTO was found in the data set built by Horn and Mavroidis (2008).⁵⁵ This information was complemented with the original GATT⁵⁶ and WTO⁵⁷ documents.

All cases

GATT/WTO number, Uruguay Round

GATT/WTO member is a dummy coded 1 for those cases in which the target country was a member of GATT/WTO anytime within the period between *Initiation date* and *Termination date*, 0 otherwise.

Uruguay Round is a dummy coded 1 for cases started after 1995, once the Uruguay Round of multilateral negotiations agreements entered into effect. The Uruguay Round created the WTO, expanded the coverage of international trade law to issues such as services and intellectual property and strengthened the dispute settlement procedure of the WTO. The dummy is

⁵² B&E (p. 355-369) and E&R (p. 221-225) each provide a table with a column on the economic stakes involved in each case. In addition, in their case studies, B&E include detailed assessment of trade gains and losses for cases: 2, 3, 5, 9, 11, 12, (17, 19), 23, (26, 71), 43, 48, 50, 57, 59, 64, 65 and 67.

⁵³ The data comes from on a file in the Maxwell European Union Center website <http://www.maxwell.syr.edu/moynihan/programs/euc/GBS/EU%20data%20sources%20and%20links/EU%20Commission,%20%20legislation%20and%20trade%20agreements/external%20trade-data%20files%20and%20links/US%20section%20301%20Cases-%20coded.xls>

⁵⁴ Robert E. Hudec, *Enforcing International trade Law, The evolution of the modern GATT legal system*, Butterworth Legal Publishers, 1993.

⁵⁵ Henrik Horn and Petros C. Mavroidis, *The WTO Dispute Settlement Data Set 1995 - 2006*, version 2.0, 6 March 2008. This database was financed by the World Bank and is available at its website at <http://econ.worldbank.org>.

⁵⁶ The documents were retrieved from the Stanford GATT Digital Library 1947-1994: <http://gatt.stanford.edu>. The built-in search engine is extremely useful.

⁵⁷ World Trade Organization website: www.wto.org.

intended to reflect that under a rules-based international system, trade concerns and disputes, even handled unilaterally, gain in legitimacy.

Case 88 China, Market access (1991-92, a partial success) is interesting, because it was self-initiated against a non-member for barriers “selected because they appeared to be inconsistent” with the GATT and related codes (56 FR 51943). As noted in Elliott & Richardson (1997, p.238, fn.26), in the language of game theory, the Uruguay Round Agreements imply a contraction of the “threat set”, the set of outcomes that can be unilaterally dealt with; in addition, the effectiveness of the “grievance bilaterals” diminishes.

GATT/WTO members

Actionable measure

Under the GATT, the different agreements in place, called Codes, had a variable geometry, in the sense that not all GATT contracting parties were signatories to all GATT Codes. In addition, the scope of the GATT Agreement and of the Codes was limited, and a few sectors (typically textiles and apparel and agriculture) were practically excluded from the system of general rules (applicable to other manufactures) and had their own rules. Services and intellectual property rights were negotiated only after the Uruguay Round.

Actionable measure is a dummy variable intended to capture the fact that the U.S. could have taken the target country to the GATT or the WTO because the alleged barrier had been “somehow” regulated at the multilateral level. Since “non-violation” complaints could be taken to both the GATT and the WTO (and they were and still are), the criteria applied is quite large: all measures before 1995 in agriculture and manufactures are considered actionable (leaving out cases in services, IP and investment), with one exception, case 24 against Argentina because it involved the breach of a bilateral agreement (on leather hides). After 1995, all cases are considered actionable, with one exception, case 98 Canada Country music cable station license, in the services sector, which went from 23 December 1994 until 6 February 1996.

Although the TRIPS Agreement entered fully into force only in 2000 for developing countries, IPR cases are considered actionable after 1995. Cases 103 Pakistan and 106 India were taken to the WTO (cases DS36 and DS50 respectively), albeit only for consultations (no panel); whereas IPR cases 116 Honduras and 117 Paraguay were not.

Cases taken to the GATT or the WTO: escalation

Busch&Reinhardt, *Consultations*, *GATT/WTO*, *GATT case*, *WTO case*, *GATT/WTO initiation date*, *Panel*, *Early settlement*, *Report*, *Adopted report*, *Ruling dummy*, *Ruling outcome*, *GW outcome*

The U.S. did not go to the GATT or the WTO for all actionable cases, but it did in 69 occasions. However, for the cases not taken to the GATT, the variables that follow are not left blank (unless specified), they get the value 0.

A few columns included in the database are there to facilitate the cross-referencing with the databases of other researchers. *Busch/Reinhardt* corresponds to the number given to the

corresponding GATT/WTO case by these authors in their own papers.⁵⁸ *Hudec* is the number assigned by Hudec in his well-known seminal work on GATT disputes (Hudec 1993).

Consultations is a dummy coded 1 if consultations were requested and/or held under the GATT/WTO. All consultations are properly referenced in the database (in a separate column), with the exception of those held on cases 12, 16, 39, 40 and 47, for which no reference was found in the database of GATT documents, nor in Hudec's book, but for which other sources (particularly B&E) mention that consultations were held under the GATT.

In case 16 EC Wheat export subsidies, the FR termination notice (45 FR 49428) mentions that "consultations were held to ensure that the EC undertook its subsidy practices consistently with GATT Article XVI: 3", although no official GATT reference was found.

Consultations were held under the specific dispute settlement procedures of the GATT Agreement or the Tokyo Round Codes⁵⁹ or under the WTO Understanding on dispute settlement. Consultations under the Subsidies Code were frequent, they follow the series SCM/*. On other occasions, consultations were held under some other provision; these are included as well.

In case 54 EC Enlargement compensations (Portugal and Spain), the EC offered to negotiate under GATT Article XXIV (on Customs Union), the U.S. refused on grounds that it would take too long; eventually consultations were held not under the GATT dispute settlement provisions (Articles XXII or XXIII) but under GATT Article XXVIII on modification of schedules.

While Hudec includes in his book several disputes for which only consultations were held, with no further formal procedure (no panel), a couple of cases were left out of his comprehensive database, for whatever the reason. This is to say that in Section 301 cases 27, 30, 34, 35, 37, 41, 42 and 54, consultations were held under the GATT, properly referenced in the database, while these consultations do not appear in Hudec's synopsis.

If the case was taken to the GATT, the indicator variable *GATT/WTO* takes the value 1, if it was taken to the WTO, it takes the value 2, 0 otherwise. There was no overlapping, except in case 62, but in the database this case is divided in two (62, 62a), while 62 was taken to the GATT, 62a was taken to the WTO. *GATT/WTO initiation date* correspond to the date of request for formal consultations. *GATT/WTO termination date* usually corresponds to any terminal procedure in the case. In the case only consultations were held, and there was not a panel, that should be the date of consultations, but it is not a datum easily found. In case there

⁵⁸ Some (not all) of their databases are available in Reinhardt's webpage at: <http://userwww.service.emory.edu/~erein/>. I requested the database used in Busch & Reinhardt (2006) and never got a reply. The information online was cross-referenced and double checked. The authors variable 'GATT Id' is included in the database for completeness.

⁵⁹ Agreement on Government Procurement; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Code); Agreement on Import Licensing Procedures; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code); Agreement on Technical Barriers to Trade (Standards Code); Agreement on Trade in Civil Aircraft; Declaration on Trade Measures Taken for Balance-of-Payments Purposes; Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause); International Dairy Agreement; International Bovine Meat Agreement; Safeguard Action for Development Purposes; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

was a ruling, the date the panel issues the ruling is retained, because that is typically the date the Section 301 case is terminated as well. The date of adoption of the panel, if any, is mentioned.

Panel is a dummy variable coded 1 if a GATT/WTO panel or Working Party (for example in subsidies cases under the GATT) was requested and/or established on the disputed practice.

Under the GATT, countries could block the establishment of a panel. It also happened under the WTO in case 104, Pakistan IPRs. Pakistan objected to the establishment of a panel, most certainly on grounds that the TRIPS agreement was not enforceable upon developing countries. A mutually agreed solution was notified shortly after).⁶⁰

Historically, a few cases have been solved through bilateral settlements in the course of bilateral consultations, before the establishment of a panel or a Working Group or before its ruling. The variable GATT/WTO *Early settlement* captures that reality.

Report is a dummy variable coded 1 for all cases in which a GATT/WTO panel issued a report on the case. The report might consist of a ruling on the legal merits of the case or just a report on an early settlement. *Adopted report* takes the value 1 if the panel report was adopted by the Members.

Under the GATT (not the WTO), a country could block the adoption of a report; it happened in five occasions, all disputes against the EC: cases 6 (adoption blocked by the U.S.), 11, 25, 26 and 71 (the EC blocked). Under the WTO, panel reports are automatically adopted, unless there is a consensus of the Members not to (the declared intention was to prevent bad reports to make their way into WTO's case law).

Following Hudec's nomenclature, *Ruling dummy* is coded 1 for those cases in which a GATT/WTO panel issued a ruling on the legal merits of the case. If the panel reports only on an early settlement, this variable is given the value 0. This variable was created because the variable *Report* is of little use empirically.

Ruling outcome is an indicator variable which applies to those cases for which there was a GATT/WTO panel ruling. It takes four values: NA (no ruling), pro-US, mixed or pro-target. Another indicator variable is *GW outcome*, which includes the following: no GATT/WTO case or no outcome (0), early settlement (1), pro-U.S. ruling (2), mixed ruling (3) and pro-target ruling (4). This indicator variable can easily be divided into binary variables.

There were two pro-target rulings, which, expectedly, ended up being completely failed Section 301 cases and which tend to behave as outliers in empirical estimations (for them a *Pro-target ruling* dummy could be created). The cases in point are cases 6 EC Wheat flour export subsidies (the U.S. blocked the adoption of the report) and 99 Japan Consumer photographic film.

There were as well six mixed rulings: cases 2 Canada Egg quota, 4 EC Canned fruits & vegetables MIPS case, 8 EC Soybeans and soy meals, livestock feed mixing requirement (slightly pro U.S.), 25 EC Pasta export subsidies (slightly pro U.S., the EC blocked the

⁶⁰ Key facts on DS36, WTO website, available online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds36_e.htm.

adoption of the report), 109 Indonesia Motor vehicles conditional tax & tariff benefits, 120 Canada Canadian Wheat Board trading practices (slightly pro Canada).

There were pro-U.S. rulings in 20 cases: 11, 13, 26, 55, 62a, 63, 63a, 65, 71, 72, 80, 100, 100a, 102, 106, 107, 108, 112, 113, 118. In total, there were 28 rulings on the legal merits of the case based on GATT or WTO law.

Cases taken to the WTO: appeal and arbitration procedures

Appeal, 21.5 compliance panel report, *Appeal* 21.5, 21.3 arbitration (period), 22.6 arbitration (level)

For recent cases taken to the WTO, the Understanding on Dispute Settlement includes a series of procedures that were not available to complainants under the GATT. Variables were created on these as well.

Appeal is coded 1 if the panel report was appealed.

21.5 compliance report takes the value of the number of compliance panel reports on the case; idem for *21.5 Appeal*. For example, there were two compliance panel reports, and two appeals in case 113 Canada Dairy products (WTO DS103); and there were 4 reports and only 1 appeal in case 100 EC Banana regime (WTO DS16).

21.3 period arbitration takes the value 1 if there was an arbitration on the reasonable period of time for implementation of the panel ruling, pursuant to article 21.3 of the Understanding.

22.6 level arbitration takes the value 1 if there was an arbitration on the appropriate level of suspension of concessions following a panel ruling, pursuant to article 22.6 of the Understanding.

Other variables related to the GATT/WTO case

Multilateral case, *Complainants count*, *Third parties dummy*, *Third parties count*, *Pro U.S. / pro defendant / mixed third parties*, *Systemic issues*, *Article XXII*, *Non-violation complaint*, *Number of articles cited*, *Discrimination*, *Balance of Payments*, *Politically sensitive*, *Other cases*, *Notes*

A number of variables have been used in previous empirical studies on GATT/WTO dispute settlement.⁶¹ *Multilateral case* is a dummy that singles out cases with more than one complainant. *Complainants count* includes the number of complainants in the case and/or the number of countries having parallel complaints about the same measure shortly after or before the U.S.

Third parties dummy is coded 1 if third parties participated in the case. *Third parties count* is the number of third parties in the case. *Pro U.S. / pro defendant / mixed third parties* are count variables as well that do not necessarily add up to third parties count. *Systemic issues* is coded 1 for those cases in which third parties claimed to have a systemic interest on the case, as opposed to (or in conjunction with) having a “substantial commercial interest”. *Article XXII* is coded 1 if consultations were held under GATT Article XXII, a setting for closed consultations in which third parties can only participate if the defendant consents. The other option is to have GATT Article XXIII consultations, which are open to third parties with no further requirement.

⁶¹ See for example Busch & Reinhardt (2006).

Non-violation is coded 1 if some claim of non-violation nullification and impairment is made. Arguably, these cases are more difficult both to settle and to adjudicate. *Number of articles* refers to the number of articles cited in the complaint, also assumed to reflect on the complexity or the weak legal standing of the case. *Discrimination* is coded 1 in those cases in which a claim of discrimination was made by the U.S. in its complaint. *BOP* is coded 1 if some balance of payments provision is invoked by the defendant in the maintenance of the barrier (typically a quantitative restriction). *Sensitive case* is an admittedly discretionary variable aimed at singling out a few Section 301 cases.

4.3.3 Retaliation, counter-retaliation and counter-suits

Retaliation and counter-retaliation

*Retaliation threat**, *Retaliation**, *Counter-retaliation**, *Counter-retaliation history**, *Counter-suits*

The coding of the variables dealing with retaliation is mostly based on FR notices and on the so-called ‘suspension of concessions’ principle following a favorable GATT or WTO panel. Retaliatory threats were issued in 41 cases, but retaliation was imposed only in 23 cases. Each case, as well as a couple of controversial cases, is discussed in a *Notes* column in the database.

In all cases in which retaliation was imposed, it is assumed that there was previously a threat. This because even if formally it was not the case, the target country has always been given some time before retaliation is imposed, and there are a few cases in which an agreement was reached on the precise date in which retaliation was to enter into effect.

In case 26 EC Canned fruit production subsidies, retaliation was threatened if no agreement had been reached by December 1, 1985; but an agreement was reached on that day. In case 92, China IPRs, the USTR decided to increase duties to 100% *ad valorem*, effective February 26, 1995, on a list of China exports worth \$2.8 billion (60 FR 1829, 3032, 7230) but an agreement was reached before that date so that sanctions were never applied (60 FR 12582). In both cases, it is considered that there was a threat although technically in case 92 retaliation was not just a threat, it was imposed; it just never entered into effect.

The most prevalent threat is the imposition of 100% *ad valorem* duties on a given list of products, but retaliation can take several forms.

In case 6 EC Wheat flour export subsidies, the U.S. sought to capture the Egyptian market of wheat flour, and a GATT case of the EC against the U.S. followed.

In case 15 Canada Broadcasting advertising the U.S. decided to enact mirror legislation (45 FR 51173), which it did in October 30, 1984 (Trade and Tariff Act of 1984, Sec. 232, Pub. L. No. 98-573).

In case 98 Canada Country music cable station, although there was never an official threat, it was reported that the USTR Michael Kantor had considered “(holding) up a Federal Communications Commission license on Teleglobe, Canada’s \$50 million underwater cable off the east coast of Canada”, and E&R report that “planned retaliation” covered \$130 million (with no additional details). Sources on the retaliatory threat are not official, there are only newspaper accounts.

The most well known WTO cases are 62a EC Hormone-treated beef and 100a EC Banana regime, for which retaliation was imposed, or rather concessions were suspended, following

WTO arbitration reports, by means of 100% increased duties on \$116.8 million and \$191.4 million of EC exports respectively. In October 1998, a WTO panel on the EC implementation measures in case 62a (DS320) upheld the right of the U.S. to suspend concessions, implying that retaliation has been in place since July 1999; whereas in case 100a, concessions were suspended from April 1999 until June 2001.

To differentiate the effect of unilateral retaliation as opposed to retaliation following a GATT/WTO ruling favorable to the U.S., which in the multilateral jargon is called the ‘suspension of equivalent concessions’, an indicator variable was created, *Retaliation*. The variable was constructed cross-referencing the dates of the retaliatory threats and of the GATT/WTO rulings, as well as the motivation given by the U.S. authorities to the decision to retaliate.

Retaliation is coded 0 to 5 and reflects on a series of dummies, which themselves are NOT mutually exclusive (as mentioned earlier, in all cases in which retaliation was imposed it is considered that a threat was issued beforehand). The dummies and corresponding codes in the indicator variable are: *Retaliation threat* (1), *Retaliation imposed* (2), *Threat of SC* (3), i.e. the threat of suspension of concessions following a favorable GATT or WTO ruling, *Unilateral SC* (4), in case the suspension of concessions had not been formally approved by the GATT Council or by a WTO arbitration panel, *GATT/WTO SC* (5), i.e. suspension of concessions agreed by the target country in compensation for a ruling favorable to the U.S. or imposed following a WTO arbitration panel on the level of suspension. The dates of each decision (if any) are included in the database as well, unless not known.

Counter-retaliation is coded 1 if the target country counter-retaliated in the particular case (it happened three times).

In case 11 EC Citrus tariff preferences, retaliation was imposed from November 1985 until August 1986 (51 FR 30146), an increase on the bound tariff for pasta of “16,000% (...) amounting to an effective total embargo” according to the EC, leading the EC to counter-retaliate by increasing tariffs on U.S. lemon and walnut imports (C/M/193, 5 November 1985).

Pasta, which was the subject of a parallel complaint against the EC, Section 301 case 25, was used in retaliation for the citrus case 11 as a means to effectively deal with both cases at the same time.

Counter-retaliation history is coded 1 for all cases initiated against a country that had counter-retaliated one or more times in the past, in a Section 301 or some other dispute. This last variable has been used in past empirical studies (B&E 1994, E&R 1997, Zeng 2004) and is intended to capture some expected restraint on the part of the U.S. based on concerns of counter-retaliation in the cases pursued against these countries.

Counter-retaliation is coded 1 for the EC as of case 11 Citrus tariff preferences; for Canada as of case 55 initiated in April 86, because from January to June 84 Canada had counter-retaliated against the safeguard measures adopted in the context of the specialty steel cases (cases 301-27-33, which were none against Canada, but safeguards are applied globally); and for China as of case 86, which “counter-retaliated in a dispute over textile quotas” (B&E 1994, p. 83-84).

Countersuits

Countersuits

Countersuits is a dummy variable coded 1 if the target country opened a case at the GATT or the WTO against U.S. action. In addition, for each GATT/WTO case, the specificities of the case are given under *Notes*, and the details on related dispute settlement cases or measures, such as antidumping and countervailing duties, under *Other cases*.

The most prevalent countersuit is the filing of a GATT or WTO dispute against the U.S. retaliatory threat. This happened in cases 48, 49 Brazil Informatics subsidies, investment and import restrictions (November 1987, L/5871, 6083, 6274+Add1, Hudec N°170; the good offices from the Director General were requested and an early settlement was achieved); 61, Brazil Pharmaceuticals patent protection (Hudec N°189); 62 and 62a; 63; 93 Japan Auto parts barriers to access to the replacement market (WTO DS6, May 1995); 100a EC Bananas importation, sale and distribution regime (on the U.S. “premature” suspension of concessions, DS165 and WT/DS27/40).

In case 48 Japan Semiconductors protective structure, the U.S. was confronted to three countersuits, two were filed by the EC and one by Japan. The EC filed a complaint against the U.S.-Japan agreement (L/5607); and then against Japan for the restrictive measures adopted on semiconductors which allegedly “favored U.S. imports in violation of MFN obligations” (Hudec case N° 156, p.541). Japan filed a dispute against U.S. retaliation for not abiding by the bilateral agreement negotiated to settle the Section 301 investigation “as well as three antidumping proceedings” (Hudec N°161, p.546). The fact that the EC threw all its weight in this dispute must have had some impact on Japan.

The countersuit in case 62 EC Beef ban on hormone treated beef seemed legitimized under the GATT, but was later blatantly challenged under the WTO. The EC filed a complaint against U.S. retaliation in November 1988 (L/6438, Hudec N°193). The establishment of a panel was blocked by the U.S. Years later, the retaliation would be ‘legitimated’ by an arbitration panel report under the aegis of the WTO. The EC would countersuit again though, twice against the suspension of concessions in case 62a, (WTO DS39, April 96, DS320, November 2004 to November 2008) and once against Canada’s parallel retaliation (WTO DS321).

The countersuit in case 63 EC Soybean oilseeds subsidies is particularly interesting as it is considered a first take at what would become case WTO DS152 against the Section 301 statute itself. The EC requested consultations against a determination made “under Section 301 of the United States Trade Act” that “[meant] that unilateral and discriminatory trade measures may be taken against the Community” (GATT DS2/1, 18 July 1989, Hudec N°200, no panel). The request for consultations claimed that “a panel [was] studying the United States’ complaint under Article XXIII with respect to the aid system concerned”, most certainly referring to GATT proceedings opened by the U.S. in relation to Section 301 cases 301-41 (L/5510); 301-42 (L/5509) and 301-63 (L/6627 37S/86). U.S. retaliation was postponed.

In case 28a EC Specialty steel domestic subsidies, the EC filed a dispute (Hudec case n°138, 10 December 1984) against the U.S. embargo (ban) on steel pipe and tube imports from the EC, a product that had not been included in a Voluntary Export Restraint Agreement (VER) negotiated in 1982 (refer to Appendix I for details); the dispute was settled through the negotiation of a new VER in 1985 for these products on 29 January 1985. Still in the specialty steel sector, but this time in case 30, Sweden requested two panels against U.S. antidumping duties applied to stainless steel plate imports (Hudec n°191, ADP/47, September 1988 to August 1990, and ADP/117, February 1994).

In case 35 Brazil Non-rubber footwear import restrictions, Brazil filed a dispute against U.S. countervailing duties (CVD) on non-rubber footwear (SCM/94, Hudec N°185, May 1988 to October 1989, adoption of report blocked by Brazil). Also, some time after the Section 301 case had been terminated, Brazil won a second case that went from 1990 to 1994 on the same product against the U.S. (GATT DS18, Hudec p. 566).

And yet, in some cases, there is a question of which came first, the chicken or the egg. In case 58 Canada Softwood lumber, Canada had opened a GATT case in February 1983 against a threatened CVD by the U.S. which was finally never applied (SCM/40 + Add.1, Hudec N°121, no panel). Then in July 1986, it opened a case against an applied CVD (Hudec N°147). In the meantime, the U.S. opened Section 301 case 58 on December 30, 1986. All three proceedings were settled in May 1987 with a “Memorandum of Understanding under which Canada agreed to impose an export duty of 15%” (Hudec p. 530).

In a twist to this complaint, in Section 301-87, which went from April 1991 to April 1996, Canada filed a complaint with the Subsidies Committee (SCM/62 40S/358). The report on that case, a pro-Canada ruling, was adopted in October 1993.

Finally in case 80, Canada Beer provincial import restrictions, Canada filed a countersuit against U.S. regulations on beer, state and federal, many of which were found GATT-inconsistent (GATT DS23/R).

4.3.4 Market variables

The database includes a series of macroeconomic variables, the value of a particular variable for a particular country at a particular year painstakingly extracted from a series of well-known sources. Not all the variables will be used in the empirical part, but since this database is intended to be useful to other practitioners in the future, the set of variables included is wide on purpose.

Although Section 301 cases cover 25 countries over 34 years, the observations are of a cross-sectional nature (not time-series, nor panel nor pooled data).

For each observation, the particular statistical value included under each column refers to the total annual value for the year immediately previous to the year of initiation of the investigation. For example, if the *Initiation date* is July 1, 1975, the values for that case are those corresponding to 1974.

For the cases against the European Community, the value given corresponds to the sum over the values of each member country. This implies, for example, that if the investigation was initiated in 1995 with the EC at 15 members, the data for the 15 members is summed up for year 1994, even though at that particular year, EU members were still only 12.

UN COMTRADE

US imports current\$, U.S. exports current\$**

Two series were extracted from COMTRADE: U.S. imports of goods from the target country, in current U.S. dollars, labeled *U.S. imports current\$*, and the U.S. exports of goods to the target country, in current U.S. dollars, labeled *U.S. exports current\$*.⁶²

These series only include trade in goods, they do not include trade in services.⁶³ And they exist only in current U.S. dollars, not in constant U.S. dollars (any base). The classification used

⁶² United Nations Commodity Trade Statistics Database: <http://comtrade.un.org>.

⁶³ After a request for information on trade in services to the Foreign Trade Division of the US, the following response was received (by email): “The Foreign Trade Division collects data regarding trade in goods only. The Bureau of Economic Analysis collects data regarding trade in services. In our monthly FT900 Press Release we show figures for total trade in goods and services; however, we have no information regarding trade in goods and services by country.

was “SITC Rev.1”, as it is the only one that covers the full period 1974-2009, the selected trade flows were “imports” and “exports”, total (for “all commodities”), as reported by the U.S. (reporters “USA (before 1981)” and “USA” for recent years).

UN Data

GNI current\$, GDP current\$*, GDP constant90\$*, Total exports current\$*, Total exports constant90\$*, Total imports current\$*, Total imports constant90\$**

The series extracted from UN Data⁶⁴ for each country, at each year, are the Gross National Income⁶⁵ in current U.S. dollars (not available in constant U.S. dollars, any base), labeled *GNI current\$*, the Gross Domestic Product in current U.S. dollars and in constant 1990 U.S. dollars, labeled *GDP current\$* and *GDP constant90\$*, the total exports and the total imports of goods and services in current U.S. dollars and in constant 1990 U.S. dollars, labeled *Total exports current\$*, *Total exports constant90\$*, *Total imports current\$* and *Total imports constant90\$*.

The series on GDP and/or GNI per capita, both available in UN Data in current U.S. dollars could be added, they have not. In addition GDP per capita is available in current international dollars (PPP).

Following the standard procedure in the literature, all or some of these variables might be included as regressors in logs, if it can be argued that changes in lower (higher) values result in large (small) changes in the dependent variables.

USSR

There was one case against the former Soviet Union, in 1977. Both COMTRADE and UN Data have entries for the former USSR for the relevant year (1976), except for *Total exports constant90\$* and for *Total imports constant90\$*, which were left blank.

Taiwan

There have been 7 Section 301 cases against Taiwan. Data was needed for 5 years: 1975, 1981, 1982 (2 cases in 1983), 1985 (two cases in 1986) and 1991.

Taiwan is missing from the COMTRADE series. I extracted the trade values with the US, for years 1985 and 1991 from the U.S. Census Bureau website (imports and exports of goods in current U.S. dollars).⁶⁶ Since the information for years 1975, 1981 and 1982 was not available; the figures from Zeng’s database were kept.

You should check with the Bureau of Economic Analysis (<http://www.bea.gov>) regarding the availability of trade in services by country. You could then combine those figures with the trade in goods by country which you can find at our website back to 1985. Any data regarding trade by country prior to 1985 can only be retrieved from paper publications, or you might find that also in the Statistical Abstract of the United States at <http://www.census.gov/compendia/statab/>.”

⁶⁴ United Nations statistics portal: <http://data.un.org>.

⁶⁵ Formerly known as Gross National Product, or GNP

⁶⁶ <http://www.census.gov/foreign-trade/balance/c5830.html>.

Taiwan is also missing from the UN Data series. For the respective series, all years, I used the National Statistics Republic of China (Taiwan) website, with minor manipulations (exchange rate, deflators' base, etc) to get statistics equivalent to those obtained through UN Data.⁶⁷

Calculated series

Merchandise trade balance (3), Export dependence* (3)*

The main variables of interest from a theoretical point of view are the trade balance of the U.S. with the target country, and the export dependence of the target country with the U.S. Three different measures were calculated of each of these variables.

A couple of these variables required the use of deflators. Optimally, deflators should be those associated exactly to the variable used, but these are not always readily available, less so for 25 countries over 34 years. As a second best, the implicit price deflators for the U.S. GDP were used, obtained from the U.S. Bureau of Economic Analysis website.⁶⁸ The deflators use the base 2005=100, so the base was changed to 1990 to be in line with the UN Data statistics. The deflator series used in the calculated series were those for the U.S. GNI, GDP, imports of goods and exports of goods.

The variable *Merchandise trade balance current\$* (tbal1) corresponds to the trade balance of the U.S. with the target country, it is calculated as the difference between U.S. *exports current\$* and U.S. *imports current\$*, therefore covering only trade in goods in current U.S. dollars. This variable is used as a proxy for the value placed by the U.S. in the outcome of the dispute. Whenever the U.S. has a large trade deficit with a commercial partner, internal groups are more likely to vocally demand that the U.S. government exert pressure for the dismantling of barriers in the target country.

Merchandise trade balance should ideally be given in constant U.S. dollars, since 34 years are covered. Two other measures were calculated, aimed at approximating the merchandise trade balance in constant U.S. dollars. A summary of calculations and descriptive statistics is included below:

tbal1: U.S. exports to X current US\$ - U.S. imports from X current US\$

tbal2: (US exports to X current US\$ / U.S. exports deflator) - (US imports from X current US\$ / U.S. imports deflator)

tbal3: (US exports to X current US\$ - U.S. imports from X current US\$) / U.S. GDP deflator

⁶⁷ <http://eng.stat.gov.tw>.

⁶⁸ <http://www.bea.gov>, Table 1.1.9. Implicit Price Deflators for Gross Domestic Product, downloaded on 9/24/2009 at 10: 54: 28, last revised August 27, 2009.

| Merchandise trade balance, US\$ millions | | | |
|--|---------|---------|---------|
| | tbal1 | tbal2 | tbal3 |
| Mean | -10,444 | -12,787 | -10,507 |
| St. Dev. | 17,482 | 18,862 | 18,298 |
| Min | -69,042 | -71,930 | -67,172 |
| Closest to 0 | 27 | 34 | 48 |
| Max | 14,576 | 15,670 | 22,040 |

As expected, the first series (trade balance in current U.S. dollars) presents a lower average, a smaller range, a smaller standard deviation. It was less manipulated than the other two, for which deflators were used, and the measure on the economic stakes is in the same “unit” (current U.S. dollars).

Export dependence with the U.S. is a measure that has been traditionally used in the empirical papers on Section 301 since the seminal paper of B&E. This variable aims at capturing the target country’s vulnerability to the U.S. B&E 1994 used the exports of the target country to the GNP of the target country. Zeng 2004 used the exports of the target country to the GDP of the target country. The database includes both measures, using the U.S. as the reporter on the trade statistics, and the UN Data statistics on the product variables. A third measure is offered, linking the exports of goods to the U.S. over the total exports of goods and services of the target country. These variables are only meant to give an order of magnitude on the target’s export dependence towards the US.

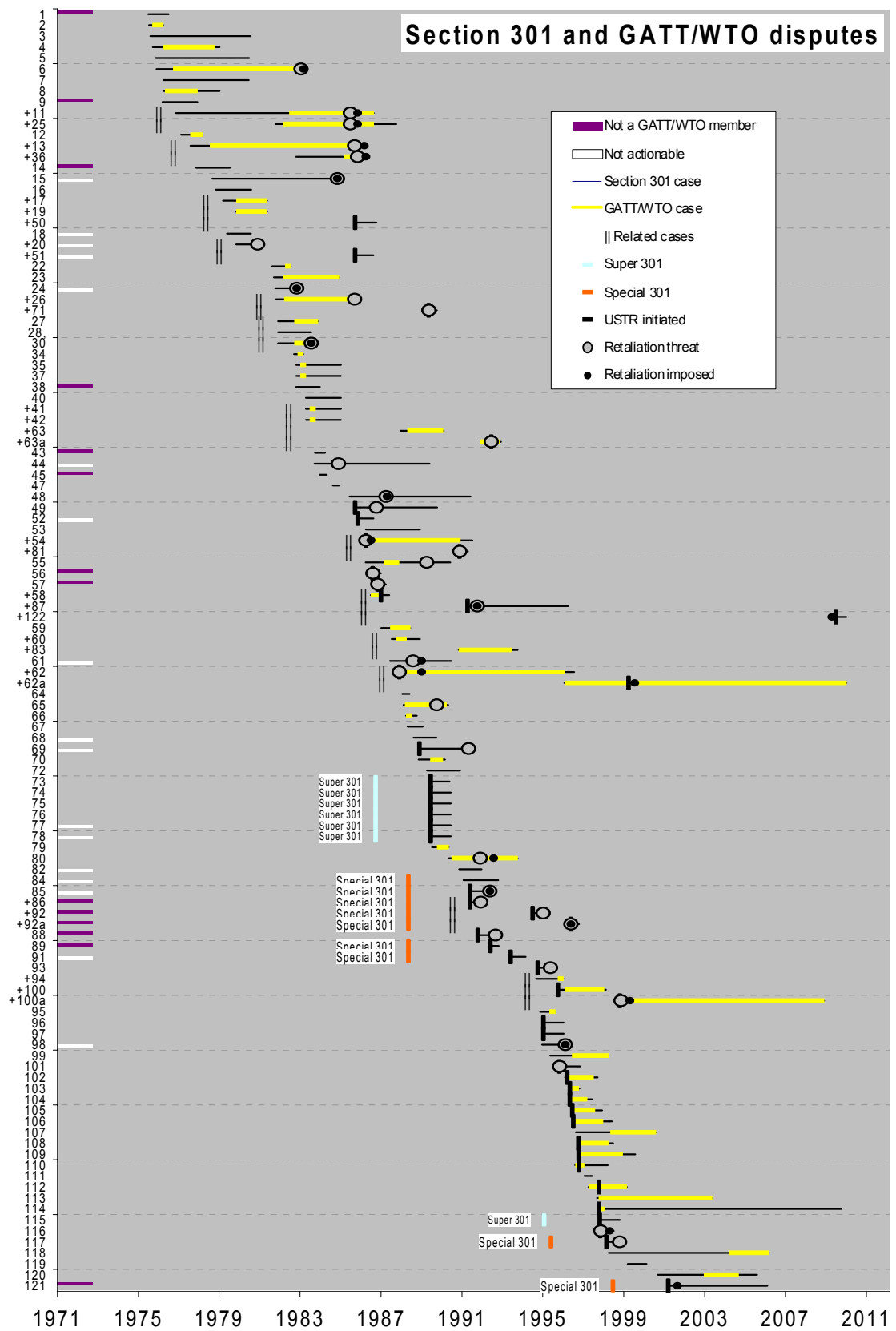
expdep1: U.S. imports from X current US\$ / GNI X current US\$

expdep2: U.S. imports from X current US\$ / GDP X current US\$

expdep3: U.S. imports from X current US\$ / X Exports of goods and services current US\$

| Export dependence | | | |
|-------------------|---------|---------|---------|
| | expdep1 | expdep2 | expdep3 |
| Mean | 6.60% | 6.45% | 23.11% |
| St. Dev. | 8.36% | 8.14% | 19.76% |
| Min | 0.03% | 0.03% | 1.14% |
| Max | 42.02% | 39.03% | 71.59% |

Figure 4.1: Section 301 and GATT/WTO disputes 1975-2009



5 Stylized facts / descriptive statistics

5.1 Trends over time

Figure 4.1 in the previous page reproduces, expands and updates to 2010 a Figure by B&E 1994, p. 20-21. Cases are presented in chronological order, except for those related to each other, which are put one after the other, with a '+' sign attached to their docket number. The Figure shows the progression and length of cases over time, with information on USTR initiation and retaliatory threats. The periods of major activity are those that immediately follow the major statutory changes to the Trade Act, when the USTR was allowed to initiate investigations *ex-officio* (October 1984) or with the establishment of Super 301 (August 1988) and Special 301 (January 1989); and the early years of the World Trade Organization (1995).

Retaliation was threatened for the first time only at the end of 1980, in the services sector, case 20 Korea Marine insurance. Comments on proposals for retaliation were requested on November 26, 1980 (45 FR 78850); Korea promised to address U.S. concerns and to foster competition in the insurance market, and the petitioner withdrew the petition (45 FR 85539).

It is also apparent that disputes were filed at the multilateral level since the very beginning (in yellow), starting with case 2. After the Uruguay Round Agreements in 1995, most of the cases were also filed under the World Trade Organization Dispute Settlement Mechanism.

Figure 5.1: Effectiveness of Section 301 by target country

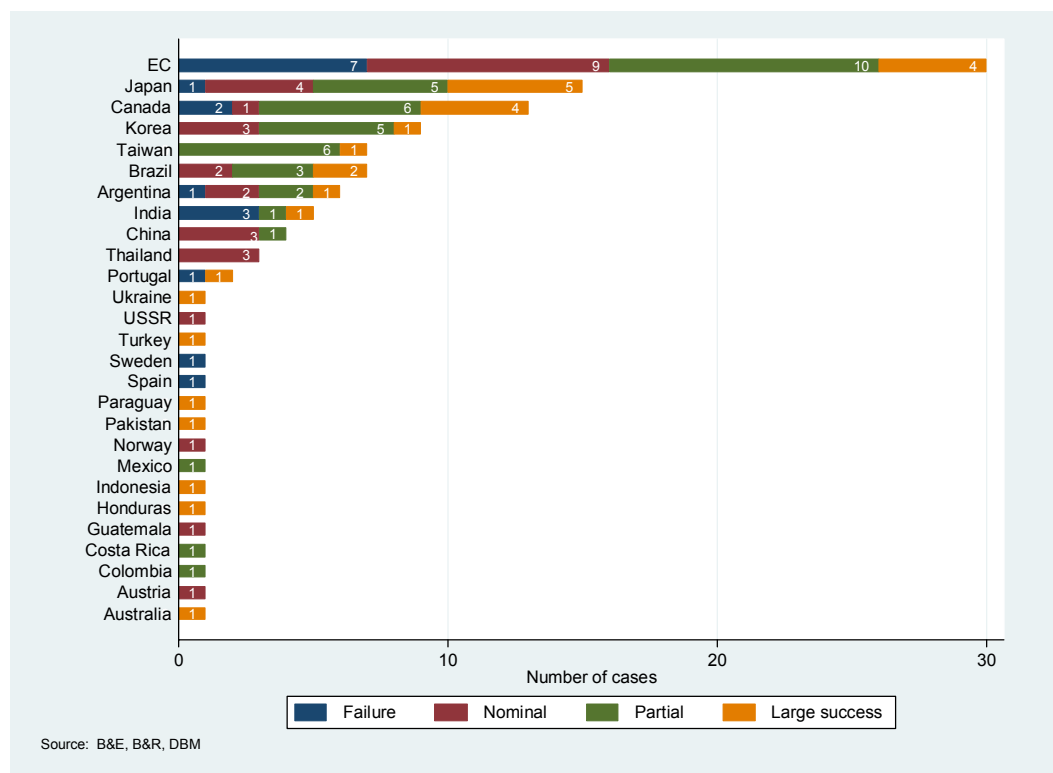


Table 5.1: Tabulation of Section 301 outcomes

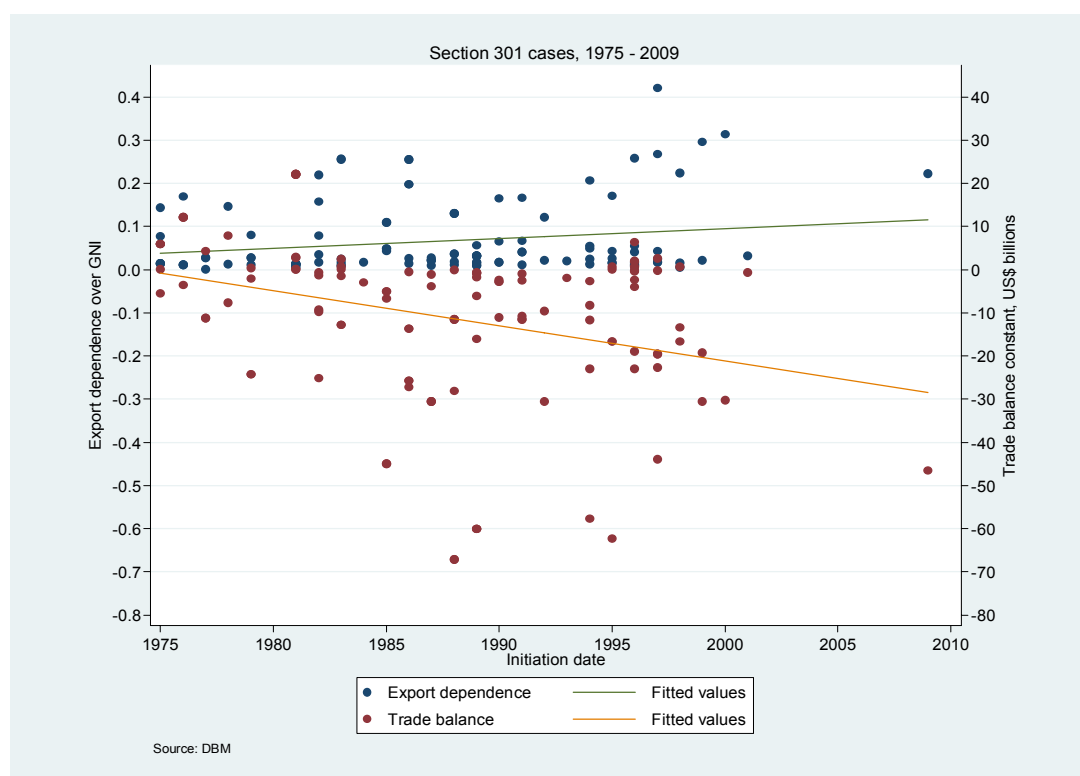
| outcome | Freq. | Percent | Cum. |
|--------------|------------|---------------|--------|
| failure | 17 | 14.53 | 14.53 |
| nominal | 31 | 26.50 | 41.03 |
| partial | 42 | 35.90 | 76.92 |
| large | 27 | 23.08 | 100.00 |
| Total | 117 | 100.00 | |

Table 5.1 tabulates the outcomes in Section 301. Close to 40% of cases can be considered failures, while in 60% of the cases the U.S. was successful in achieving its goals.

Figure 5.1 depicts Section 301 cases by target country and by effectiveness in the case. The distribution is skewed, although 27 countries have been targeted so far, close to one fourth of the cases (30 cases) are transatlantic cases against the EC, with mixed results. The countries targeted more than once are Japan, Canada, Korea, Taiwan, Brazil, Argentina, India, China, Thailand and Portugal (before it joined the EC). The remaining 16 countries are targeted only once.

Figure 5.2 shows the levels of export dependence and trade balance of target countries with the U.S., at the case initiation date, for the previous calendar year. The Figure has two scales, each case appears twice, in the same vertical line (same year). The left-hand side scale ranges from 0 to

Figure 5.2: Export dependence and trade balance over time



40% and gives the level of export dependence measured as the target country's exports to the U.S. over its Gross National Income. A simple regression line shows that the mean export dependence of target countries has been increasing over time. The right-hand-side scale ranges from \$20 billion to minus \$7 billion and gives the trade balance of the target country with the U.S. in constant U.S. dollars. Here again, the trend is clear, over time the U.S. has increasingly targeted countries with which it has had a large bilateral trade deficit.

5.2 Escalation at GATT/WTO

Figure 5.3 shows the level of escalation at GATT/WTO by outcome in the 117 cases retained in the empirical estimation. The first bar includes the cases that were never filed at the multilateral level, the second bar includes those that were. These only made it to the consultations level, or escalated. The Figure includes four possible outcomes after a panel was requested: early settlement or a panel report on the legal merits of the case with a pro-U.S., mixed or pro-target ruling.

Thirty-one cases led to positive outcomes (partial or large success) through bilateral negotiations outside the multilateral framework (bars 'no case'). Arguably, the target country might be willing to move to avoid a panel or unilateral retaliation, if the threat is credible. Notwithstanding, a majority of largely successful cases were disputes brought to the GATT/WTO (18 GATT/WTO disputes against 9 'no case'). Of these, 11 led to an early

Figure 5.3: Escalation at GATT/WTO and Section 301 outcomes

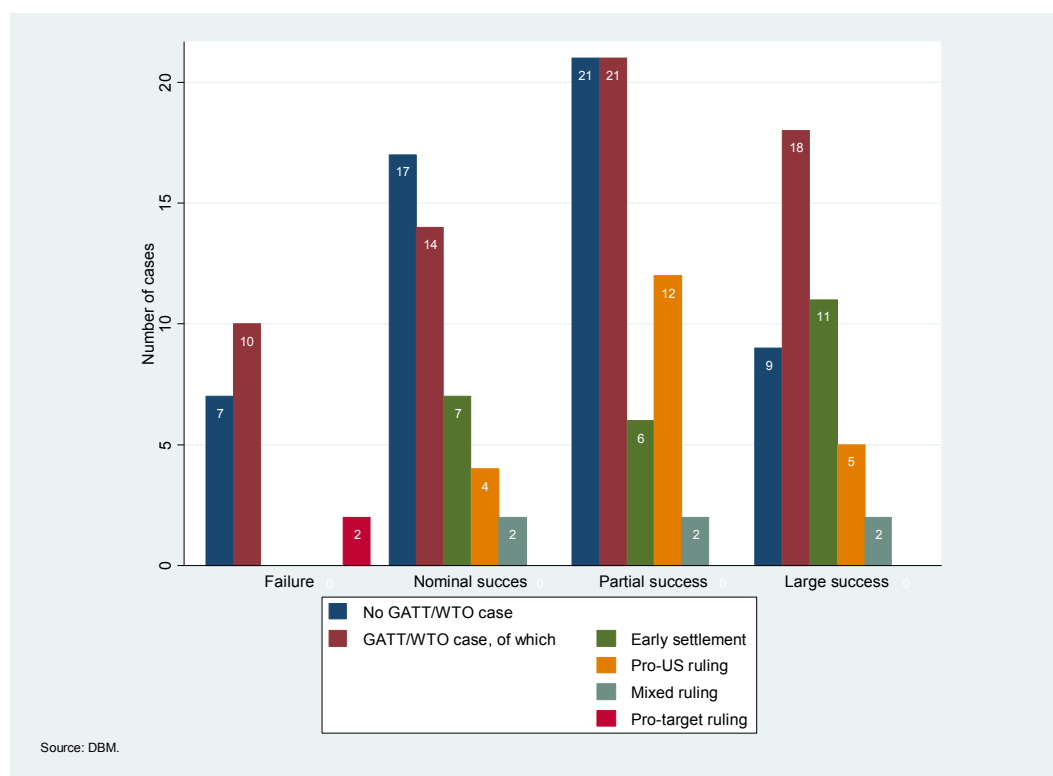
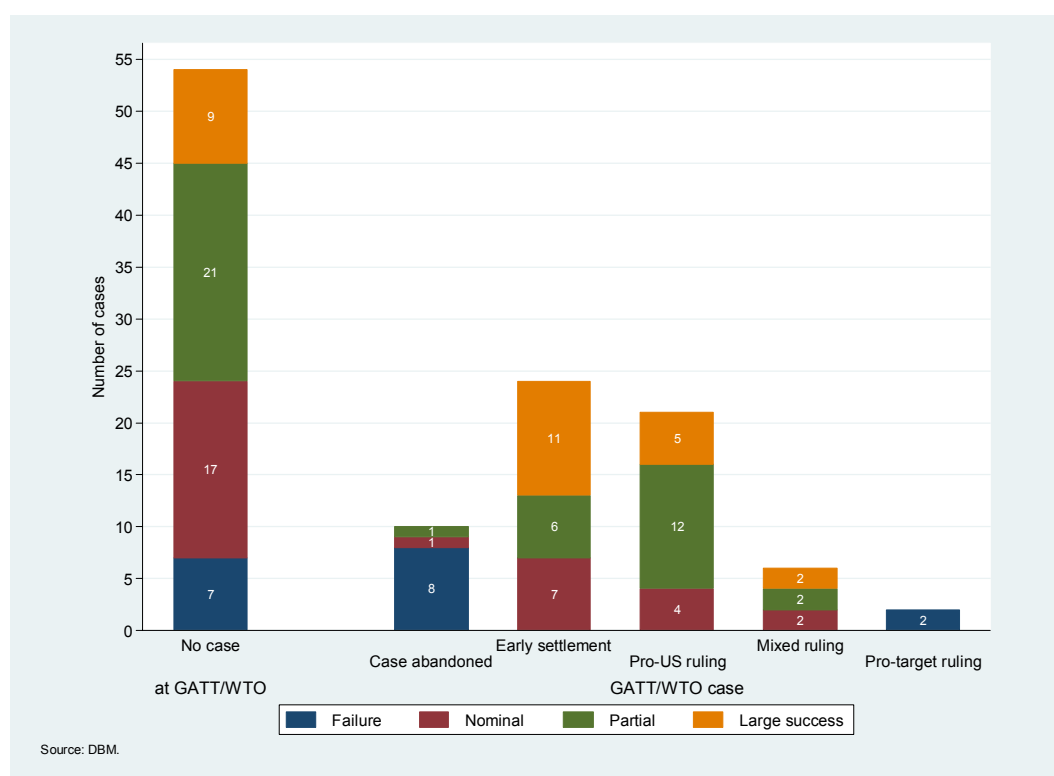


Figure 5.4: Section 301 effectiveness



settlement, in 7 cases the panel ruling was favorable to the U.S. or mixed.

Cases with early settlements during panel proceedings or with pro-U.S. rulings led to successful outcomes, although in 11 cases, the outcome was a nominal success at best. The 6 cases with mixed rulings are evenly split into the three most favorable outcomes. The only 2 pro-target rulings were Section 301 failures, as expected. Figure 5.4 inverts the previous graph; a column is added with GATT/WTO cases abandoned after consultations (8 failures out of 10 cases, detailed in Table 5.2).

In case 16, the EC “agreed to monitor developments in world wheat trade, exchange info, and meet to discuss further problems” but nothing really happened (nominal success).

In case 40 against Brazil, U.S. firms claimed that “all subsidies disappeared because the government can no longer afford them and there has been pressure from Europe and the U.S.”, but no agreement was reached on subsidies or the differential export tax system (partial success).

Table 5.2: GATT/WTO that were ‘abandoned’ (no settlement nor ruling)

| ustr | target | title | sector | sucord |
|------|----------|---|--------------|---------|
| 16 | EC | wheat export subsidies | agriculture | nominal |
| 22 | EC | Sugar export subsidies | agriculture | failure |
| 30 | Sweden | Specialty steel domestic subsidies | manufactures | failure |
| 34 | Canada | Front end wheel loaders duty remissions | manufactures | failure |
| 40 | Brazil | Soybean oil and meal subsidies | agriculture | partial |
| 41 | Portugal | Soybean oil and meal subsidies | agriculture | failure |
| 42 | Spain | Soybean oil and meal subsidies | agriculture | failure |
| 47 | EC | Fertilizer superphosphate water solunility standard | manufactures | failure |
| 62 | EC | Beef ban on hormone treated beef | agriculture | failure |
| 94 | EC | Banana import regime | agriculture | failure |

The cases of failure are sensitive cases in agriculture, except 34 Canada, for which B&E 1994 report that the “USTR [did] not appear to have put much emphasis on the case perhaps concluding that the petitioner did not have a strong case or that it did not want to pursue a case on which the domestic industry was split” (B&E 1994 p. 410).

5.3 Retaliation

Retaliatory threats or sanctions declared *after* a pro-U.S. GATT/WTO panel ruling are taken as GATT/WTO legal ‘suspensions or withdrawals of concessions’, even if the decision to retaliate is adopted unilaterally. For retaliation to be indisputably legal under GATT, it had to be agreed upon by consensus by the GATT Council Meeting, but a single country –and the target country in particular– could always block that decision. The arbitration procedure only exists since 1995, and is based on the WTO Dispute Settlement Understanding negotiated in the Uruguay Round.

Figure 5.5 shows the different types of retaliation by outcome, differentiating those cases in which there was a GATT/WTO ruling favorable to the U.S. The categories are mutually exclusive (the sum of the bars adds up to 117). In 17 cases of failure, sanctions were imposed in seven. The other outcomes present more dispersion, cases in which threats were not invoked are evenly split (with 20, 23 and 21 instances of no retaliation, against 11, 16 and 6 instances of any type of retaliatory action). The cases of compensation / arbitration are coded like partial successes; although the target country does not remove the barrier, the U.S. is vindicated in its complaint.

All cases in which retaliation was only threatened somehow moved up the scale of effectiveness: not a single episode of threat ended up in failure. On the other hand, in 7 occasions

Figure 5.5: Retaliatory threat under Section 301 by outcome

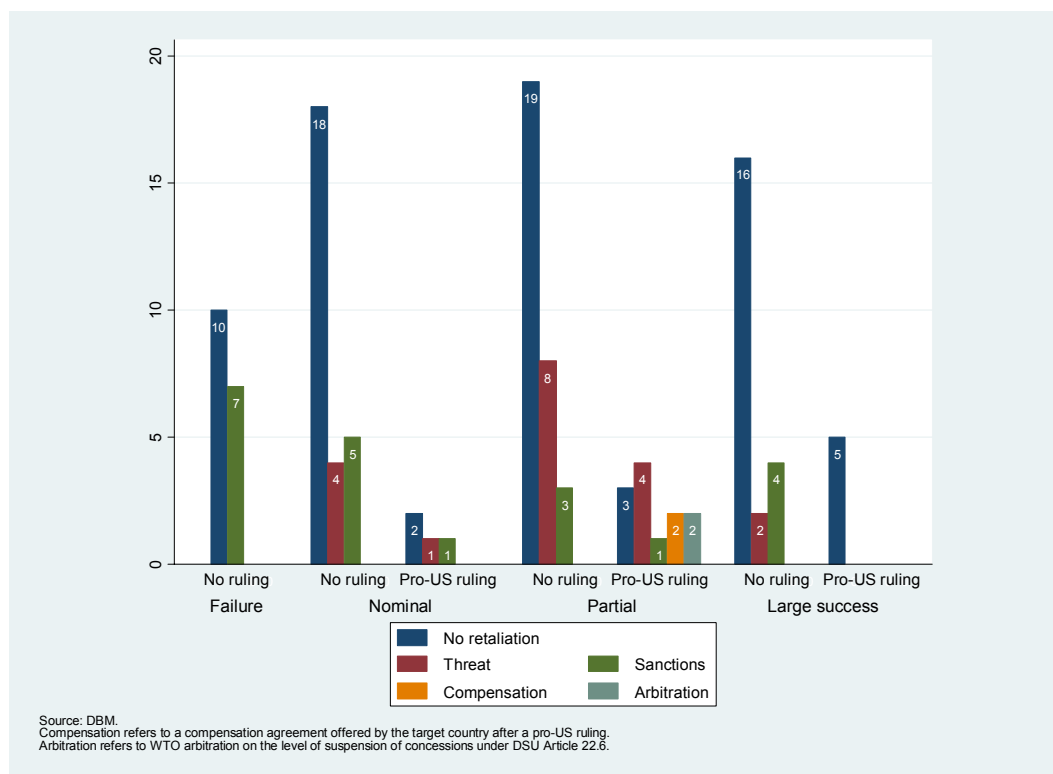
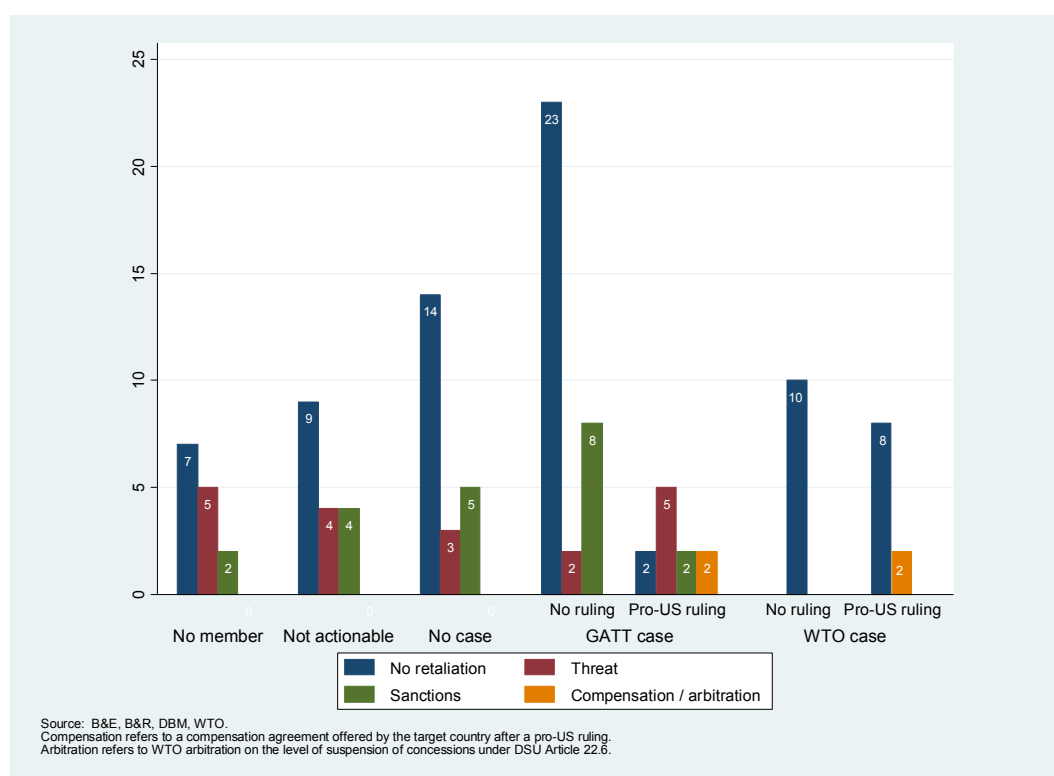


Figure 5.6: Retaliation by GATT/WTO status



in which sanctions were imposed, the target country decided not to react. Finally, in seven cases in which the U.S. prevailed at the multilateral level, it still had to take action to achieve a favorable outcome, which it did in five cases; this without counting the cases of compensations.

Figure 5.6 shows the episodes of retaliation by GATT/WTO status of the target country, the measure, and the dispute. The higher ratio of retaliatory threats and sanctions is against non GATT/WTO members (issued in half of the cases). Disputes against members on measures not covered by the multilateral agreements were not spared; hit-lists were issued in 8 out of 17 of these cases.

For multilateral disputes, the picture is striking. Not a single episode of retaliatory threat or sanction has been registered since the Uruguay Round agreements entered into force, besides those legitimized by arbitration panels; indicating that countries tend to fulfill their obligations under the WTO. Under the GATT, Section 301 target countries got used to being retaliated against when they would not abide by panel rulings; it happened in seven occasions, with two additional cases of negotiated retaliation, out of 11 cases. This Figure is telling regarding the countries lack of commitment with multilateral adjudication before 1995 and the GATT's lack of 'teeth'.

5.3.1 No retaliation

Table 5.3 cross-tabulates GATT/WTO status and outcome for the 73 cases in which retaliation was not invoked. Of the 16 cases that could not be filed multilaterally, the U.S. achieved at least

Table 5.3: No retaliation

| GATT/WTO status | failure | outcome nominal | partial | large | Total |
|-----------------|-----------------------|-----------------------|-----------------------|-----------------------|------------------------|
| No member | 0 0.00 0.00 | 2 28.57 10.00 | 4 57.14 18.18 | 1 14.29 4.76 | 7 100.00 9.59 |
| Not actionable | 2 22.22 20.00 | 6 66.67 30.00 | 1 11.11 4.55 | 0 0.00 0.00 | 9 100.00 12.33 |
| No case | 1 7.14 10.00 | 1 7.14 5.00 | 8 57.14 36.36 | 4 28.57 19.05 | 14 100.00 19.18 |
| GATT case | 5 20.00 50.00 | 10 40.00 50.00 | 5 20.00 22.73 | 5 20.00 23.81 | 25 100.00 34.25 |
| WTO case | 2 11.11 20.00 | 1 5.56 5.00 | 4 22.22 18.18 | 11 61.11 52.38 | 18 100.00 24.66 |
| Total | 10 13.70 100.00 | 20 27.40 100.00 | 22 30.14 100.00 | 21 28.77 100.00 | 73 100.00 100.00 |

partially its goals in 6 occasions and failed twice, with 8 nominal agreements. Out of the 14 cases in which the U.S. could have filed a dispute and decided not to do so, large or partial gains were achieved in 12 occasions.

The record on the multilateral cases is highly positive under the WTO; much less so under the GATT, in which it is a known fact that the U.S. resolve and effort in pursuing a case would not be necessarily rewarded. Read vertically, more than two thirds of failures and large successes

Figure 5.7: Retaliation and GATT/WTO rulings

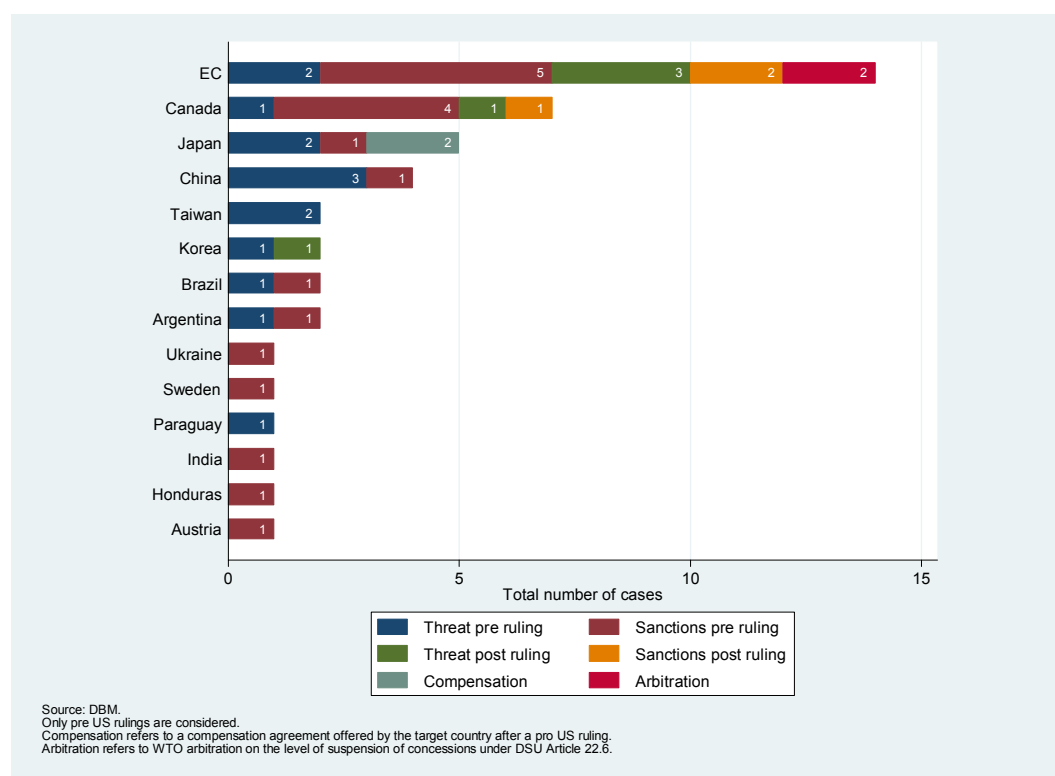


Table 5.4: Retaliation and Section 301 outcomes

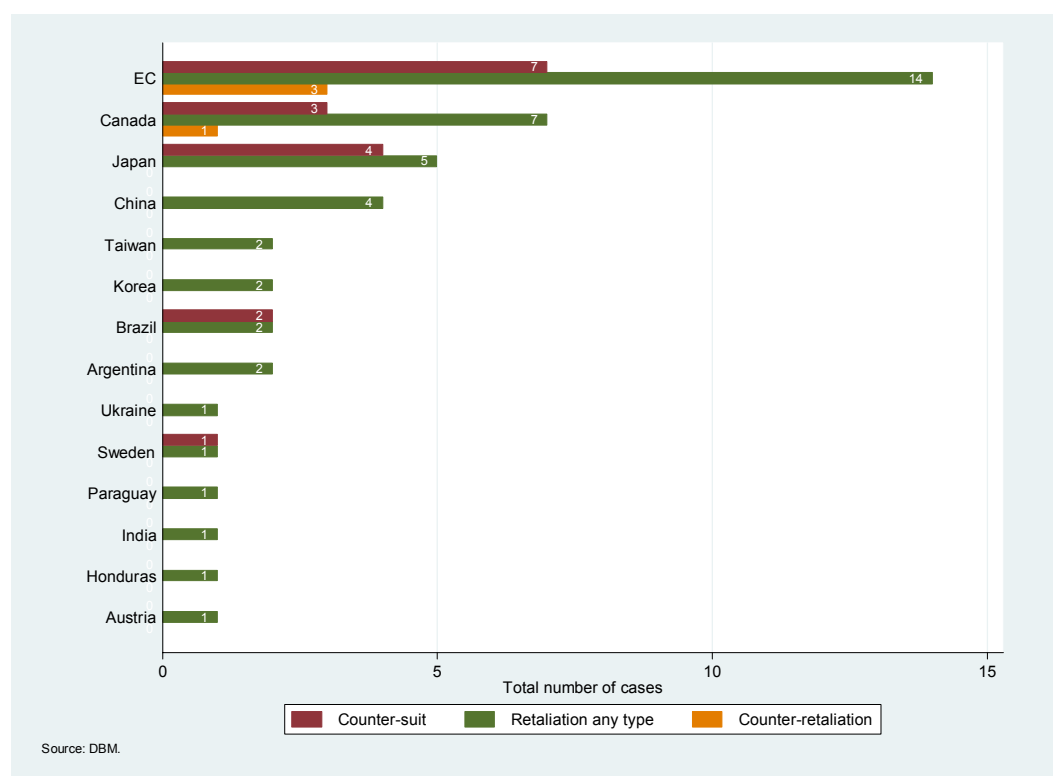
| retaliation | failure | outcome | | | Total |
|-----------------------|---------|---------|---------|--------|--------|
| | | nominal | partial | large | |
| Hitlist | 0 | 4 | 8 | 2 | 14 |
| | 0.00 | 28.57 | 57.14 | 14.29 | 100.00 |
| | 0.00 | 36.36 | 40.00 | 33.33 | 31.82 |
| retaliation | 7 | 5 | 2 | 4 | 18 |
| | 38.89 | 27.78 | 11.11 | 22.22 | 100.00 |
| | 100.00 | 45.45 | 10.00 | 66.67 | 40.91 |
| GW threat | 0 | 1 | 4 | 0 | 5 |
| | 0.00 | 20.00 | 80.00 | 0.00 | 100.00 |
| | 0.00 | 9.09 | 20.00 | 0.00 | 11.36 |
| GW suspension | 0 | 1 | 2 | 0 | 3 |
| | 0.00 | 33.33 | 66.67 | 0.00 | 100.00 |
| | 0.00 | 9.09 | 10.00 | 0.00 | 6.82 |
| compensation / arbitr | 0 | 0 | 4 | 0 | 4 |
| | 0.00 | 0.00 | 100.00 | 0.00 | 100.00 |
| | 0.00 | 0.00 | 20.00 | 0.00 | 9.09 |
| Total | 7 | 11 | 20 | 6 | 44 |
| | 15.91 | 25.00 | 45.45 | 13.64 | 100.00 |
| | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

were GATT/ WTO cases, while only half of the middle outcome cases were.

5.3.2 Retaliation

Figure 5.7 shows retaliation by country. Retaliation was invoked against 13 countries, although only four countries were confronted to the more legitimate process of withdrawal of concessions

Figure 5.8: Retaliation, counter-retaliation and counter-suits



following a bad outcome at a dispute settlement panel, for a total of 12 instances: the EC, in 7 occasions, Canada and Japan twice and Korea once (out of 14, 7, 5 and 2 occasions respectively). The extra case with respect to the previous graphs is case 25 against the EC in which the ruling was considered to be mixed. The remaining 32 cases were unilateral threats, most probably illegal and arbitrary, and contested for the most part.

Table 5.4 cross-tabulates the outcomes by type of retaliation and outcome, with rather mixed results, except for recent cases of arbitration or compensation.

5.3.3 Counter-retaliation and countersuits

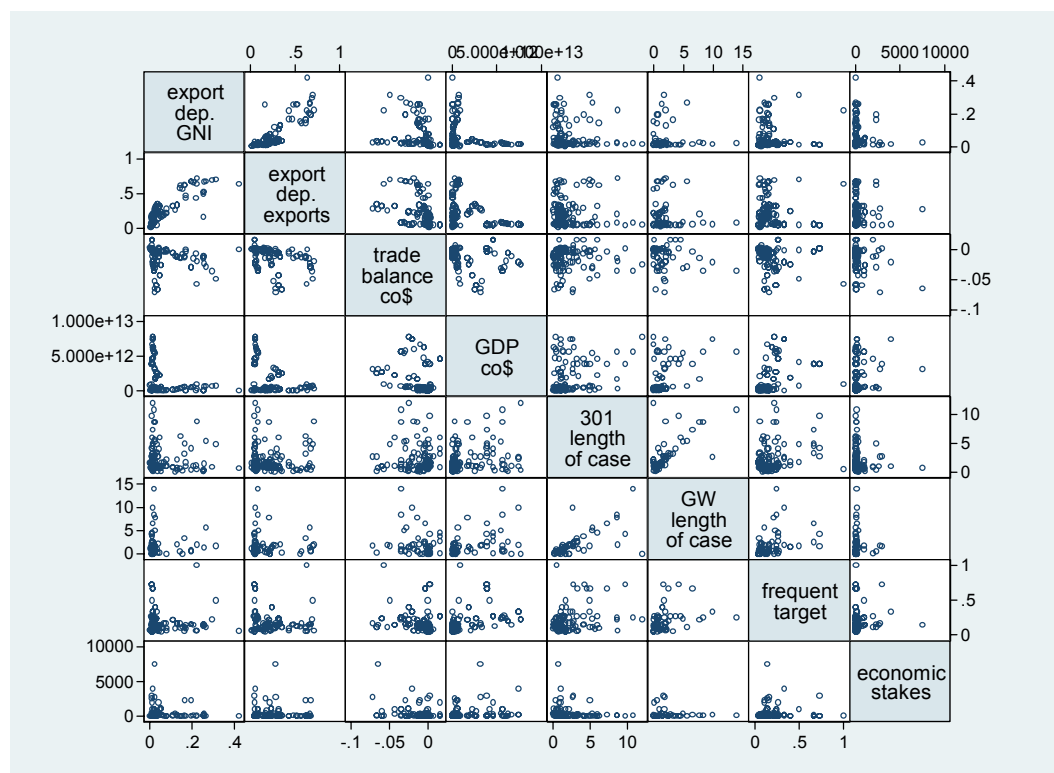
Figure 5.8 considers all cases in which the U.S. retaliated or suspended concessions following a favorable GATT or WTO panel ruling; with details on counter-retaliation or on eventual countersuits filed by the target country.

Only the EC and Canada counter-retaliated on a Section 301 case, three times and once respectively; while the EC, Canada, Japan, Brazil and Sweden filed one or more countersuits against the U.S.

5.4 Correlations for the empirical estimation

Figure 5.9 shows scatterplots for the main continuous variables contained in the database. The main positive correlation is that of length of the Section 301 case with length of the GATT/WTO case, which is rather natural as usually the former is not closed before the later is.

Figure 5.9: Scatterplots continuous variables



The Figure also shows that Section 301 cases are either against small highly U.S. export-dependent countries, or against big countries, although most targeted countries have a trade balance surplus with the U.S. The longer cases are against big countries with which the U.S. has a negative trade balance, but in sectors in which the economic stakes are not particularly important (although some data is missing).

6 Empirical strategy

In the process of drafting this thesis, many hours were spent trying to come up with the best estimation model.⁶⁹ The testable hypothesis cannot be taken directly to the data; this section discusses the assumptions and the choices made to arrive at an estimable equation based on the available data. Results are discussed in Section 0 and possible extensions for future research in Section 8.

6.1 Baseline model⁷⁰

The dependent variable, *Outcome* has a binary and an ordinal versions. In both cases, response models are appropriate.⁷¹ Therefore the baseline specification uses response models (probit and logit) in their binary and ordered versions to analyze the determinants in the effectiveness of Section 301 proceedings. The regressors of interest are a series of variables on retaliation and escalation at GATT/WTO; to which a series of control variables are added:

(1.a) `probit/logit Outcome dummy` [Retaliation variables] [GATT/WTO variables] [control variables]

(1.b) `oprobit/ologit Outcome ordinal` [Retaliation variables] [GATT/WTO variables] [control variables]

The empirical estimations included in Bayard & Elliott 1994 and Zeng 2004 follow structure (1.a); Elliott & Richardson 1997 follow structure (1.a) and the multinomial logit approach to the ordered dependent variable; and Benavente, Dupont & Mariani 2008 follow (1.a) and (1.b). The explanatory variables of interest differ in each case.

⁶⁹ Other authors noted the challenge. For Elliott & Richardson, “the combination of multiple actors and multiple procedures makes econometric specification troublesome. No single agent’s behavior (or group of agent’s behavior) is present in every case. Nor is the sequence of environments leading to resolution or irresolution common to each observed case: sometimes it is threat followed by response; sometimes it is petition, ‘cooperative’ negotiation, and then outcome; sometimes negotiations are punctuated by clear ‘non-cooperative’ breakdown”. They add that “nevertheless, ‘loose’ specification by itself is not sufficient to abjure [their] statistical approach” (Elliott & Richardson 1997, p.226).

⁷⁰ This subsection draws heavily on Benavente, Dupont & Mariani (2008).

⁷¹ For the ordered regressand, OLS would account for the ordered nature of the variable but would treat the distance between outcomes as fixed in a continuous scale, which is conceptually wrong. For the binary regressand, the linear probability model (plain OLS), although flawed in many respects, is a real option, some would argue the optimal one for first stage estimation in a small sample-2 stage regression context.

6.2 Selection bias of retaliation

Arguably, only cases considered as failures or nominal successes at a particular point in time lead the U.S. to issue a retaliatory threat or to impose sanctions. But after a threat has been issued, the case could end up being successful –which is what the USTR aims to achieve by issuing a threat in the first place– or not. If in a majority of cases in which retaliation was threatened or imposed, the target country decided NOT to move, *Retaliation* would be highly correlated with the *Failure* outcome, and would thereby obtain a negative sign in the regression. In essence, the law of Talion would be applied to hopeless cases, a result that indeed has been confirmed in past empirical research.⁷²

This is a classical case of potential endogeneity of the retaliation variables, leading to treatment and selection bias. The threat of retaliation is the treatment applied by the U.S. so that the target country dismantles the measure under dispute, the outcome. The “selection bias” is due to the selection by the USTR of cases in which retaliation is threatened, a ‘selection’ based on unobservables. Although, arguably, all cases’ starting point is as failures,⁷³ some cases are solved to the satisfaction of the U.S. after consultations, while others are solved after retaliation is threatened.⁷⁴

The selection bias issue was raised by Drezner (2003, refer as well to Section 3.2.2 above), although his analysis leads to a way out of this problem. Drezner starts by warning that at the diplomatic level, threats made behind doors “raise the possibility that selection bias has seriously affected empirical studies”, and that “if this is true, then the sanctions literature has grossly underestimated the utility of economic diplomacy”.⁷⁵ He then argues that “to test the selection effects argument, the crucial cases to study are those in which coercion is threatened but not implemented. If these cases exist in significant quantity and have an appreciably higher success rate than cases in which sanctions are imposed, it strengthens the argument that selection bias has adversely affected the trajectory of research about sanctions, underestimating the role of strategic interaction”.

Empirically, Section 301 would be “less likely to suffer from the selection bias problems [because] there is a highly bureaucratized process that makes the threats of economic coercion

⁷² Bayard & Elliott (1994) and Elliott & Richardson (1997), who expected a *positive* sign on the *Retaliation* coefficient based on realist theories, obtained, the former, a significant *negative* sign and the latter a coefficient which was not significant, which led them to drop altogether the *Retaliation* dummy from the reported regressions (refer to Section 3.3).

⁷³ In a few cases the U.S. has withdrawn a case, or the U.S. has changed its legislation, not the target country (21 Switzerland Eyeglass frames), or the U.S. has been proved wrong or only partially right in a GATT or WTO panel (refer to fn. **Error! Bookmark not defined.**).

⁷⁴ This is not a problem of self-selection, as those who ultimately decide on dismantling the alleged barriers (the target countries) do not decide on the treatment (retaliation by the U.S.); although it could be argued that a target country that decides to do nothing after a threat has been issued self-selects itself into being sanctioned by the U.S.

⁷⁵ In particular, “game-theoretic approaches to studying economic sanctions argue that because of strategic interaction, one should observe most of the failures but miss most of the successes” (Drezner 2003, p. 644).

explicit and identifiable” (Drezner 2003, p.652). He adds that cases of economic sanctions “are an ideal testing ground for selection bias, because the cases are isomorphic in their structure” to the game-theoretic approaches to sanctions: “the sender country threatens to disrupt some economic exchange unless the target country changes its policy in a particular issue area.”

Drezner does not expand on the empirical strategy to be adopted, but in his line of reasoning, it could be argued that selection bias at the threat level would be mild (controlling for factors such as the mandate to retaliate embedded in the Trade Promotion and Omnibus Trade bills of 1984 and 1988), and that what is important is to disentangle the relative effectiveness in cases “that end at the threat stage” over those in which economic sanctions are imposed. A higher rate of success would be expected in the former cases.

To explore this insight –which incidentally would have important policy implications– the baseline model is refined by including more than one variable on retaliation. The exact dates of threats and actual retaliation were obtained from the FR notices and other sources of information and the instances of retaliation that took place after a GATT/WTO favorable panel ruling were singled out by cross-referencing these dates with those of the panel reports; since the latter are more akin to legitimate (and, under the WTO, legal) withdrawals of concessions.

6.3 GATT/WTO escalation

In close to half of Section 301 cases, a GATT or WTO dispute was initiated as well, which always started with consultations and may or may not have escalated. This subsidiary forum of adjudication leads to additional econometric issues. Two instances merit special attention, the process of escalation of the dispute and the issuance of a binding ruling on the legal merits of the case.

Once a dispute is filed, the *escalation* in the dispute would theoretically be endogenously defined as well, because the decision to go all the way to a panel ruling belongs to the U.S., and the dispute will most probably only escalate when the U.S. is not achieving its goals, which is when the target country is not moving. However, this concern, which would apply to any country in any GATT/WTO dispute has been tested and found wanting.⁷⁶

The *ruling* itself, when there is one, is based on the legal merits of the case according to international law and is issued by a group of three to five expert panelists assumed to act with independence and according to GATT/WTO law and case law. This implies that although the

⁷⁶ In a paper focusing on all GATT/WTO cases up to 2003, Busch & Reinhardt report to have run a series of selection effects models “within the life of filed disputes [which] were found wanting” (Busch & Reinhardt 2003, p.149).

existence of a ruling might be endogenously determined by the escalating dispute, the *direction* of the ruling is not.⁷⁷

A related matter is what Reinhardt calls the “puzzling selection effect” that defendants concede more *prior* to GATT/WTO rulings than afterward (Reinhardt 2001). The effect is all the more puzzling in that it is stronger in the GATT period, in spite of the fact that the GATT is (and was) known to have ‘no teeth’ to enforce its rulings (for a theoretical explanation of this effect, refer to Section 3.2.4).

This puzzling selection effect has the same flavor of that posited by Drezner regarding retaliation. So the final approach adopted on this issue is to include in the baseline model a series of GATT/WTO related dummies.

7 Results

The model consists of a single equation. Possible refinements to this workhorse model are explored in the next section and were not possible at this stage for lack of data. In the estimation, the new features of Stata 11 (released in August 2009) were exploited, especially those regarding the calculations of marginal effects and the use of indicator variables.⁷⁸

7.1 Model selection

Table 7.1 gives the ordered logit estimators for the baseline model. Standard errors were clustered around targets to deal with potential heteroskedasticity. Although it could always be argued that covariances might be non-zero (cross-correlations of pairs or groups of countries moving in tandem in time or by region could be envisaged), or that heteroskedasticity could stem from some other source (time trend, periods), these extra layers of complexity are not apparent from the descriptive statistics and were not explored.

The same models were estimated with ordered logit and probit, with robust, bootstrapped and target-clustered standard errors with similar results and therefore are not reported here.⁷⁹ The statistics for each model follow in the next page.

⁷⁷ Busch & Reinhardt address a similar problem. In a paper on the influence of third parties at the WTO, these authors posit that the intervention of third parties in a WTO dispute has an effect on three binary dependent variables: (1) early settlement (prior to a ruling), (2) panel ruling and (3) pro-complainant panel ruling. But they argue that the effect of third-parties on pro-complainant rulings is through their effect on the existence of a ruling in the first place, an econometric problem which they properly address with a Heckman probit selection model “because, naturally enough, we do not observe ruling direction when no ruling is issued” (Busch & Reinhardt 2006 p. 472).

⁷⁸ Several bugs have been reported and, for the most part, fixed since the release of Stata 11 in August 2009. The Stata 11 homepage reports on the fixes on its ‘what’s new’ page. I myself reported one bug to Statatech in December 2009 with a positive feedback from the statistician in charge.

⁷⁹ Stata commands `oprobit`, `ologit`, `vce(r)`, `vce(boot)`, `vce(cl trgt)`.

Table 7.1: Baseline model - ordered logit estimators

| | 0L1C b/se/ci95 | 0L2C b/se/ci95 | 0L3C b/se/ci95 | 0L4C b/se/ci95 | 0L5C b/se/ci95 | 0L6C b/se/ci95 |
|----------------------|-----------------------------------|---------------------------------------|-----------------------------------|---------------------------------------|---------------------------------------|---------------------------------------|
| export dep. GNI | 6.668** (2.32) [2.1,11.2] | 5.850* (2.81) [0.3,11.4] | 7.535*** (1.42) [4.8,10.3] | 6.383* (3.07) [0.4,12.4] | 7.470** (2.39) [2.8,12.2] | 7.903*** (2.06) [3.9,11.9] |
| trade balance co\$ | 11.192 (9.52) [-7.5,29.9] | -1.244 (11.36) [-23.5,21.0] | -0.120 (7.28) [-14.4,14.2] | -8.447 (8.83) [-25.8,8.9] | -6.971 (8.60) [-23.8,9.9] | |
| frequent target | -2.755* (1.13) [-5.0,-0.5] | -3.046* (1.38) [-5.7,-0.3] | -0.853 (0.86) [-2.5,0.8] | -3.248** (1.02) [-5.2,-1.2] | -3.314** (1.09) [-5.5,-1.2] | -2.777** (1.03) [-4.8,-0.8] |
| border measure | 1.433** (0.53) [0.4,2.5] | 1.141* (0.48) [0.2,2.1] | 1.389** (0.44) [0.5,2.2] | 1.041* (0.50) [0.1,2.0] | 0.969* (0.41) [0.2,1.8] | 1.018** (0.38) [0.3,1.8] |
| USTR-initiated | 2.034*** (0.47) [1.1,2.9] | 1.802*** (0.49) [0.9,2.8] | 1.901*** (0.51) [0.9,2.9] | 2.158*** (0.57) [1.0,3.3] | 2.279*** (0.49) [1.3,3.2] | 2.174*** (0.47) [1.3,3.1] |
| TPA (pre 1985) | -0.150 (0.65) [-1.4,1.1] | -0.084 (0.67) [-1.4,1.2] | -0.330 (0.52) [-1.4,0.7] | -0.059 (0.78) [-1.6,1.5] | 0.156 (0.69) [-1.2,1.5] | |
| Trade bill (po~1988) | -0.862 (0.61) [-2.1,0.3] | -0.969 (0.72) [-2.4,0.4] | 0.208 (0.57) [-0.9,1.3] | -1.329 (0.69) [-2.7,0.0] | -1.317* (0.66) [-2.6,-0.0] | -1.122 (0.61) [-2.3,0.1] |
| post-Uruguay Round | 1.929 (1.27) [-0.6,4.4] | 1.976* (0.98) [0.1,3.9] | | 2.328** (0.88) [0.6,4.0] | 2.123* (0.91) [0.3,3.9] | 1.777* (0.88) [0.1,3.5] |
| GATT/WTO member | -0.787 (0.83) [-2.4,0.8] | -1.189 (0.90) [-2.9,0.6] | | -0.995 (0.85) [-2.7,0.7] | | |
| actionable | 1.755** (0.62) [0.5,3.0] | 2.108** (0.64) [0.8,3.4] | | 2.059** (0.76) [0.6,3.6] | 1.777* (0.71) [0.4,3.2] | 1.796** (0.67) [0.5,3.1] |
| consultations | -1.562** (0.59) [-2.7,-0.4] | -4.596*** (1.07) [-6.7,-2.5] | | -4.825*** (1.17) [-7.1,-2.5] | -4.695*** (1.19) [-7.0,-2.4] | -4.683*** (1.16) [-7.0,-2.4] |
| panel | 2.982*** (0.71) [1.6,4.4] | 1.476* (0.70) [0.1,2.9] | | 1.384 (0.83) [-0.2,3.0] | 1.421 (0.77) [-0.1,2.9] | |
| ruling | -1.146 (0.71) [-2.5,0.2] | | | | | |
| adopted report | -0.333 (0.52) [-1.4,0.7] | | | | | |
| appeal | 0.253 (1.01) [-1.7,2.2] | | | | | |
| compliance panel | 0.600 (0.54) [-0.5,1.7] | | | | | |
| compl. panel appeal | -1.242 (0.73) [-2.7,0.2] | | | | | |
| period arbitration | -0.538 (0.85) [-2.2,1.1] | | | | | |
| level arbitration | -0.877 (1.25) [-3.3,1.6] | | | | | |
| early settlement | | 4.568*** (0.98) [2.7,6.5] | | 4.791*** (1.10) [2.6,6.9] | 4.677*** (1.12) [2.5,6.9] | 5.318*** (1.11) [3.1,7.5] |
| pro-us ruling | | 3.151* (1.23) [0.7,5.6] | | 2.894 (1.52) [-0.1,5.9] | 2.927* (1.42) [0.2,5.7] | 4.443*** (1.00) [2.5,6.4] |
| mixed ruling | | 4.032** (1.39) [1.3,6.8] | | 4.118** (1.51) [1.2,7.1] | 3.938** (1.42) [1.1,6.7] | 5.102*** (1.19) [2.8,7.4] |
| pro-target ruling | | -15.047*** (1.44) [-17.9,-12.2] | | -14.741*** (1.30) [-17.3,-12.2] | -15.653*** (1.30) [-18.2,-13.1] | -12.945*** (1.24) [-15.4,-10.5] |
| counter ret. or suit | | | 1.201 (0.75) [-0.3,2.7] | 1.400 (0.81) [-0.2,3.0] | 1.378 (1.31) [-1.2,4.0] | |
| any threat | | | -1.131 (0.61) [-2.3,0.1] | -0.493 (0.81) [-2.1,1.1] | -0.141 (0.62) [-1.4,1.1] | -0.316 (0.58) [-1.5,0.8] |
| sanctions, no ruling | | | -1.601** (0.54) [-2.7,-0.5] | -1.934* (0.76) [-3.4,-0.4] | -1.956** (0.70) [-3.3,-0.6] | -1.770** (0.55) [-2.8,-0.7] |
| ruling + threat | | | 0.991 (0.73) [-0.4,2.4] | 0.933 (1.26) [-1.5,3.4] | | |
| suspension | | | -0.399 (1.40) [-3.1,2.3] | 0.102 (1.52) [-2.9,3.1] | | |
| compensation arbit-n | | | 0.029 (0.27) [-0.5,0.5] | -0.289 (0.63) [-1.5,0.9] | | |

Table 7.1 cont'ed: Baseline model - ordered logit estimators – statistics

| | OL1C b/se/ci95 | OL2C b/se/ci95 | OL3C b/se/ci95 | OL4C b/se/ci95 | OL5C b/se/ci95 | OL6C b/se/ci95 |
|---------------------|-----------------------|----------------------|------------------------|------------------------|-----------------------|------------------------|
| cut1 | -1.172 [-3.1,0.8] | -2.021 [-4.3,0.2] | -1.249* [-2.4,-0.1] | -2.414* [-4.7,-0.2] | -1.528 [-3.2,0.2] | -1.475* [-2.8,-0.2] |
| cut2 | 0.858 [-1.2,2.9] | 0.678 [-1.8,3.1] | 0.687 [-0.3,1.7] | 0.521 [-2.0,3.1] | 1.309 [-0.4,3.0] | 1.280 [-0.1,2.6] |
| cut3 | 3.465*** [1.5,5.5] | 3.440** [1.0,5.9] | 2.886*** [1.6,4.2] | 3.417* [0.6,6.3] | 4.209*** [2.1,6.3] | 4.121*** [2.5,5.7] |
| observations: N | 117 | 117 | 117 | 117 | 117 | 117 |
| Regressors: K | 16 | 16 | 12 | 21 | 18 | 14 |
| Outcomes: J+1 | 4 | 4 | 4 | 4 | 4 | 4 |
| Estimates: K+J | 22 | 19 | 16 | 25 | 21 | 17 |
| Deviance | 235.811 | 209.967 | 259.862 | 200.873 | 203.037 | 207.239 |
| Deviance df | 95 | 98 | 101 | 92 | 96 | 100 |
| Log-likelihood | -117.905 | -104.984 | -129.931 | -100.437 | -101.518 | -103.620 |
| Zero-slope ML | -156.586 | -156.586 | -156.586 | -156.586 | -156.586 | -156.586 |
| LR test | 77.362 | 103.205*** | 53.311 | 112.300 | 110.136*** | 105.933*** |
| LR df | 16 | 16 | 12 | 21 | 18 | 14 |
| LR p-value | 0.000 | 0.000 | 0.000 | 0.000 | 0.000 | 0.000 |
| Chi2 test | . | 5602.718*** | . | . | 8637.077*** | 2919.768*** |
| Chi2 type | wald | wald | wald | wald | wald | wald |
| McFadden R2 | 0.247 | 0.330 | 0.170 | 0.359 | 0.352 | 0.338 |
| McFadden Adj R2 | 0.107 | 0.208 | 0.068 | 0.199 | 0.218 | 0.230 |
| Cox-Snell R2 | 0.484 | 0.586 | 0.366 | 0.617 | 0.610 | 0.596 |
| Cragg-Uhler R2 | 0.520 | 0.629 | 0.393 | 0.663 | 0.655 | 0.640 |
| McKelvey Zavoïna R2 | 0.520 | 0.780 | 0.380 | 0.799 | 0.803 | 0.785 |
| Count R2 | 0.496 | 0.632 | 0.504 | 0.701 | 0.709 | 0.650 |
| Count Adj R2 | 0.213 | 0.427 | 0.227 | 0.533 | 0.547 | 0.453 |
| AIC=AIC0*N | 273.811 | 247.967 | 289.862 | 248.873 | 245.037 | 241.239 |
| AIC0 | 2.392 | 2.119 | 2.495 | 2.144 | 2.094 | 2.062 |
| BIC (df=K+J) | 326.292 | 300.449 | 331.294 | 315.165 | 303.042 | 288.196 |
| BIC' (LR,df=K) | -1.167 | -27.011 | 3.835 | -12.294 | -24.417 | -39.263 |
| BIC0 (D) | -216.596 | -256.726 | -221.118 | -237.247 | -254.132 | -268.978 |
| VCE | cluster | cluster | cluster | cluster | cluster | cluster |
| Var y* | 6.847 | 14.960 | 5.303 | 16.379 | 16.717 | 15.284 |
| Var error | 3.290 | 3.290 | 3.290 | 3.290 | 3.290 | 3.290 |
| Brant test | | | | | | |
| Brant df | | | | | | |
| Brant p-value | | | | | | |

Ordered logit regressions gave better results than ordered probit, something which is welcome since logit estimates have a more intuitive interpretation. The logistic distribution which is assumed to drive the disturbance process in the logit approach has fatter tails than the normal distribution, a feature consistent with the existence of chronic outliers, a permanent feature of the regressions performed that was noticed by Zeng (2004).

The six models reported include between 10 and 21 explanatory variables. The model retained for further analysis is the fifth, based on parsimony (only 18 explanatory variables), fit, predictive power and overall significance. The other models were used to select the variables that would be kept in the final model. The first five models include the control variables dictated by previous empirical research and theory: *Export dependence* and *Trade balance*, *Frequent target*, *Border measure*, *USTR-initiated*, *Trade Promotion Authority* and *Trade bill* (the two main amendments to the Section 301 statute).

The traditional measures of quality of fit based on the proportion of the variation of the dependent variable attributable to the variation of the explanatory variables, which rest on the fitted values, are not appropriate for response models. These models, based on a latent continuous structure of the dependent variable and the fitted values (probability values, thereby continuous and bounded by 0 and 1), have no actual value against which comparisons could be drawn; the numbering assigned to the different outcomes in the ordinal dependent variable are absolutely arbitrary. Several authors however have come up with different measures of regression 'fit', which are reported in Table 7.1 cont'ed.

Table 7.2: Model OL5C – predictive power

| outcome | failure | predicted nominal | outcome partial | large | Total |
|---------|-----------------------|-----------------------|-----------------------|-----------------------|-------------------------|
| failure | 11 64.71 78.57 | 6 35.29 20.00 | 0 0.00 0.00 | 0 0.00 0.00 | 17 100.00 14.53 |
| nominal | 2 6.45 14.29 | 19 61.29 63.33 | 9 29.03 19.15 | 1 3.23 3.85 | 31 100.00 26.50 |
| partial | 1 2.38 7.14 | 3 7.14 10.00 | 33 78.57 70.21 | 5 11.90 19.23 | 42 100.00 35.90 |
| large | 0 0.00 0.00 | 2 7.41 6.67 | 5 18.52 10.64 | 20 74.07 76.92 | 27 100.00 23.08 |
| Total | 14 11.97 100.00 | 30 25.64 100.00 | 47 40.17 100.00 | 26 22.22 100.00 | 117 100.00 100.00 |

Models 1 and 2 include only GATT/WTO variables of interest and controls (nothing on retaliation). The focus of Model 1 is on the escalation in the dispute; it is apparent that instances beyond a panel (which are all WTO variables, except for *Adopted* which refers to the adoption or not of reports under the GATT), and in particular the existence of a ruling are not determinant in the effectiveness of a case. In model 2, the analysis is refined by dropping these variables and by adding *Early settlement* and the variables giving the direction of the ruling; the four variables are significant at the 95% level. Model 2 has a good fit.

In Model 3, the GATT/WTO variables are dropped to check for the explanatory power of the variables linked to retaliation. The only significant impact is the negative and significant sign of the *Sanctions, no ruling* variable, which refers to sanctions being imposed previous to a panel ruling. This model is a very poor fit.

This suggests that retaliation variables are dispensable, while GATT/WTO variables are not. Models 4, 5 and 6 contradict this. Model 4 includes the GATT/WTO escalation variables (up to panel), with early settlement and direction of ruling, and the variables on retaliation. The explanatory power increases up to predicting more than 70% of the outcomes. Models 4 and 5 are just refinements in which a few variables were dropped for parsimony. Interestingly, Model 5 has a better fit than Model 4 on almost all counts.

7.2 Model OL5C

7.2.1 Fit and predictive power

Model 5 presents pretty high R-squared measures, ranging from .218 to .803 (for a critique of these measures, refer to Greene & Hensher 2008). Its predictive power given by the count R-squared is 70.9%, adjusted to 54.7% when the mode outcome (partial success) is not counted. Most importantly the zero-slope likelihood ratio and Wald tests are significant, and the Akaike information criteria (AIC) is among the lowest.

Table 7.2 cross-tabulates the actual outcome with the predicted outcomes. Based on the regression, one can assign the probability of each outcome for each case. The predicted outcome is then the outcome with the highest probability. In general, prediction errors are biased towards better outcomes (except for the best outcome, naturally).

7.2.2 Parameter estimates

In ordered response models, the estimated parameters' signs and values are not readily interpretable. The direction of the impact of a change in an explanatory variable on the estimated probabilities of the highest and lowest classifications is unequivocal, and is given by the sign of the estimate; which is why binary logit and probit coefficient signs make sense. If the sign is positive, an increase in the value of the regressor, which implies an increase in the conditional mean, increases the probability of having the top outcome (large success) and decreases that of having the worst outcome (failure).

However, the impact on the estimated probabilities of the intermediate outcomes can be in either direction (Greene 2000), and are apparent only with additional manipulations. In addition, the magnitude of the effects is not given by the parameter value, but rather by the marginal effects.

Nonetheless, at this point, it is already apparent that, broadly speaking, results are in line with previous empirical research on 301, on sanctions and on GATT/WTO disputes and with the theory. The control variables got significant parameter estimates (except *Trade balance* and *TPA*) with the expected signs.

Of the variables of interest, *Retaliatory threat* and *Sanctions* got both a *negative* sign, significant for the latter; a result in line with the 'folk theorem' "in those situations when sanctions are most likely to work, they are least likely to be imposed", with the corollary that when applied, they just don't work. The Wald test of joint significance gave a Chi-squared (2) of 7.97, the null is rejected at the 5% level of significance but not at the 1% ($p = 0.0186$). LR tests are not valid for models with robust standard errors.

The GATT/WTO variables are to be taken with great care. They are jointly significant, with a Wald Chi-squared (8) of 1684.04 and a p -value of virtually zero, so that the null that they are all zero is rejected. And the parameters related to the *settlement* variables (*Early settlement*, *Pro US*, *Mixed*, *Pro Target* rulings) have the expected signs and are significant. However, concerns over potential endogeneity of the *escalation* variables, and the linkage that exists between the *all* the variables due to this same escalation process, make it difficult to discern at first sight if the signs are as expected. To illustrate, in comparing a non GATT/WTO member and a member, the effect of requesting consultations at the GATT/WTO is the sum of the effects of being a member, the measure being actionable and the case being filed.

Table 7.3: Model OL5C with indicator variables

```
Iteration 0: log pseudolikelihood = -156.5864
Iteration 1: log pseudolikelihood = -106.19628
Iteration 2: log pseudolikelihood = -101.76462
Iteration 3: log pseudolikelihood = -101.52053
Iteration 4: log pseudolikelihood = -101.51886
Iteration 5: log pseudolikelihood = -101.51847
Iteration 6: log pseudolikelihood = -101.51838
Iteration 7: log pseudolikelihood = -101.51836
Iteration 8: log pseudolikelihood = -101.51836
```

| | | | |
|-----------------------------------|---------------|---|---------|
| Ordered logistic regression | Number of obs | = | 117 |
| | Wald chi2(18) | = | 8637.08 |
| | Prob > chi2 | = | 0.0000 |
| Log pseudolikelihood = -101.51836 | Pseudo R2 | = | 0.3517 |

(Std. Err. adjusted for 27 clusters in trgt)

| sucord | Coef. | Robust Std. Err. | z | P> z | [95% Conf. Interval] | |
|-------------|-----------|---------------------|--------|-------|----------------------|-----------|
| expdep1 | 7.469659 | 2.390302 | 3.12 | 0.002 | 2.784754 | 12.15456 |
| tbal3 | -6.97145 | 8.598864 | -0.81 | 0.418 | -23.82491 | 9.882014 |
| bulv | -3.314225 | 1.091914 | -3.04 | 0.002 | -5.454336 | -1.174113 |
| bordr | .9685448 | .4121428 | 2.35 | 0.019 | .1607598 | 1.77633 |
| ini | 2.279324 | .6942784 | 4.61 | 0.000 | 1.310556 | 3.248092 |
| tpa | .1562 | .6944999 | 0.22 | 0.822 | -1.204995 | 1.517395 |
| bil | -1.316989 | .6629577 | -1.99 | 0.047 | -2.616363 | -.0176161 |
| ur | 2.123214 | .9081937 | 2.34 | 0.019 | .3431869 | 3.903241 |
| escala | | | | | | |
| 1 | 1.777287 | .7097372 | 2.50 | 0.012 | .3862279 | 3.168347 |
| 2 | -2.917637 | 1.001626 | -2.91 | 0.004 | -4.880788 | -.9544871 |
| 3 | -1.497076 | 1.39398 | -1.07 | 0.283 | -4.229226 | 1.235073 |
| esres1t | | | | | | |
| 1 | 4.677345 | 1.117547 | 4.19 | 0.000 | 2.486992 | 6.867698 |
| 2 | 2.926702 | 1.415937 | 2.07 | 0.039 | .1515172 | 5.701888 |
| 3 | 3.938105 | 1.423505 | 2.77 | 0.006 | 1.148086 | 6.728124 |
| 4 | -15.65325 | 1.299849 | -12.04 | 0.000 | -18.20091 | -13.1056 |
| counter | 1.378133 | 1.31311 | 1.05 | 0.294 | -1.195515 | 3.95178 |
| retaliation | | | | | | |
| 1 | -.1410872 | .6203772 | -0.23 | 0.820 | -1.357004 | 1.07483 |
| 2 | -1.95612 | .6966186 | -2.81 | 0.005 | -3.321468 | -.5907727 |
| /cut1 | -1.528312 | .8731743 | | | -3.239702 | .1830782 |
| /cut2 | 1.309249 | .8473704 | | | -.3515667 | 2.970064 |
| /cut3 | 4.209453 | 1.06875 | | | 2.114741 | 6.304165 |

Note: 2 observations completely determined. Standard errors questionable.

7.2.3 Marginal effects

To address this problem I used indicator variables, a recent addition to Stata 11 (August 2009). Table 7.3 includes the exact same regression Model OL5C with the use of indicator variables (since early settlements can be negotiated either at the consultations level or at the panel level the indicator variables *Escala* and *Esreslt* could not be lumped into one).

Escala, for escalation corresponds to: 1 *Actionable*, 2 *Consultations*, 3 *Panel*, each a dummy detaching from the previous dummy, so that the estimates correspond to net estimates (-2.918 for 1 corresponds to $-4.695 + 1.777 = -2.918$ in Table 7.1, $-1.497 = -2.918 + 1.421$). Same for *Retaliation*: 1 *Any threat*, 2 *Sanctions, no GW ruling*. The outcomes in *Esreslt* are mutually exclusive by definition.

Table 7.4 gives the average response to retaliation. The marginal effect is given by the partial derivative of the probability of a particular outcome with respect to the regressor, the derivative is itself a function of the parameter and the density function (logistic) at the particular values of interest of the regressor.

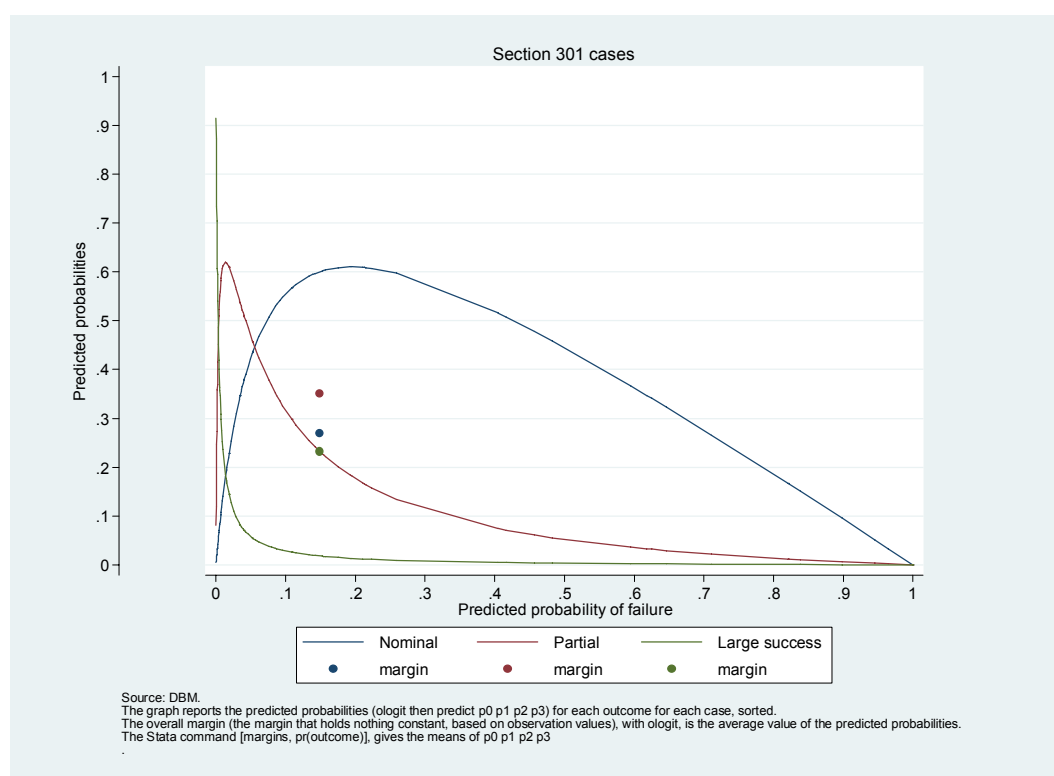
If the distribution of cases remained unchanged, but there was a retaliatory threat on *all* cases, we would expect an *average response* of about 13% to end in failure, and 26, 36, 23% in nominal, partial and large success respectively. If there were sanctions (without a GATT/WTO ruling), these figures would be 27, 36, 27, 8%, i.e. even worse outcomes. A Wald test gives evidence that the predicted margins differ at the 90% level of confidence but not at the 5% (Chi-square (1) = 3.70, p. = 0.0545).

Figure 7.1 reports the predicted probabilities of each outcome for each case, sorted, as well as the overall margin, i.e. the margin that holds nothing constant (based on the observed values),

Table 7.4: Predictive margins - average response to retaliation

| | | | | | | | | | |
|--------------------|--|----------|----------------------------------|-------|-------|----------------------|----------|-----|--|
| Predictive margins | | | Number of obs | | | = | | 117 | |
| Model VCE | | | : Robust | | | | | | |
| Expression | | | : Pr(sucord==0), predict(out(0)) | | | | | | |
| | | Margin | Delta-method Std. Err. | z | P> z | [95% Conf. Interval] | | | |
| retaliation | | | | | | | | | |
| 0 | | .1233025 | .0266821 | 4.62 | 0.000 | .0710065 | .1755986 | | |
| 1 | | .1307773 | .0299731 | 4.36 | 0.000 | .0720311 | .1895235 | | |
| 2 | | .2731614 | .063417 | 4.31 | 0.000 | .1488664 | .3974563 | | |
| Expression | | | : Pr(sucord==1), predict(out(1)) | | | | | | |
| | | Margin | Delta-method Std. Err. | z | P> z | [95% Conf. Interval] | | | |
| retaliation | | | | | | | | | |
| 0 | | .2525051 | .0340685 | 7.41 | 0.000 | .1857321 | .3192781 | | |
| 1 | | .2630235 | .0497525 | 5.29 | 0.000 | .1655104 | .3605366 | | |
| 2 | | .3609004 | .068635 | 5.26 | 0.000 | .2263783 | .4954226 | | |
| Expression | | | : Pr(sucord==2), predict(out(2)) | | | | | | |
| | | Margin | Delta-method Std. Err. | z | P> z | [95% Conf. Interval] | | | |
| retaliation | | | | | | | | | |
| 0 | | .3706425 | .0351369 | 10.55 | 0.000 | .3017754 | .4395096 | | |
| 1 | | .3679081 | .0341142 | 10.78 | 0.000 | .3010455 | .4347706 | | |
| 2 | | .2776686 | .0509969 | 5.44 | 0.000 | .1777165 | .3776208 | | |
| Expression | | | : Pr(sucord==3), predict(out(3)) | | | | | | |
| | | Margin | Delta-method Std. Err. | z | P> z | [95% Conf. Interval] | | | |
| retaliation | | | | | | | | | |
| 0 | | .2535498 | .0262379 | 9.66 | 0.000 | .2021245 | .3049751 | | |
| 1 | | .2382911 | .0553851 | 4.30 | 0.000 | .1297384 | .3468439 | | |
| 2 | | .0882696 | .0408873 | 2.16 | 0.031 | .0081319 | .1684073 | | |

Figure 7.1: Predicted probability of success over failure



which, with ologit, corresponds to the average value of the predicted probabilities. The Figure clearly shows the large success curve falling while the probability of failure increases; this corresponds to the same feature of the model that gives the unambiguous interpretation to the parameter signs for the extreme outcomes.

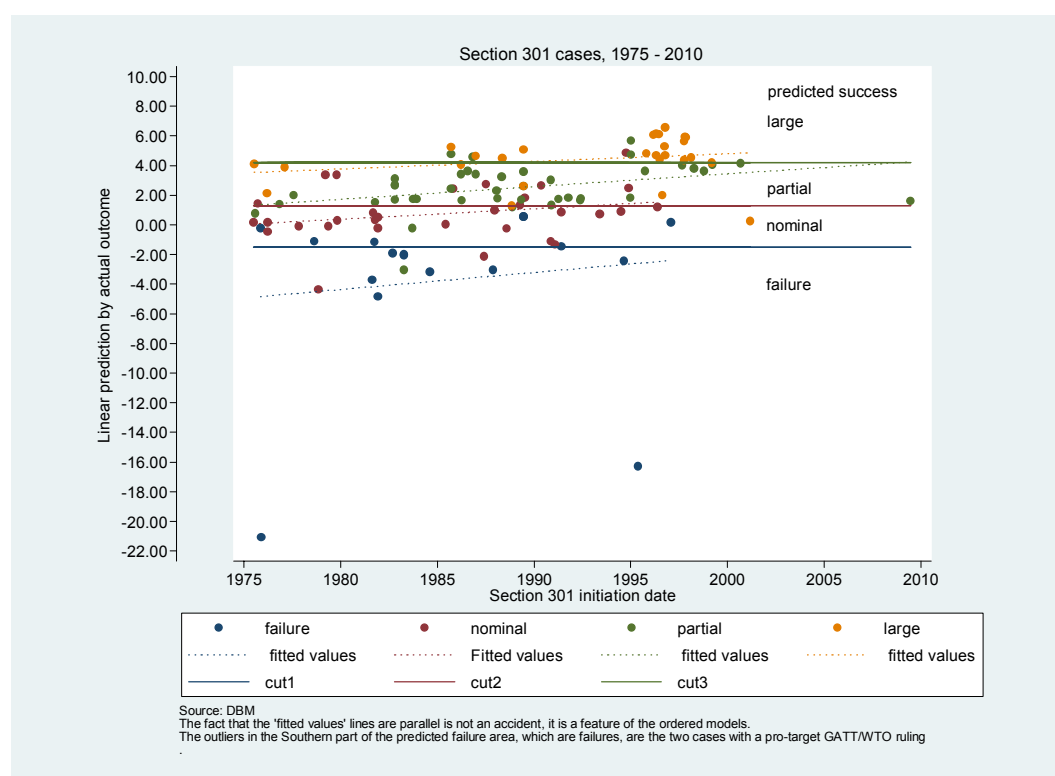
The nominal and partial success outcomes are concave because coefficient signs are not unequivocal for intermediary outcomes. The failure and nominal success probabilities increase together, up to close to the overall margin (average predicted probability); at which point the probability of a nominal success starts declining. The probabilities for partial success have a sharp increase at low levels of failures and start declining together with that of a large success.

7.2.4 Latent variable

Response models assume that behind the actual response, there is a latent continuous variable which is a function of a series of variables that underlie the actual dependent variable. Dealing with an ordered dependent variable is not simple. The techniques available are less known and interpretations are often confusing or inadequate. Of the main textbooks consulted (Cuddy, Hayashi, Greene, Gujarati, Aldrich & Nelson), only Greene includes a chapter on the issue. The best sources on these techniques are two primers on ordered modeling and discrete choice modeling published in 2008 with the state of the art (Greene 2008, Greene & Hensher 2008).

The dependent variable is ordered because the actual responses cover a full range of possibilities, but are categorized –one would hope, objectively– into only four possible outcomes

Figure 7.2: Linear prediction, outcomes, categories



describing levels of *efficiency* in achieving the desired investigation outcomes, and thereby reflecting a ranking. OLS, WLS, and multinomial response models would fail to account for the ordinal nature of the variable.⁸⁰

The regression estimates the cut-off points defining the ranges of the latent variables, as well as the parameters associated to each variable, proceeding by maximum likelihood, yielding asymptotically IID, consistent and efficient estimators.

Figure 7.2 is an interesting graph, in that it gives a visual notion of the fit of the regression.⁸¹ The linear prediction for each outcome for each case at the date of its initiation is represented by a dot. Each color corresponds to a particular outcome. The plain lines correspond to the cutoff points, as estimated in the regression.

The dotted lines correspond to the fitted values by outcome. The fact that they are parallel is not a coincidence, the 'parallel regressions' is a feature of ordered response models. The Brant test is designed to test whether this assumption is sound by specifying binary logits for each outcome and testing the null hypothesis that the parameter estimates are equal. This test could

⁸⁰ OLS would treat the difference between consecutive outcomes as constant.

⁸¹ In contrast, in a model with *Agriculture*, *Intellectual property* and *Target country*, picked for their low explanatory power, the Figure obtained has very close cut-off and fitted lines, the fitted lines are horizontal and packed together, with the dots scattered around the 0 predicted value line.

not be performed for the models in Table 7.1, Stata reports that not all independent variables can be retained in all binary logits, which was expected with such a small number of observations.

Ideally, the yellow dots (largely successful cases) would be confined to the upper part of the graph, followed by green, red and blue dots at the bottom. Section 301 cases have become more successful over time, as shown by the concentration of yellow and green dots in recent years. The factors driving that process (probably Section 301 and multilateral legal reforms) have been properly captured by the model since a time trend added to the regression yielded no extra explanatory power and was dropped.

7.2.5 Graphical analysis of margins

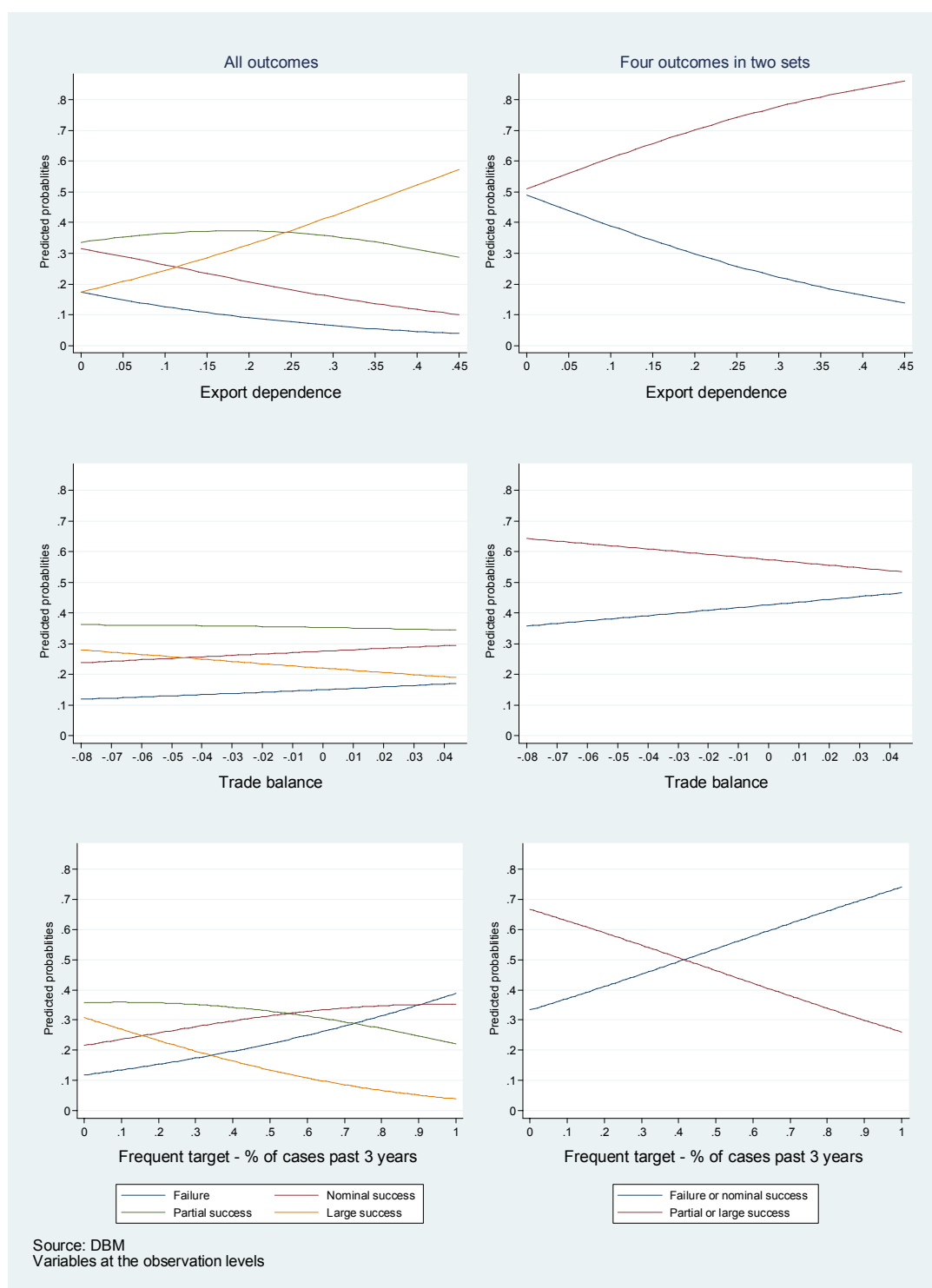
Figure 7.3 shows the margins (average predicted probabilities) of each outcome as a function of *Export dependence*, *Trade balance* and being a *Frequent target*.⁸² These plots show clearly the little meaning *a priori* that has the sign of the estimated parameter for intermediary outcomes. Three different types of interactions appear.

To the left, in the first panel the bad outcomes become less probable the more export dependent the target is towards the U.S. (target exports to the U.S. over total exports). The probability of success rises sharply with increases in export dependence. For low dependent countries the most probable outcome is a nominal success, while as of a level of dependency of approximately 25%, the most probable outcome is a clear success. And the coefficient is highly significant. When the two bad outcomes and the two good outcomes are lumped together (panel to the right), the effect is stronger (both panels are on the same scale). Countries with a dependency of 45% have more than 80% of probability of responding favorably to U.S. demands.

The results regarding trade balance are less clear cut. In fact the regressor parameter is not significant. Interestingly though, there is no ambiguity or shifts regarding the effects, failure and nominal success move in tandem, so do partial and large success. The U.S. has a high probability (65% approx) of being successful in a dispute against a country with which it has a high trade balance deficit. That effectiveness diminishes steadily when lower deficits or surpluses are attained. However, in the range of the variable, the predicted outcome is *always* a partial success, at a value of 35 to 40%; a result that informs about the low significance of the parameter.

⁸² This type of graphs is only available for continuous variables, since the evaluation of the margin over a continuum does not make sense for dichotomous variables.

Figure 7.3: Average predicted probabilities



Regarding the third row, again the direction of the effects of the extreme outcomes is unambiguous: the U.S. is more successful against less targeted countries, either because they don't like to be 'bullied'; or maybe the U.S. decides to multiply its disputes against non-conforming

partners (such as the E.C.).⁸³ For this variable, the two intermediary outcomes exhibit an inflexion point, so that at low levels of bullying the U.S. might expect a partial success, but its insistence, at least in the data, leads to a gradually deteriorating situation to nominal success in the ranges of 60 to 80% of targeting and complete failures at higher levels.

A few targets got a score of 1 (100%) on this variable, the data show that countries do not appreciate to be singled out as the unique non-compliant trading partner by the U.S. in a three-year period.

7.2.6 Marginal effects of GATT/WTO consultations and retaliation

The final set of Figures on the baseline model draws on the previous Figure, but with a focus on the additional impact on the marginal effects of the variables of interest: *Consultations* at the GATT/WTO level, *Retaliation threats* and *Sanctions* (the same graphs could be drawn for other binary variables of interest).

These graphs are easy to draw with the new features of Stata 11 implemented in August 2009. In the past, it was computationally cumbersome to obtain the marginal effects at the observation values, calculations were more commonly performed at the means, and could be misleading.

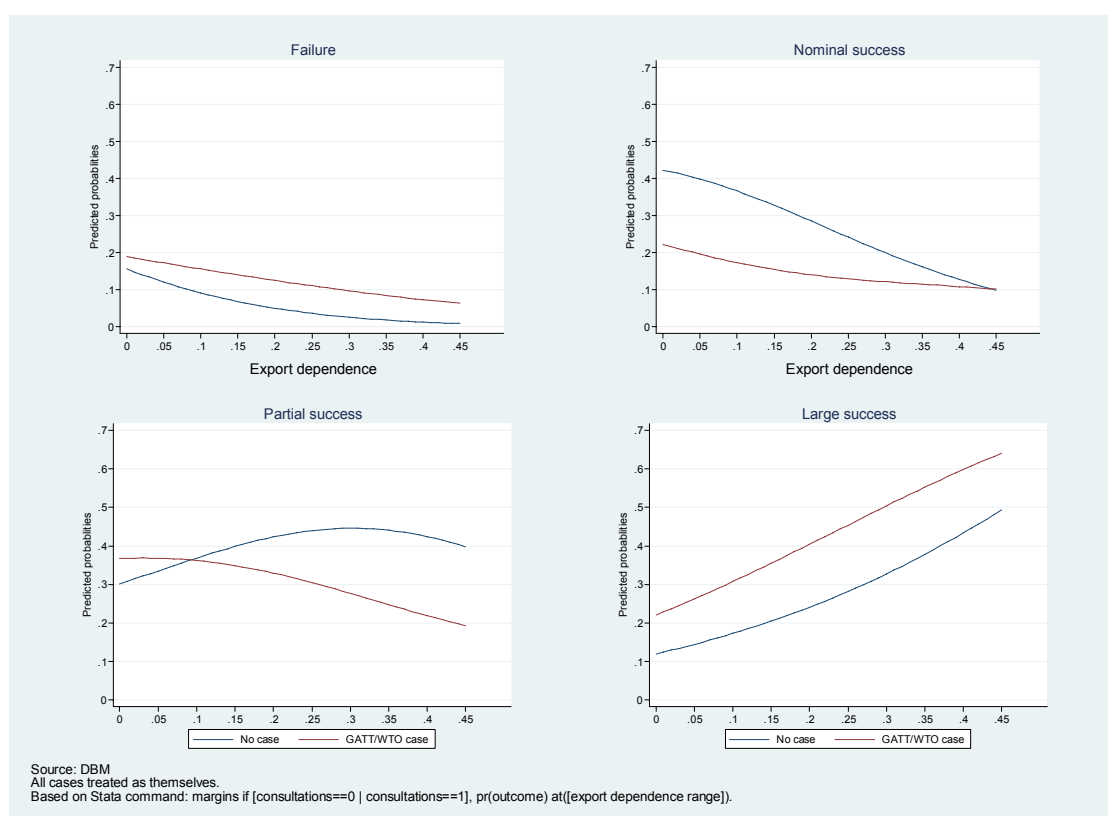
Busch & Reinhardt (2003) include a detailed analysis of the reasons that allowed the WTO to be more successful than its predecessor the GATT in inducing favorable policy outcomes in dispute settlement. As for the main reasons explored, they stress the contrast between the GATT's "diplomatic norms" and the formalized dispute settlement understanding. One aspect they point out is that the improved record of WTO over GATT would "owe more to the expanded scope of 'actionable' cases under new agreements" (parenthesis in the original, p.145), an effect that should be captured by the *Actionable* dummy. In addition, "the *anticipation* and not the *realization* of a ruling is ... the system's most effective means of extracting market-liberalizing concessions" (p.147, emphasis in the original).

Consultations might capture a bit of both effects. Figure 7.4 is telling. The U.S. gets the upper hand in its dispute when it files a multilateral dispute. The probability of a large success is higher with a dispute than without one, and this with a sharply increased probability the more dependent the target country is (which tend to be smaller countries), reaching an absolute probability of 50% at a level of dependency of less than 30% (reached at 45% of exports without a GATT/WTO dispute).

But the probability of *failure* is higher as well, although slightly so. It can be hypothesized that the filing of a dispute can be taken as an opportunity to distract the attention and gain some time on the part of the target country. Besides, if netted out with the effects in the nominal

⁸³ This variable, created by Elliott & Richardson (1997), was originally labeled 'bully'.

Figure 7.4: APP GATT/WTO case and export dependence



success area, the trend becomes positive again for the multilateral trading system. And since probabilities must add up to one, these trends imply a decreasing probability of partial success.

In a nutshell, the most probable outcome of a Sanction 301 case filed at the GATT/WTO against countries and measures that are similar except for their level of export dependence goes from partial success for low levels to large success for high levels. Without consultations at the GATT or the WTO, the predicted outcomes go from nominal to partial to large success as dependency increases.

The same effects are shown with a different calculation methodology in Figure 7.5, which, I would argue, is wrong and misleading because it does not take into account the links between the different explanatory variables included in the model. The graphs look similar, although the effects seem much more dramatic.⁸⁴

⁸⁴ When calculated **at the means**, all cases are treated 'as if' they were (or not) GATT/WTO cases. The Stata command is: margins, pr(outcome) at([export dependence range] [consultations==0 | consultations==1]). But the Figure obtained is wrong, essentially because of the linkage of consultations *en aval* with membership and coverage (if consultations is one, both are one as well), and *en amont* with panel and ruling. Here the approach is to calculate the marginal effects at the observed levels, except for target dependence, which is allowed to move within its empirical range of values.

Figure 7.5: Same Figure as 7.4, wrong methodology

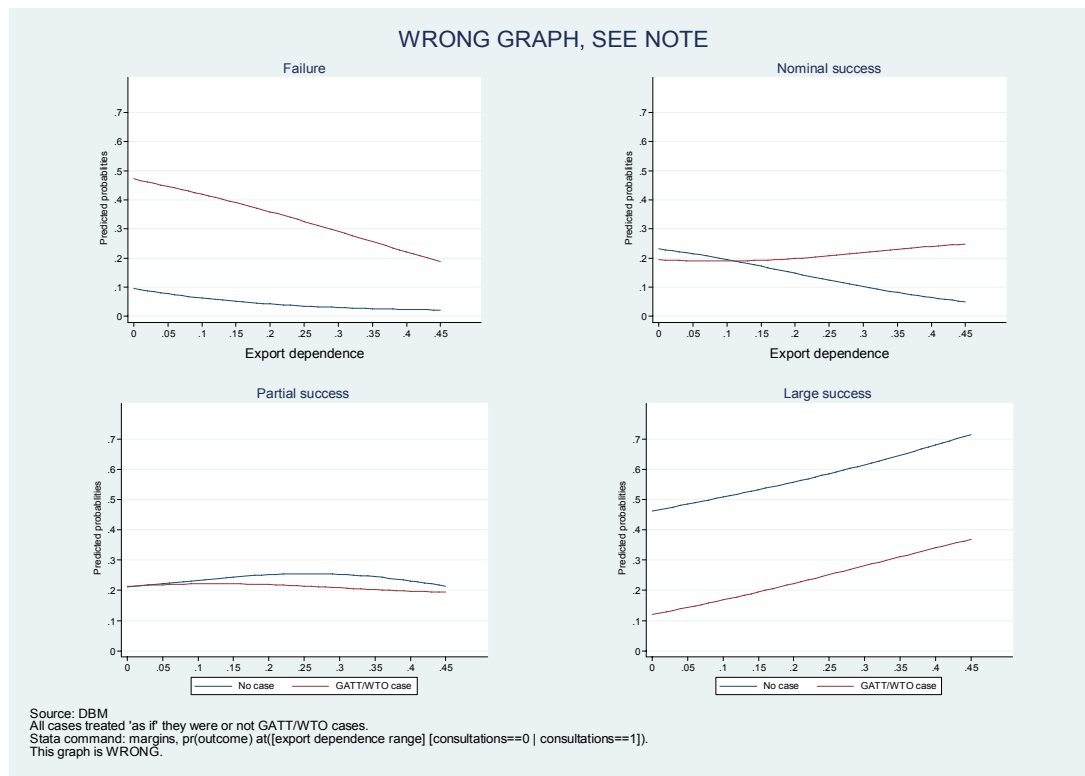


Figure 7.6, Figure 7.7, Figure 7.8 and Figure 7.9 show again that while retaliatory threats give some leverage to the U.S. in its unilateral disputes against highly export dependent countries and against countries with high trade deficits; sanctions are definitely counter-productive.

Figure 7.6: Retaliatory threats, export dependence and Section 301 outcomes

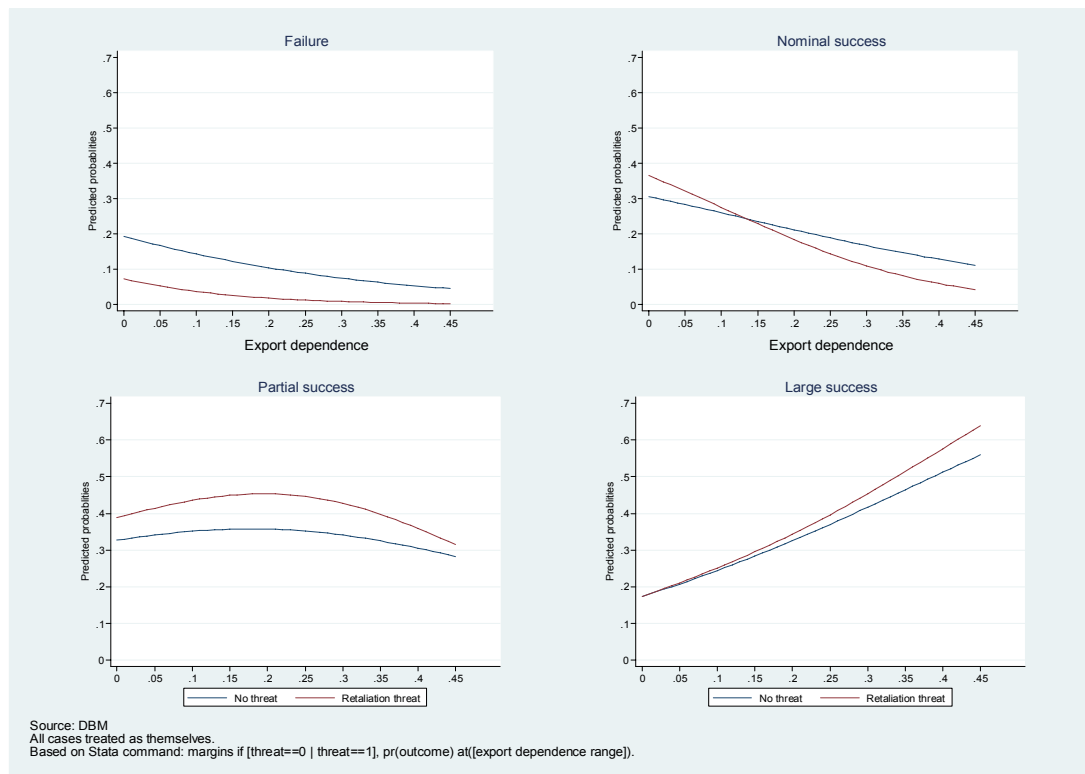


Figure 7.7: Sanctions, export dependence and Section 301 outcomes

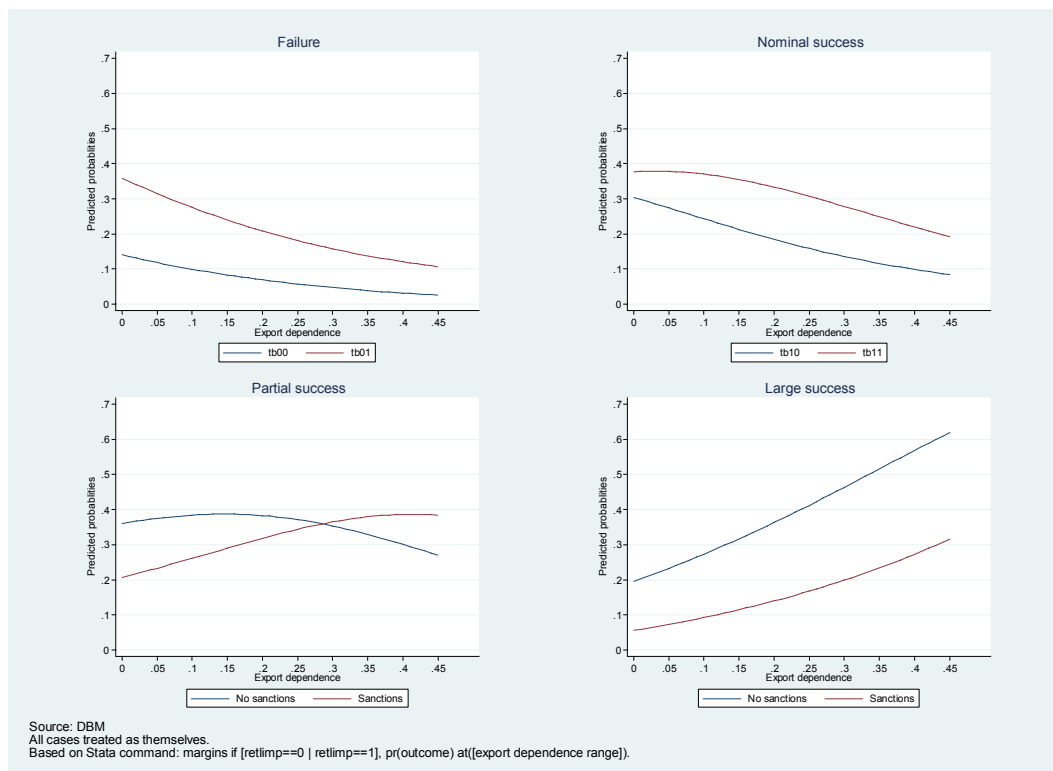


Figure 7.8: Retaliatory threats, trade balance, and Section 301 outcomes

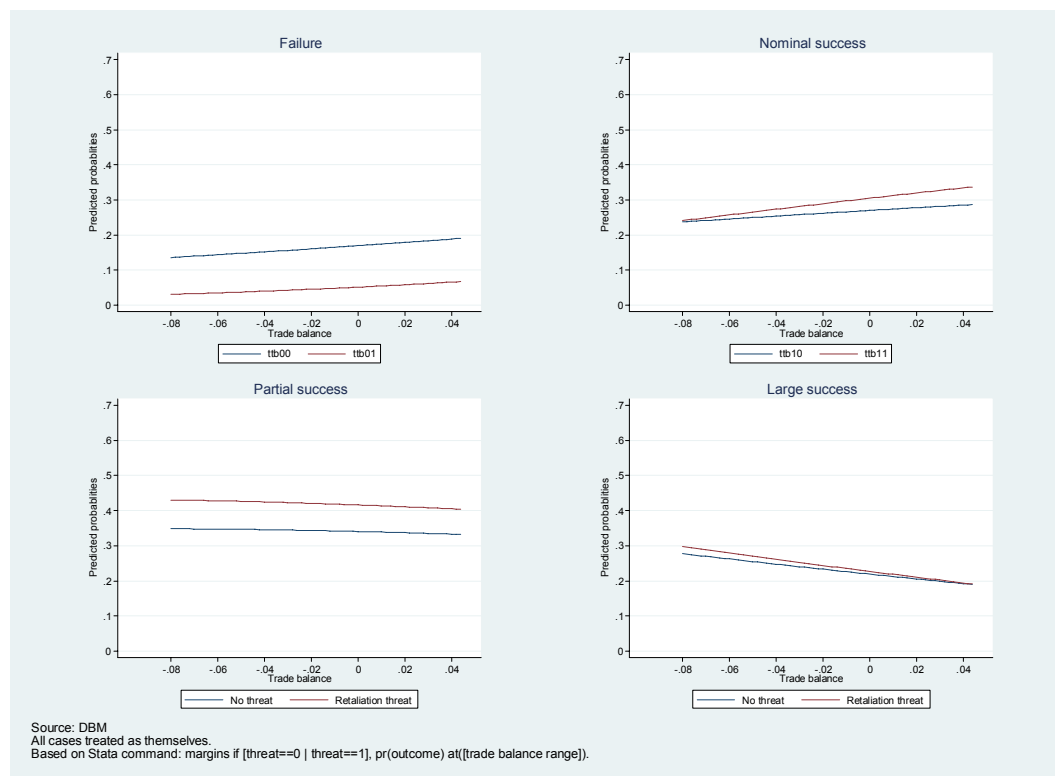
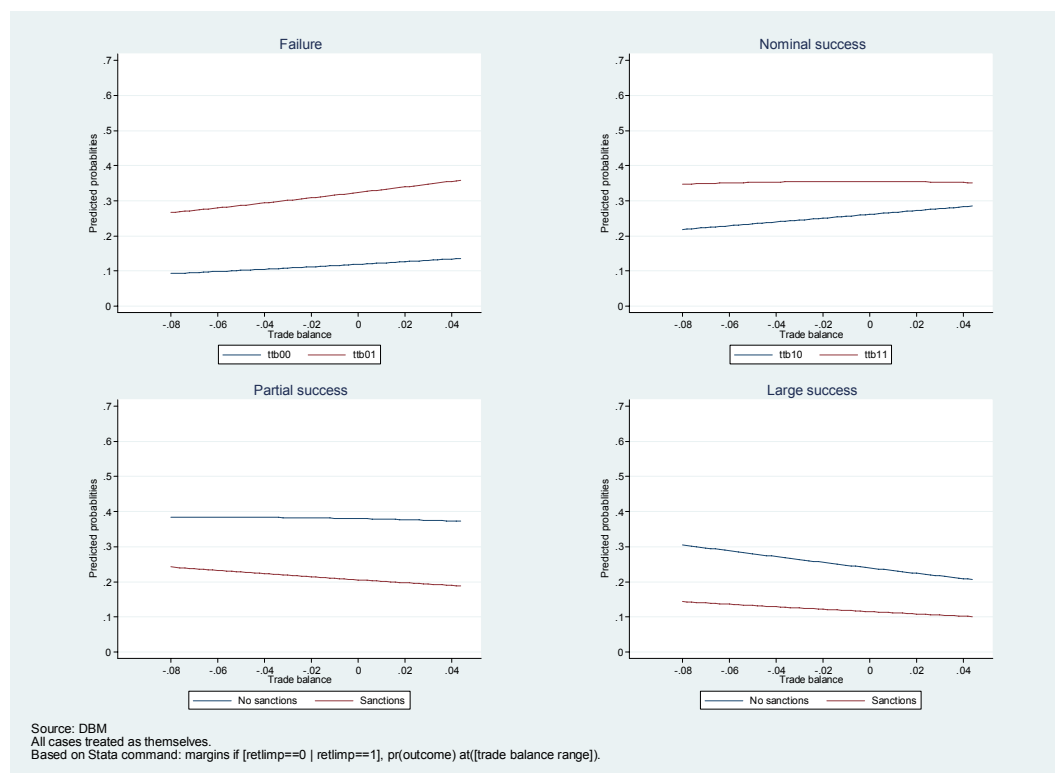


Figure 7.9: Sanctions, trade balance and Section 301 outcomes



8 Possible refinements for future research

The reported econometric results were based on a single equation estimation. However, a series of refinements are possible, which were not explored for lack of data. This section presents a couple of econometric issues that might be the subject of future empirical research.

8.1 Model Specification

8.1.1 Option 1: selection model for Section 301 cases

The first caveat is a constant in the literature on diplomacy and international sanctions (Busch & Reinhardt 2003, Drezner 2003): the baseline model might be subject to selection bias, i.e. the possibility that unobserved factors that determine whether cases are initiated under Section 301 or not might bias the results.

This particular selection effect is testable through the use of data on non-cases, Section 301 cases and all U.S. cases under GATT/WTO.⁸⁵ Reinhardt explores this issue in his working paper *To GATT or not to GATT* (2000). He analyses 235 disputes initiated by the U.S., of which 135 are GATT/WTO complaints; 107 are formally initiated Section 301 cases (41 are both), and 34 are non-cases.⁸⁶ He then estimates a bivariate probit model with *GATT/WTO consultations* and *Section 301 case* as dependent variables.⁸⁷ His results indicate that the U.S. is more likely to litigate disputes (go to GATT/WTO versus acting unilaterally) against low income target countries; in the periods of ‘judicialization’ of the multilateral trading system and of negotiation rounds; if litigation against the target country in the past three years was successful; if the target country filed a dispute against the U.S. the previous year; in cases involving agricultural products or sanitary and phytosanitary measures. In contrast, disputes against countries with which the U.S. has a PTA will more likely be dealt with unilaterally. All other variables are not significant.⁸⁸

⁸⁵ Elliott & Richardson (1997) include eight non-formally initiated ‘Section 301’ cases in their estimation, other non-initiated cases are detailed in the Appendix; one main problem with this approach is that other non-cases are bound to be left out, and the process of gathering the information for the known non-cases is burdensome and difficult and beyond the scope of this paper.

⁸⁶ As a technical note: there is a separate entry for *each* defendant in a dispute; Section 301 cases against non-GATT or WTO members are not included; cases in which the U.S. used both instruments have only one entry in the database; and the total number of Section 301 cases amounts to 142 when those which were not formally investigated are included (of which 42 were GATT/WTO cases as well).

⁸⁷ Reinhardt argues that “since the decision to file a GATT/WTO complaint is clearly dependent upon the simultaneous choice whether to initiate a Section 301 investigation, the errors of equations of the two processes will be correlated, leading to potential bias if estimated separately”. “The bivariate probit model explicitly models and corrects for the correlated error structure”. He uses robust standard errors clustered by target country.

⁸⁸ Low income targets are those with a GDP per capita of less than 20,000 U.S. dollars. The variables representing the ‘judicialization’ of GATT/WTO are two dummies for the period 1989-93 (a reform in 1989 eliminated the possibility to block the constitution of a panel) and 1995 to date (WTO era) respectively; the Tokyo Round (1975-79) and the Uruguay Round (1986-93) are included in a single dummy. The non-significant control variables are: republican party in power, intellectual property, and its interaction with WTO, services, democracy index and GDP.

An alternative specification to address selection bias would be to estimate a Heckman selection model (Stata command `heckman`) with a probit/logit first stage and an ordered probit/logit second stage. The first stage dependent variable would be a binary variable coded 1 for Section 301 cases and 0 for all other cases (all GATT/WTO disputes filed by the U.S., plus non-301 cases). This approach allows to net out the effects of particular explanatory variables on the *selection* process from their effect on the effectiveness of the U.S. in Section 301 cases. The challenge is to gather the additional data necessary to this endeavor.

8.1.2 Option 2: treatment effects model for retaliation

A treatment effects model could be used for *Retaliation*. An obvious (maybe the unique) candidate for the treatment is a dummy coded 1 in all cases of retaliation (unilateral or multilateral / threatened and/or imposed). The challenge is to find a couple of instrumental variables correlated with retaliation but not with the regression error term. Policy variables are generally the best candidates in social sciences; the Section 301 amendments that strengthened the USTR authority to retaliate, *TPA* and *Trade bill* could do the trick.⁸⁹

The caveat is that the treatment effects model is not meant to be used with a binary or an ordinal dependent variable in the structural equation. In Stata, the `treatreg` command “considers the effect of an endogenously chosen binary treatment on another endogenous *continuous* variable, conditional on two sets of independent variables” (Stata 11 help for `treatreg`, emphasis added). The full information maximum likelihood Stata estimator `bioprobit` is another option (more on this in Section 8.2).

At the cutting edge of econometrics, Munkin & Trivedi (2008) developed a complex Bayesian model of the ordered probit model with endogenous selection (OPES), an approach which was not pursued for three reasons.⁹⁰ First, OPES models are not readily estimable in mainstream econometric software. Second, the performance of the OPES estimator in small-

⁸⁹ Another option would be to add a dummy for the political party in power as Republicans are often assumed to be ‘realists’ and tougher. Other candidates related to GATT/WTO, such as non-membership, non-coverage, or favorable ruling, which definitely give some freeway to the U.S., could have a potential impact on the final outcome on their own, and therefore cannot be retained. In addition, in a small sample situation, the less instruments, the better (smaller small-sample-bias).

⁹⁰ Munkin & Trivedi (2008) apply the OPES model to the impact of medical insurance on hospitalization rates, with risk-aversion posited as the main unobservable factor driving insurance selection. Table 2, p.342 of their paper reports the actual cell hospital utilization frequencies and those predicted by OPES and OP models (ordered probit ignores the endogeneity of insurance status, its estimates are potentially subject to self-selection bias). Both give similar estimates of the cell frequencies (OP results are *closer* to the actual results); which makes the authors conclude that “the main benefit of the structural approach, which controls for selection on unobserved factors, is that the total impact of insurance can be decomposed into selection and incentive components [the pure effect of insurance]” (p.345). The coefficients of public and private insurance plans respectively show weak incentive effects, and an important positive selection effect for private plans.

sample situations was not addressed by the authors and is therefore a question mark. Third, they report that OPES and OP give similar estimates, with OP results *closer* to the actual results.⁹¹

8.1.3 Option 3: a recursive model

The *filing* of a GATT/WTO dispute (the variable *Consultations*)⁹² has similar causes and effects to that of a retaliatory threat, leading to the same statistical issues: endogeneity, treatment effect and selection bias.

But there is some automaticity in the filing of a dispute at GATT/WTO, which attenuates the selection bias, since by law, the USTR is mandated to go to GATT/WTO when it has ‘jurisdiction’ over the country and the practice, and in practice the U.S. cannot file disputes against non-members or for practices that are not covered by the multilateral agreements. In this context, concerns regarding *selection bias* – the treatment-on-the-non-treated effect (an unobserved counterfactual. i.e. the outcome of a *particular* case had there been a GATT/WTO dispute), and the treatment-on-the-treated effect net of selection bias– are still valid but appear to be rather vacuous since by definition the treatment was not applicable in close to a fourth of the cases (retaliatory threats, in contrast, were always an option).

The *endogeneity* issue however, is still of concern. One way to deal with it is to set a recursive model with a first stage reduced form for the decision to request consultations at the WTO and a second stage structural specification for the outcome of the Section 301 case (how to deal, in parallel, with retaliation is another question). The fitted values of the first equation would represent the probability that the U.S. would have filed a case at GATT/WTO had the target country not responded favorably to the U.S. demands during the preliminary Section 301 proceedings. The second equation would then include the fitted values (with a value of 0 for cases against non-members or not-actionable).

The first equation does not need to include the same number of observations as the second equation. It can be estimated with all Section 301 cases; with the sub-sample of Section 301 that are GATT/WTO actionable; or, even better, with the full sample of cases and non-cases. The challenge, again, is to gather the data.

Besides, there is a qualitative difference in being a respondent outside GATT/WTO to being a defendant inside GATT/WTO, from which it can be argued that the *Consultations* variable should be included in any structural form specification to check for eventual shift effects on Section 301 outcomes, independently of any reduced form that might be considered for it.

⁹¹ Munkin and Trivedi conclude that “the main benefit of the structural approach, which controls for selection on unobserved factors, is that the total impact of [the endogenous variable] can be decomposed into selection and incentive components” (p.345).

⁹² Consultations requested and/or held, the database does not make a distinction between the two.

8.2 Econometric strategy

The problem reduces to the estimation of an ordered response model with one or two endogenous dummies. This section argues that although full information maximum likelihood models are *a priori* preferable, due to potential small sample bias and inconsistencies, a two-stage LPM-cum-ordered probit recursive estimation might be the right econometric strategy.

8.2.1 The case for an LPM first stage regression⁹³

A number of authors have showed that in the context of small sample estimation, the linear probability model is advisable over probit or logit response models for the first-stage equation.⁹⁴

Heckman (1978) analyses a simultaneous equations model (SEM) cast in terms of two continuous *latent* variables. The hybrid model he focuses on has one *observed* continuous and one *latent* endogenous represented by an observed dummy, with structural shift (the dummy is included in the second equation).⁹⁵ He notes that if the sole purpose of the analysis is in the parameters of the second structural equation, “it is not necessary to estimate probit functions at all”, an OLS (LPM) estimation of the first equation is sufficient. This is akin to a standard 2SLS estimation, where predicted values of the *latent* endogenous variable are used as regressors, since the regression residuals are constructed to be orthogonal to the exogenous regressors. In his view, “this result simply restates the well known point that it is unnecessary to obtain consistent estimators of the parameters of reduced form equations in order to consistently estimate structural equations”. He adds that since the LPM procedure “is the simplest one to use, it is recommended” stressing that “it is likely that the use of the probit instrument results in more efficient estimators although no proof of this assertion is offered” (p.947).⁹⁶

⁹³ Ordinary least squares (OLS) estimation, when applied to a binary dependent variable, is called a linear probability model (LPM). LPMs have a series of drawbacks in the presence of a binary dependent variable: the disturbances are not normally distributed (they follow the binomial distribution) and the model cannot be used for statistical inference; residuals are not homoskedastic (although weighted least squares solves that problem); the point estimates are not efficient (they are unbiased but they have not minimum variance); conditional probabilities do not lie in the 0-1 range; the R-squared is not a good measure of fit; the model assumes constant marginal effects (i.e. that the probability of an outcome increases linearly with the dependent variables). Response models (probit and logit) solve all these problems. The virtue of LPM however, is that in small sample estimations, the estimates are unbiased, which is not necessarily the case for response models.

⁹⁴ I take this opportunity to thank Professor Jean-Louis Arcand for his generous and insightful suggestions on this issue. In his view, in the small sample case, with ordered dependent and endogenous dummy, the best empirical strategy is probably to do an OLS on the endogenous dummy, get the estimated probabilities and plug them in the ordered probit for *Outcome ordinal*, with bootstrapping to get the standard errors right.

⁹⁵ Heckman derives the indirect least squares and log-likelihood estimators and stressed that “ML estimators are consistent, asymptotically normal, and efficient [although] computationally cumbersome”. He then proposes an alternative instrumental variable (IV) estimator which is ubiquitous today. First estimate the reduced form of the latent dummy by probit (regress the endogenous dummy on the dependent and instrumental variables), get the estimated probabilities ([0,1] range) and the fitted values (0 or 1), and use them as instruments for the latent and observed regressand in the second structural equation (p. 944).

⁹⁶ In the case of two independent dummy endogenous; if no structural shift is assumed (if only the latent variables are regressors, not the dummies), he establishes that both equations’ reduced form coefficients can be estimated by probit (biprobit). In addition, in the last sentence of Appendix B (p.958) Heckman refers to the possibility to polytomize a single latent continuous random variable into a series of ordered dummies but he does not expand on this, which is a pity, because the GATT/WTO escalation variables lend themselves to such an approach (as

In Heckman's model however, the observed variable is continuous (not ordinal), and the second-stage equation is estimated by ordinary least squares (OLS), which does not seem advisable for an ordered dependent variable, although the ordinal nature of the dependent variable does not seem to invalidate the approach for the first stage estimation.⁹⁷

Angrist (1999) analyses the treatment-control problem from a slightly different angle, the challenge faced by researchers to identify a model by finding a suitable instrumental variable (IV). After formulating a critique to the traditional solutions which essentially involve a latent first stage regression with IVs, he proposes to reinstitute the linear probability model, based on the consistency of its estimators under wrong specification,⁹⁸ although not without controversy,⁹⁹ highlighting "the sort of utilitarian trade-off that underlies the choice of empirical strategy" (p. 28).¹⁰⁰

8.2.2 Maximum likelihood estimators

Limited information (single equation methods)

Kawakatsu and Largey (2009) propose an EM algorithm for ordered probit models with endogenous regressors, under the broader chapeau of limited information maximum likelihood (LIML) estimators. They review in detail the case in which the endogenous regressors are one or many binary variables. They stress the "asymptotic efficiency and well established results for statistical inference" of LIML estimation methods. There are two problems with the technique they propose. One is purely statistical, the modeling technique, which involves a complex algorithm, works asymptotically and is therefore not suited for small samples. The other problem

an example, he says that in an analysis of the effects of legislation on the income of blacks, one might distinguish existing laws by their 'strength').

⁹⁷ A paper by Rivers and Vuong (1988) was put to my attention. They propose a two-stage conditional maximum likelihood procedure (2SCML) for a recursive model with a structural latent equation of interest represented by a binary variable and a set of reduced form equations for endogenous continuous regressors. They propose to estimate the reduced form equation by OLS, get the residuals and do a second stage probit with the endogenous regressors (not their fitted values), the exogenous variables (excluding the instruments) and the residuals from the first stage equation as regressors. The particular case of a binary endogenous regressor and an ordered response is not addressed by the authors. And their approach is not transferable to that other problem, because the residuals from an LPM (as opposed to the residuals from an OLS estimation on a continuous variable) are not normal, they follow the binomial distribution.

⁹⁸ "Because [the treatment] is binary, a non-linear first stage such as probit or logit may seem appropriate for 2SLS estimation. But the resulting second-stage estimates are inconsistent, unless the model for the first stage conditional expectation function (CEF) is actually correct. On the other hand, conventional 2SLS estimates using a LPM are consistent whether or not the first stage CEF is linear. So it is generally safer to use a linear first-stage. Alternatively, consistent estimates can be obtained by using a linear or nonlinear estimate of the [conditional expectation of the endogenous dummy given the regressors and the instruments] *as an instrument* (this is the same as the plug-in-fitted-values method when the first stage is linear)" (emphasis and parenthesis in the original, Angrist 1999, p.8).

⁹⁹ The article includes at the end the comments and critiques of five experts: Jinyong Hahn, Guido W. Imbens, Robert A. Moffitt, John Mullahy and Petra Todd with a reply from Angrist in p.27-29.

¹⁰⁰ Angrist even states that for a descriptive agenda, it is simple to compare the outcomes with and without the treatment, with careful attention given to the statistic that should be the focus of the analysis (means, medians, quantiles or whatever suits better the data) (p.3).

is practical, this technique has been developed only recently at the theoretical level, and is not available yet on Stata nor on any other econometric package.

Estimation of the first equation is possible by OLS, probit or logit. Drawbacks and advantages of each of these methods are well known. In particular, probit and logit do not lend themselves easily to instrumental variable estimation, an issue discussed above.

More generally, while limited information methods provide consistent estimators which are robust to specification errors in the remaining equations; Monte-Carlo simulations have proved that they are usually inferior (estimators are less efficient asymptotically) to full information techniques, unless one of the equations is badly specified or in small sample scenarios.

Full information (systems methods)

For Greene (2008 p.386), “although systems methods are asymptotically better, they have two problems. First, any specification error will be propagated throughout the system, while limited information estimators will, by and large, confine a problem to the particular equation where it appears. Second, the finite-sample variation of the estimates covariance matrix is transmitted throughout the system”.

Full information maximum likelihood used to be computationally burdensome, but it is today easily estimable with a Stata routine developed by Zurab Sajaia (no date) of the World Bank. His Stata command, bioprobit, computes full-information maximum likelihood estimates for a two-equation ordered probit model. The command is used for recursive models of two endogenous ordered variables with latent structure. The first equation is a reduced form for the first ordered variable, the second equation is a structural form for the second ordered variable with the first ordered endogenous variable included as a regressor. This specification corresponds exactly to that of Option 3, except that the first endogenous variable is binary (equivalent to an ordered variable with two outcomes only, the cut-off point in that case corresponds to the coefficient of the constant term in standard probit estimation).

Monte-Carlo simulations show that under the assumption of a normally distributed error, the FIML estimator performs better than 2SLS, independent ordered probits (IOP) and two-step procedures. In particular, for small samples “the FIML estimator performs well in recovering the true parameter associated to the endogenous regressor”. But Sajaia warns that “precision is low for samples of less than 300 observations”, which is the case of this paper (N=117).¹⁰¹ In addition, FIML provides “correct standard errors for the parameters”.¹⁰²

¹⁰¹ The main interest being in the second equation (effectiveness in the case), first-stage LPM (OLS consistent estimators) with second-stage oprobit with bootstrapping (to get the standard errors right) might imply a lower small sample bias.

¹⁰² In the case of non-normal errors, FIML and two-steps estimators are biased, the more skewed the distribution, the larger the bias, although “the size of the bias is independent from the sample size”.

9 Concluding remarks

The contributions of this paper are of three types. First, the paper fills a gap in the literature by gathering and complementing in a systematic way the information available regarding Section 301 trade disputes. A comprehensive dataset was put together, backed up by 45 case studies. However, the research was done from Geneva, with the use of powerful search engines of a few internet sites; it would no doubt be of interest to complement this study with a fact-finding mission to the archives of the USTR office in Washington.

Second, the data was used in an empirical study aimed at disentangling the role of proceedings at the multilateral level, in contrast to unilateral retaliatory threats and sanctions, in the effectiveness of Section 301 cases. The main findings are that, in accordance with the extant theoretical literature, the GATT and later the WTO have had both a constraining and a supporting effect to the United States in effectively solving its Section 301 disputes.

These findings have potential policy implications. First, they enhance the general understanding of the role of international institutions and, in particular, the international trading system. Second, they qualify some of the theoretical claims made by institutionalist and realist theorists, in support of bargaining game-theoretic models that focus on uncertainty. For example, results showed that while the escalation of a dispute at the GATT / WTO level greatly improves the chances of the Section 301 outcome to be favorable to the United States, actual rulings are rather anticlimactic and diminish the prospects of a settlement, in line with Reinhardt (2001) and Busch & Reinhardt (2006), and that the same could be said of retaliatory threats as opposed to sanctions, in line with Drezner (2003).

Third, the main innovation regarding the empirical estimation as such, besides the results, is the graphical approach adopted in presenting the results in the ordered logit estimation. The new features of Stata 11 (released in August 2009) regarding the calculation of marginal effects and indicator variables were fully exploited to come up with meaningful graphs.

Possible directions for future research regarding the empirical estimation were sketched in Section 8. Although it was beyond the scope of the paper to actually tackle this research agenda, most of the data necessary to the task is available (although scattered in multiple databases). The main challenge is rather on the side of the limited econometric techniques and software available to fully take advantage of the ordinal nature of the main dependent variable (Section 301 outcomes) and to avoid falling back to a binary version of this variable.

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Appendix A Case studies on Section 301 cases

Cases 1 to 91 are covered in detail in Bayard & Elliott (1994). This appendix expands on the cases deemed too recent for these authors to draw conclusions about, as well as on those excluded from their empirical estimation.

Specialty Steel Domestic Subsidies

France 301-28 (EC), Italy 301-29 (EC), UK 301-31 (EC), Belgium 301-33 (EC), Austria 301-27, Sweden 301-30

What follows is the story as it can be retrieved from USTR / FR / and GATT documents, although this is one short account of the episode: ¹⁰³

“In 1982, the EC agreed to limit steel exports to the United States in order to settle antidumping and countervailing duty cases brought by U.S. steel producers. Finally, in 1984, President Reagan announced a new set of voluntary restraints (VERs) to end the Section 201 trade case (safeguards) brought by Bethlehem Steel earlier in the year. These new restraints, which were to include most steel exporting countries, limited finished steel imports to 18.5% of the U.S. market for 1985-89 and allowed the importation of another 1.5 million tons of semi-finished steel. These restraints were not actually negotiated with most countries until mid-1985”.

Section 301 cases

The Tool and Stainless Steel Industry Committee *et al.* filed a petition on December 2, 1981, and re-filed on January 12, 1982, alleging that an increase in the import penetration of subsidized specialty steel products from Belgium, France, Italy, the UK, Austria, Brazil and Sweden was adversely affecting the U.S. industry. The USTR initiated an investigation on February 26, 1982. The initiation notice mentions that because Brazil had committed to eliminate its export subsidies under the Subsidies Code, the U.S. was precluded from challenging them (47 FR 10107). With regard to Belgium, the USTR initially declined to open a case, “having learned” that the only Belgian producer for which the petitioners provided specific subsidy information did not export specialty steel to the US. The industry filed a new petition on June 23, and case 301-33 against Belgium was opened on August 13, 1982 (47 FR 35387). Both petitions went in great detail on the alleged subsidies and market statistics (the first notice is 25 pages long).

¹⁰³ Robert W. Crandall, Brookings Institution The Effects of U.S. Trade Protection for Autos and Steel, Brookings Papers on Economic Activity, Vol. 1987, No. 1 (1987), pp. 271-288, The Brookings Institution.

Antidumping (AD) and Countervailing duties (CVD) cases

A series of CVD petitions were filed in parallel by the industry before the Department of Commerce (DOC). In an account given in July 7 to the Committee on Subsidies and Countervailing Duties (that was not challenged by the U.S. representative), the EC mentioned that a total of 132 petitions for CVD had been filed in January 1982, including 96 against the EC, covering 95% of the European steel exports; that the DOC had decided to initiate 86 investigations and that the ITC had made 36 preliminary injury determinations. The EC went on to say that a certain number of requirements under the Code had not been met by the DOC¹⁰⁴, that he considered that the only explanation for this situation was that “something was wrong with the U.S. countervailing duty system” and that “exporters had been harassed” in the process (SCM/M/11). The case was discussed at length at the Committee in September; according to the EC, these investigations covered a value of trade of \$1.3 to 1.5 billion (SCM/M/Spec/7, p. 11-22)¹⁰⁵. On 21 October 1982, the EC submitted to the Committee a 14-pages long technical Memorandum on the final determinations on the CVD cases (SCM/35). The U.S. filed its own Memorandum in response on October 27, essentially stressing that the Subsidies Code was mute or ambiguous on several methodological issues, the result of accommodating different positions at the time it was negotiated (SCM/36, 62 pages long)¹⁰⁶.

After these initial determinations, a series of voluntary export restraints agreements, safeguard measures, licensing requirements and countermeasures were adopted; but CVD and AD measures were taken all the same, in parallel. In the period going from October 1985 to March 1986, the GATT Secretariat noted that “as in the previous period, the United States had opened the highest number of cases on iron and steel products, with 31 out of 32 cases involving iron and steel products” (L/6025, para. 316).

Voluntary Export Restraints Arrangements¹⁰⁷

Back to 1982, in November 11, one month after the CVD final determinations, a US-EC Voluntary Export Restraint Arrangement (VER) was negotiated, effective from 1 November 1982 to 31 December 1985 (O.J. L/307 of 1 November 1982)¹⁰⁸. Its stated objective was to facilitate

¹⁰⁴ As an example, it was mentioned that in the case of hot-rolled carbon steel bars, the cumulative market share of exporters from the Federal Republic of Germany, France and Italy was 0.27%; in the case of hot-rolled alloy bars the market share of EC exporters was 0.31% and in the case of cold-formed carbon bars, 0.13%.

¹⁰⁵ SCM documents with “Spec” are those circulated solely among the signatories to the Subsidies Code.

¹⁰⁶ Both Memoranda were technical in nature, but the U.S. put the CVD cases in context, by recalling that after a series of antidumping petitions were filed in 1978, “the U.S. had persuaded its own steel industry to withdraw its antidumping complaints by offering a compromise solution, the Trigger Price Mechanism (TPM)”, which collapsed in March 1980, because of sales by certain exporters at prices below trigger price levels. New AD petitions were filed and later withdrawn on the basis of a revised TPM, effected with the agreement of the EC, that had collapsed as well.

¹⁰⁷ Other VERs had been negotiated in the past. The U.S. and the EC had one on steel in 1969.

¹⁰⁸ Shortly after, the U.S. started requiring the presentation of a valid export certificate as a condition of entry into the U.S. of steel mill products from the EC subject to export licensing under this arrangement (Section 626 of the

restructuring within the industry and to create a period of trade stability. To that effect the European Coal and Steel Community (ECSC, “or the EC as appropriate”) agreed to “restrain exports to or destined for consumption in the US” of steel products (L/5413, 11 November 1982). A concern first voiced by Chile at the Subsidies Committee¹⁰⁹ was noted by the Consultative Group of Eighteen’s report on “Subsidies in GATT”, which in its paragraph 44 stressed that “there are also conflicting concepts as to measuring the amount of a subsidy (an example affecting an important volume of trade is the case of a countervailing duty action by the United States against certain steel products exported by the EEC, which was settled through voluntary export restraints outside the GATT framework). Such bilateral solutions on a temporary basis will not remove the danger of possible future conflicts” (CG.18/W/79, 13 March 1984).

A second VER Arrangement, concerning trade in steel pipes and tubes (O.J. L/9 of 10 January 1985), limiting EC exports to 7.6% of U.S. consumption (L/6025, para. 278) and “to remain in force during 1985 and 1986” was notified to the GATT on 18 January 1985 (L/5773, L/5448/Add.1).

Later the same year, a complementary Arrangement to the first VER (O.J. L/215 of 12 August 1985), covering the period 1 August to 31 December 1985, was notified (L/5868), increasing the coverage of the export ceiling from 10 to 31 EC products (L/6025 para. 278).

In December 1986, the first and second VERs were extended until 30 September 1989 (O.J. L/340 of 17 December 1985, O.J. L/355 of 31 December 1985, L/5413/Add.1, L/5773/Add. 1, L/5448/Add.2).¹¹⁰

In addition, on 5 September 1986, a third VER arrangement concerning semi-finished steel products, involving restraints by the EC as composed in 1985 (hence not including Spain and Portugal), during the period from 15 September 1986 to 30 September 1989, was notified (O.J. L/262 of 13 September 1986, L/5413/Add.2).

These VERs, and other “market sharing agreements”, were detailed by the GATT Secretariat in an Appendix to its report *Developments in the Trading System*, October 1985 – March 1986 (L/6025, 22 August 1986). By August 1985, on steel and steel products, the EC had

Tariff Act of 1930, as amended, enacted as Section 153 of P.L. 97-276, 2 October, 1982, notified to the GATT in document L/5448 of 11 January 1983).

¹⁰⁹ At the January meeting of the Committee, Chile asked “whether the measures taken were export restrictions by the EC on certain steel products destined to the U.S. market” and the U.S. said that that was correct. Chile went on to say that in view of the Ministerial Meeting the fact that there were many measures taken outside the framework of the General Agreement was of great concern (SCM/M/13, para. 40).

¹¹⁰ The GATT Secretariat, in L/6025, para.70, stresses that under the four-year arrangement, “new products were included, and stainless steel products were to become subject to quotas once the U.S. lifted its unilateral safeguard measures and the EC its retaliatory measures”. Elsewhere, it is mentioned that the extension limited “10 carbon steel products to 5.57% of the U.S. market and restrained 11 so-called ‘consultation products’ to 3.77% of the market”. It also restrained 10 new products, 5 of which were stainless steel products covered by quotas and tariffs imposed as a result of a section 201 case in 1983 (L/6025, para. 344).

negotiated agreements with 14 different countries, including the US, designed to “limit imports to 10% of internal consumption”; and the U.S. had negotiated with 27 countries (including the EC countries), resulting in a 4.2% decrease in overall steel shipments to that market (L/6025 para. 342, Appendix V(a))¹¹¹. As an example, the Japanese Ministry of International Trade and Industry (MITI) set Japan’s quota for steel exports to the U.S. at 4.646 million tonnes for 1986 (under a 1984 VER agreement) to restrict shipments to approximately 5.8% of U.S. consumption (L/6025, para. 75).

The U.S. VER arrangements on steel were extended a second time in 1989 until 31 March 1992. In 1991, the Secretariat noted 284 known VER and VER-type arrangements, 39 on steel and steel products (C/RM/OV/ 2, page 17).

Safeguard measures

In addition to the countervailing duties of October 82 and to the VER Arrangement of November 1982, on November 17, 1982, the President directed the USTR to request the ITC to conduct an expedited investigation under section 201 of the 1974 Trade Act, which enacts GATT’s Article XIX “escape clause” on safeguard measures (47 FR 51717). Safeguard measures, including increased tariffs and quantitative restrictions, were adopted on 20 July 1983, following the finding that certain specialty steel products were “being imported into the U.S. in such increased quantities as to be a substantial cause of serious injury to the domestic industries producing articles like or directly competitive with the imported articles” (48 FR 33233, notified to the GATT in the series L/5524). The EC took the case to the GATT Council Meeting of 12 July 83, denouncing that this was a “clear case of double jeopardy and harassment”, 7 countries made statements. The U.S. noted that the safeguard measures taken were “less severe than the restrictive measures suggested by the U.S. ITC” (C/M/170)¹¹².

EC compensatory measures

After having consulted with the U.S. with no agreement reached regarding the safeguard measures, the EC decided to take compensatory measures pursuant to Article XIX: 3(a), by means of the suspension of concessions in the form of tariff increases and import quotas. The EC compensatory measures took effect on 1 March 1984 (L/5524/Add.15); they were considered

¹¹¹ Highly indebted countries were not spared: Korea and Brazil, among others, had agreements with both (L/6025, para. 17, Appendix V(a))

¹¹² The measure was notified to the Committee on Trade and Development (COM.TD/SCPM/W/19), and discussed at a Committee Session. The U.S. stressed that “the additional tariffs, which covered approximately 75% of the U.S. market, were to be phased down at a relatively rapid rate and could not be raised above the initially proclaimed rates. The quotas, covering 25% of the market, were to be increased at the rate of 3% per annum despite the negative growth in demand recorded in 1978/1979 (Spec(83)38), 29 September 1983 and COM.TD/SCPM/6, 20 October 1983).

“excessive” by the U.S. (* /Add.17, 21, 22¹¹³). The EC measures were later reduced from 1 March 1985 to 28 February 1986, following the “progressive easing of the U.S. measures” (* /Add.50). These measures were revoked, effective 1 March 1986, following an amendment to the VER Arrangement negotiated in 1982, on 11 December 1985 (* /Add.74).

Regarding the revocation of these measures, the GATT Secretariat noted that under the steel VER arrangement of October 1985, the U.S. replaced with “more generous bilateral import quotas, with effect from 1 March 1986, the unilateral safeguard restrictions (tariff increases and import quotas) it imposed on EEC specialty steel. In return, effective the same date, the European Community lifted its retaliatory measures introduced in March 1984 in respect of certain imports originating in the United States (including tariff increases on imports of methanol, vinyl acetate and electrical signalling apparatus and quotas on imports of polyethylene, styrene and sports equipment)” (L/6025, paras. 72 and 272)

Canada also applied compensatory measures, effective from 1 January to 14 June 1984 (L/5524/Add.10, 19, 31), an increase in duties on specialty steel imports from the U.S. by up to 7.7% “in retaliation for U.S. specialty steel import curbs”, affecting about \$15 million a year in U.S. exports¹¹⁴. Argentina agreed on an “orderly marketing arrangement with the US” of a bilateral character (L/5524/Add.12). These three measures are the only ones notified under the safeguard measure series (L/5524/*), but as mentioned above, other market-sharing agreements had been negotiated in the meantime by the US.

Outcome

EC cases

The safeguards imposed under GATT Article XIX were terminated in September 1989, although certain aspects were (temporarily) “folded into” the steel VER program (C/RM/OV/4, 3 May 1993). The VER program expired on 31 March 1992; at that time, it still involved 21 agreements affecting steel imports from 29 countries (C/RM/OV/4, 3 May 1993). In the meantime, the U.S. tried unsuccessfully to address the trade-distorting practices in global steel trade by negotiating a Multilateral Steel Agreement (C/RM/OV/4).

In 1995, the WTO was created, and the voluntary export restraints and other market sharing arrangements were prohibited, but the U.S. steel industry was still not completely on its

¹¹³ The U.S. noted that: “The EC used the 1982 exchange rate of ECU 100 to \$98 in expressing the quota levels in dollar terms. The current exchange rate is approximately ECU 100 to \$80. This results in an increased dollar impact of the quotas, even using EC trade figures. At today’s exchange rate the proposed quota of ECU 54.1 million is worth only \$43.3 million, resulting in a trade reduction of \$33.9 million, about 44 per cent, based on 1982 EC trade figures. Applied to the United States trade figures this quota level cuts back United States trade by \$67.7 million, nearly a 61 per cent reduction as compared with the 30 per cent reduction indicated in the EC proposal” (L/5524/Add.22 and * /Corr.1).

¹¹⁴ Figures given in the GATT Secretariat’s “GATT Survey of Developments in Commercial Policy”, No. 20, December 1983 - February 1984, Geneva, April 1984.

feet. In 1994, the Secretariat reported that in 1992-93 a peak was reached for the number of AD and CVD investigations initiated by the U.S. (68 and 62 respectively). These figures however, were due almost entirely to 48 AD and 36 CVD investigations against 21 countries initiated in July 1992 at the expiry of the VER program; they dropped sharply in 1993-94 (C/RM/OV/5, 5 December 1994).

Although the U.S. was greatly criticized, it seems that the U.S. private sector and the USTR had a case. This view was tacitly supported by the EC when it agreed to the VER Arrangements with the US. As a matter of fact, the dimension of the subsidies involved in the sector became more transparent in 1983, when the EC informed the GATT members about the structural adjustment measures that had been taken in steel and other sectors by EC member countries in a note later discussed at a Working Party on Structural Adjustment and Trade Policy (Spec(82)6/Add.17, Spec(83)29/Add.27, 2 September 1983).

More importantly, the panoply of measures and agreements taken on by the U.S. seem to have had some effect in limiting the amount of subsidization received by the EC steel industry. In August 1986, the GATT Secretariat reported what follows¹¹⁵:

“On 30 October 1985, the Council of Industry Ministers agreed on a new Community regime for the steel industry to follow the expiry of the aid code and anti-crisis mechanism at the end of 1986. The main points are: the regulations for granting subsidies will be lightened and subsidies authorised will not be payable beyond the end of 1988. Subsidies must meet certain criteria and be confined to certain areas (research and development, adjustments to new environmental protection standards, plant closure and accelerated depreciation); market controls are to be progressively liberalized over two years, subject to review before the end of the first year. Steel products accounting for around 15% of the current production and eligible for the quota system will be exempt as from 1 January 1986; the current reference tonnages and flexibility in applying steel quotas will be maintained and updated, and statistical checks on the flow of steel products between Member States will continue. The minimum price system was also put in abeyance as from the end of 1985.”

Austria 301-27

Austria maintained VER Agreements with the US, from 1 October 1984 until 31 March 1992 (L/6025, para. 73, C/RM/S/19A, para. 237). The GATT Secretariat reported what follows “according to an exchange of letters signed 19 December 1985, Austria has agreed to an export ceiling limitation so as to regulate its steel shipments to the United States for the period 1 October 1984 to 30 September 1989” (L/6025, para. 73). So it seems that the VER was applied retroactively.

Sweden 301-30

Sweden's case is not that simple. Sweden exports were subject to a CVD investigation; in January 1983, Sweden presented its complaints against the U.S. at the Subsidies Committee, saying,

¹¹⁵ Secretariat note on Developments in the Trading System, October 1985 – March 1986 (L/6025, paras. 64-65, 22 August 1986).

among others, that “the U.S. procedures raised serious questions on the compatibility of the U.S. law with the Code”, were “extremely time-consuming and created uncertainty” to traders (SCM/M/13). In addition, for the sake of transparency, structural adjustment measures taken by Sweden, in particular in the steel sector, were notified to the Subsidies Committee on 21 April 1983 (L/5102/Add.14/Suppl.2) and discussed at a Working Party on Structural Adjustment and Trade Policy (Spec(83)29/Add. 22).

In August 1986, the GATT Secretariat reported what follows (L/6025, para. 75):

“In March 1986, it was reported that the U.S. Administration would seek talks with the Swedish Government on a possible voluntary restraint agreement to cover Swedish stainless steel exports. The Swedish Government’s reported response was to suggest that informative talks be held so as to clear up any misunderstandings with respect to Swedish steel shipments to the American market. On 17 March, on the understanding that discussions would soon begin, the U.S. steel industry agreed to drop its Section 301 case against Swedish subsidies”.

This version of events was confirmed by Sweden, in 1990. Under the Trade Policy Review Mechanism, Sweden mentioned that it had been requested to conclude a VER agreement on speciality steel, which it had refused, with “the consequence of being faced with an additional tariff on the product”; and that “a standstill notification against the same contracting party in the Surveillance Body met with the reply that since Sweden had not agreed to VERs it had to accept higher tariffs”. Sweden denounced that “the message appeared to be that, if rules were not to be broken in one area, they would have to be broken in another” (C/RM/M/5, para. 96, 1 August 1990).

At the same TPR meeting, Sweden noted that it had reduced its steel capacity, from 7.3 million tons of raw steel annually in the mid-1970s to 4.6 million tons and that there were no new subsidies being given to the steel industry (C/RM/M/5, para. 96). At the 1995 TPR, Sweden further stressed that the Government had renounced sector-specific support to industry and that the steel industry and shipbuilding were examples of sectors where significant restructuring had taken place (C/RM/M/54, 20 January 1995, para. 44)¹¹⁶.

Finally, in May 1989, Sweden requested that a Panel be established to investigate U.S. anti-dumping duties on stainless steel pipes and tubes imports from Sweden. The Panel was established in January 1989 (C/RM/S/5A para. 500).

Assessment

What is not clear from the previous account is what products from which countries were affected by what measure at any point in time. So although it could be argued that the U.S. could not

¹¹⁶ Since 1980-81, some SEK 5 billion had been paid in government subsidies to the steel industry, of which SEK 769 million were paid in 1988-89. Rationalization of the iron and steel industry had resulted in changes in ownership as well: the State-dominated group, SSAB, Svenskt Stal AB, continued to be the biggest producer of steel, whilst two private firms, Avesta and Sandvik, had developed as the largest producers of speciality steels (C/RM/S/5A, para. 474).

possibly and legally apply all these measures at the same time on a particular shipment, it might have applied a mix anyways. It would be extremely hard – although not impossible – to find out what happened in practice, but that is beyond the scope of this study.

AD and CVD duties are increased duties over the MFN tariff applied at the firm level. Safeguards are increased duties applied on an MFN basis over imports. Under the safeguard measures, these imports might in addition be subject to a global quota (global in the sense that it does not discriminate among exporting countries). VERs are quantitative restrictions applied by the exporting country. Traditionally, the rationale behind the VER for the exporting country is to capture the rent that would otherwise be collected by the importing country in the form of increased tariffs (through a safeguard mechanism for example), or by the final consumer in case prices were allowed to fall following a surge in imports. In case both safeguards and quotas are applied, the rationale is less obvious. This might explain why Canada and the EC retaliated against the safeguard.

For the purposes of the empirical study, the question is whether these “escape clause” cases should be included or not. The measures involved were GATT-legal production subsidies (export subsidies to manufactures are not legal under the GATT, production subsidies are legal, although they are countervailable) with an effect in the domestic market. So the remedy the U.S. had was the application of countervailing duties. Global safeguards are not intended to target subsidized imports.

Case 26 EC Canned fruit production subsidies also involved production subsidies (although in agriculture, but that’s besides the point). However, there was a non-violation complaint in that case. The U.S. argued that the “subsidy nullified the benefits of tariff concessions on the processed fruit products involved, even though the EC subsidy was arguably a domestic production subsidy not in violation of GATT”¹¹⁷. In the steel case the market of reference is not the EC market, but rather the U.S. internal market. So the U.S. could not have a non-violation case under these terms.

In another case involving export subsidies (in agriculture, so somehow GATT-legal), case 6 EC Wheat flour export subsidies, the standard was whether the EC had obtained “more than an equitable share of world export trade”, including any case in which the effect of the export subsidy is “to displace the exports of another signatory”¹¹⁸. In the steel case, the domestic market is the reference, not a third market.

It seems that the EC subsidies were not actionable, although they were countervailable. And countervailing duties cannot be considered retaliation, they constitute normal remedies. Safeguards could probably be considered retaliatory measures (they would be illegal as retaliatory

¹¹⁷ Hudec, page 155.

¹¹⁸ Hudec, page 148.

measures, they are legal if applied correctly, apparently they were not applied correctly since the EC and Canada retaliated against them). Can the VERs be considered retaliation? Probably not. Can the VERs be considered an early settlement to the dispute? Probably yes, albeit a failed one, as later events proved. And there was definitely counter-retaliation in the 4 cases involving EC countries, in the form of the countermeasures adopted against the safeguard measures.

In the database, the EC cases are bundled into one case. The EC and Austria cases are coded as a nominal success, the case with Sweden is considered a failure. Retaliation is coded 1 for Sweden and counter-retaliation is coded 1 for the EC.

Canada Softwood Lumber cases 58, 87, 122

Case 58, Canada Softwood Lumber, 30 December 1986 – 8 January 1987

In 1982, the Department of Commerce (DOC), following a petition by the U.S. lumber industry, decided that Canada's stumpage system was not countervailable. On 5 June 1986, following a new petition by the Coalition for Fair Lumber Imports, the DOC decided to initiate a countervailing duty investigation. On 30 July 1986, after conciliation failed, Canada requested the Committee on Subsidies and Countervailing Measures (GATT) to establish a Panel (SCM/76). On October 16, 1986, a preliminary countervailable duty of 15% was applied (SCM/83 - 34S/194).

On 30 December 1986, a Memorandum of Understanding (MOU) was signed to settle the pending countervailing duty proceeding by which Canada committed to collect a 15% export surcharge on exports to the US. The GATT panel reported on this early settlement ("Softwood Lumber I"). Under Section 301 case 58, by means of expeditious action, and as a temporary administrative measure, from December 30, 1986, a duty of 15% *ad valorem* was applied on imports of Canadian softwood lumber products (52 FR 552, Bayard & Elliott). Canada passed legislation providing for the tax on May 26, 1987.

This case is considered a large success.

Case 87, Canada Softwood Lumber, 10 April 1991 – 1 April 1996

Almost five years after it was signed, on September 3, 1991, Canada withdrew from the MOU (see case 58). In SCM/128, Canada noted that by 1991, the 15% export charge applied to less than 10% of Canadian lumber exports to the United States. In response, the Department of Commerce announced it would self-initiate a countervailing duty investigation. At the same time, Section 301 case 87 was initiated on October 4, 1991, and used "for administrative purposes ... pending completion of the CVD case" (Bayard & Elliott), with "the suspension of liquidation and imposition of bonding requirements" and the imposition of "contingent, temporary increased duties" (SCM/162).

Canada requested consultations under the GATT on 8 October 1991 (SCM/162), the CVD case was initiated on October 31, and a panel was established on December 16. Japan reserved third party rights. The DOC issued its preliminary CVD determination on March 12, 1992 and its final affirmative CVD determination on May 28, 1992. The CVD investigation was challenged by Canada and the industry before a binational panel established under the US-Canada Free Trade Agreement as well (59 FR 52846, USTR).

Following the GATT panel report (SCM/162, 19 February 1993, “Softwood Lumber II”), which recommended the U.S. “to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991” and an adverse Extraordinary Challenge Committee (ECC) decision under the FTA, the CVD order was revoked (59 FR 42029, August 16, 1994). The domestic industry filed a complaint with the United States Court of Appeals for the District of Columbia Circuit on September 14, 1994, which was withdrawn once negotiations started again.

The USTR terminated the action taken under section 301 on October 19, 1994 (59 FR 52846). On May 29, 1996, a 5-year term Agreement of Softwood Lumber was reached (61 FR 28626) effective April 1, 1996, expiring on April 2, 2001 and Section 301 case 87 was terminated. See 58 and 122.

Case 87 is considered a case in which retaliation was imposed, and a partial success.

Case 122, Canada Compliance with Softwood Lumber Agreement (SLA), April 10 2009 to date

Under the 2006 Softwood Lumber Agreement, Canada agreed to impose export measures on Canadian exports of softwood lumber products to the United States. An arbitral tribunal established under the SLA found that Canada had not complied with certain SLA obligations concerning the application of export taxes with quotas (“volume caps”) adjusted in accordance with the market price of lumber, resulting “in greater levels of shipments from Canada than were allowed ... a failure which exacerbated already difficult market conditions” (74 FR 16436). On February 26 2009, the London Court of International Arbitration ruled that Canada had miscalculated the quotas during January-June 2007 and ordered a 100% *ad valorem* additional export charge up to \$54.8 million on imports of softwood lumber products from the provinces of Ontario, Quebec, Manitoba and Saskatchewan.

In order to enforce the award, the USTR initiated a Section 301 investigation and decided to impose 100% *ad valorem* duties, effective April 15, 2009, up to the collection of \$54.8 million, as a “compensatory adjustment” for Canada’s breach of the SLA. The USTR decided to take “expeditious action” in this case.

The origin of the 2006 SLA can be traced back to the expiration of a previous SLA in April 2, 2001 (refer to Section 301 case 87). When the two countries failed to reach a new agreement, the U.S. industry filed countervailing and antidumping cases and the Department of Commerce

(DOC) applied CVD and AD duties for a combined average rate of 27.22% on April 25, 2002. A series of 6 WTO disputes followed, against the United States¹¹⁹. The 2006 SLA Agreement was signed on 12 September 2006, and notified to the WTO as a solution to these pending disputes.

This case is just one “iteration in one of the most significant and enduring trade disputes in modern history” (wikipedia). It relates to Section 301 investigations 58 and 87, to a series of countervailing and antidumping duties, to 8 GATT/WTO cases and to 14 NAFTA panels¹²⁰. Softwood lumber represents one of Canada’s largest exports to the United States; in 2005, 21.5 billion board feet of lumber, worth \$8.5 billion, were shipped from Canada to the United States. In the United States, roughly 70% of forest land is privately owned, and approximately 90% of lumber is produced from timber harvested on privately owned lands. In Canada, in contrast, approximately 94% of forests are owned by either federal or provincial governments.¹²¹

Case 122 is considered a case in which retaliation was imposed and a partial success.

EC Importation, Sale, and Distribution of Bananas

Case 94, EC Importation, Sale, and Distribution of Bananas, 2 September 1994 - 27 September 1995

On September 2, 1994, Chiquita Brands International, Inc. and the Hawaii Banana Industry Association filed a petition alleging that various policies and practices of the EU, Colombia,

¹¹⁹ DS236, United States – Preliminary Determinations with respect to Certain Softwood Lumber from Canada (“Softwood Lumber III”, Panel Report); DS247, United States – Provisional Anti Dumping Measure on Imports of Certain Softwood Lumber from Canada (consultations); DS257, United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada (“Softwood Lumber IV”, Appeal Report on a Compliance Panel Report); DS264, United States – Final Dumping Determination on Softwood Lumber from Canada (“Lumber V”, Appeal Report on a Compliance Panel Report); DS277, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (“Softwood Lumber VI”, Compliance Panel Report); DS311, United States – Reviews of Countervailing Duty on Softwood Lumber from Canada (consultations).

¹²⁰ Under the NAFTA Agreement there has been no less than 14 disputes: USA-CDA-2006-1904-05, Softwood Lumber (AR), International Trade Administration, 04/03/2006 - 06/25/2008, USA-CDA-2006-1904-02, Softwood Lumber (CVD), International Trade Administration, 01/11/2006 - N/A, USA-CDA-2006-1904-01, Softwood Lumber (AD), International Trade Administration, 01/11/2006 - N/A, USA-CDA-2005-1904-04, Softwood Lumber (Section 129), International Trade Administration, 05/31/2005 – N/A, USA-CDA-2005-1904-03, Softwood Lumber (Section 129), International Trade Commission, 01/21/2005 – N/A, USA-CDA-2005-1904-02, Softwood Lumber (Section 129-CVD), 01/18/2005, USA-CDA-2005-1904-01, Softwood Lumber (CVD & Rescission), International Trade Administration, 01/18/2005 - 01/30/2009, USA-CDA-2004-1904-01ECC, Softwood Lumber (ECC), 11/24/2004 - 08/10/2005, USA-CDA-2002-1904-07, Softwood Lumber (IN), International Trade Commission, 05/22/2002 - 08/31/2004, USA-CDA-2002-1904-02, Softwood Lumber (AD), International Trade Administration, 04/02/2002 - 01/05/2007, USA-CDA-2002-1904-03, Softwood Lumber (CVD), International Trade Administration, 04/02/2002 - 04/02/2002, USA-CDA-1992-1904-02, Softwood Lumber (IN), 07/24/1992 - 07/06/1994; Panel unanimously remanded the Agency’s determination three times, in the third instance affirming part of the determination. On January 27, 1995, Panel dismissed the panel review, USA-CDA-1992-1904-01, Softwood Lumber (CVD), 05/28/1992 - 12/17/1993; In two decisions, each with two dissents, the panel overturned the agency’s determination. A request for Extraordinary Challenge Committee was filed (Secretariat File No.: ECC-94-1904-01USA), USA-CDA-1994-1904-01ECC, Softwood Lumber (ECC), 04/06/1994 - 08/03/1994. ECC, with one dissenting opinion, dismissed the request for failure to meet the standards of an extraordinary challenge set forth under FTA Article 1904.13 and affirmed Panel decisions and order.

¹²¹ Dunoff, Jeffrey L., The Many Dimensions of Softwood Lumber. Alberta Law Review, Vol. 45, 2007; Temple University Legal Studies Research Paper No. 24. Available at SSRN: <http://ssrn.com/abstract=1013609>.

Costa Rica, Nicaragua and Venezuela concerning trade in bananas were discriminatory, unreasonable and burdened or restricted United States commerce. Cases 94 against the EU and cases 96 and 97 against Colombia and Costa Rica respectively were initiated shortly after. Consultations under the WTO were requested together with Guatemala, Honduras as Mexico as complainants (DS16, 28 September 1995). Six other countries joined as third parties.

Nothing happened, the case is considered a failure.

Case 100, EC Importation, Sale, and Distribution of Bananas, 27 September 1995 - 10 February 1998

On September 27, 1995, the USTR terminated case 94 concerning the European Union's (EU) practices with respect to the importation of bananas" and initiated a second case, case 100, regarding the "EU's acts, policies and practices relating to the importation, sale and distribution of bananas" (60 FR 52026).

A new case was opened at the WTO (WT/DS27) with the same complainants plus Ecuador and 23 third parties, on 5 February 1996. Both WT/DS16 and WT/DS27 specifically concerned EC Council Regulation No. 404/93 and related measures "distorting international banana trade and discriminating against U.S. marketing companies importing bananas from Latin America". A panel was established on May 8, 1996 under WT/DS27. Both the panel and the Appellate Body found the EC banana regime in violation of the General Agreement on Tariffs and Trade 1994 (GATT) and the General Agreement on Trade in Services (GATS). On September 25, 1997, the DSB adopted the report of the panel, as modified by the Appellate Body. A WTO appointed arbitrator subsequently determined that the "reasonable period of time" for the EC to implement the DSB recommendations and rulings would expire by January 1, 1999. The EC undertook to implement the WTO reports within that period and on February 10, 1998, the USTR terminated the investigation without taking action.

For reasons mainly explained below, this and case 100a are considered partial successes.

Case 100a, EC Importation, Sale, and Distribution of Bananas, 22 October 1998 - 1 July 2001

On July 20, 1998, the EC Council of Agriculture Ministers formally approved amendments to the banana regime and on July 28, those amendments were published in the EC *Official Journal* (EC 1637/98; "Regulation 1637"). On October 31, 1998, the European Commission published additional implementing provisions concerning the administration of import licenses for bananas (EC 2362/98; "Regulation 2362"). Regulations 1637 and 2362 became effective on January 1, 1999. The USTR considered that these regulations "perpetuated discriminatory aspects of the EC banana regime" and on January 14, 1999, the USTR requested authorization from the WTO to suspend tariff concessions on certain products of the EU. The EC requested WTO arbitration on the amount of the U.S. proposed suspension of concessions, which the U.S. had estimated at US\$520 million. The arbitrators determined the level of nullification suffered by the United

States to be equal to US\$191.4 million (report 6 April 1999), and on 19 April 1999, the DSB authorized the United States to suspend concessions for that amount (Ecuador was allowed to suspend concessions for US\$201.6 million). The USTR terminated the Section 301 investigation in July 6, 2001 and ceased the application of 100% ad valorem duties.

However, on 29 June 2007, the United States requested the establishment of an Article 21.5 panel as it considered that the EC had failed to bring its import regime for bananas into compliance with its WTO obligations. At its meeting on 12 July 2007, the DSB referred the matter to the original panel. The Article 21.5 panel Report was circulated on 19 May 2008. On 15 September 2009, the EC notified to the WTO that it “continued to be engaged in discussions with Latin American banana supplying countries with the view of concluding promptly a comprehensive agreement on bananas that would establish, among other elements, the level of the new EC bound tariff duty”. And that it “expected to have another meeting in the coming days with those MFN suppliers and make definitive progress towards a satisfactory agreement, which would put an end to this longstanding dispute”.

EC Third Country Meat Directive

Case 83, EC Third Country Meat Directive (standards for meatpacking facilities), 28 November 1990 – 11 June 1993

Bayard & Elliott considered this case ongoing back in 1994. Refer to the Appendix, page 435. The final part of their report on the case mentions an Agreement reached on 13 November 1992 by means of an Exchange of Letters, based on findings and recommendations of a joint US/EC veterinary group, and referred to as pending in 57 FR 47508 of October 1992. Among others, “the EU agreed to amend the Meat Directive to provide recognition of equivalent (meat) inspection systems in third countries by January 1995”¹²². Two complaints had been filed at the GATT, on 25 September 1987 (L/6218, panel established on 3 December 1987) and specifically on imports of pork and beef on 8 November 1990 (GATT series DS20, panel requested on 7 June 1991); both complaints were withdrawn on 11 June 1993 (L/6218/Add.1 and DS20/3). Vogel [1987] reports that the target was not met, so that for the purposes of the empirical estimation, the case is considered a nominal success.

Veterinary equivalency of April 1997

In effect, in 1997, the EU introduced rules which “meant that U.S. producers would no longer be allowed to export agricultural products for which no agreement on veterinary equivalence had

¹²² David Vogel, *Barriers or benefits?: regulation in transatlantic trade*, European Community Studies Association, Brookings Institution Press, 1997

been reached with the EU” (Vogel). And on 30 April 1997, by means of an Exchange of Letters, veterinary equivalency was negotiated for red meat, fish, pork, pet food, dairy and egg products (covering US\$1.5 billion of trade from each side). But no agreement was reached on poultry and poultry products.¹²³

The decade-long ban on poultry and poultry products

The ban on poultry and poultry products effectively banned U.S. exports to the EC ever since, which are estimated to be worth a potential US\$ 50 million.¹²⁴ The negative impact on U.S. exports became even greater in 2004 with the EU Enlargement. On 16 January 2009, the U.S. requested consultations on the more than a decade long ban on imports of “poultry treated with any substance other than water unless that substance had been approved by the EC”, noting that back in 2002, the U.S. had requested the EU to approve the use of four PRTs in the production of poultry intended for export to the EC: chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids (WT/DS389).

Chicken exports to the EU from producers including Tyson Foods Inc., Pilgrim’s Pride Corp. and Sanderson Farms Inc. might be worth about \$200 million if all trade barriers were lifted, Richard Lobb, a spokesman for the National Chicken Council, a Washington-based lobby group, said in May 2008 (Bloomberg, as reported in www.thepoultrysite.com).

Hormone-treated beef

Case 62, EU Ban on hormone treated beef, 25 November 1987 – 15 July 1996

On December 24, 1987, the President, by Proclamation 5759, threatened to unilaterally retaliate against the EC Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action (the first in a series of Directives banning imports of meat from growth hormone-treated animals, issued on 31 July 1981). Increased duties (100% *ad valorem*) on certain products of the EC were proclaimed but immediately suspended pending the implementation of the Directive, planned for January 1, 1989 (52 FR 49131).

¹²³ To further show that this case was far from settled in 1992, the “Fair Trade in Meat and Pork Products Act of 1997” was introduced to the Senate in January 1997, and to the House of Representatives in February, in reference to the Third Country Meat Directive which had been “used to decertify more than 400 U.S. facilities exporting beef and pork products to the EU” and to Section 301 cases 60 and 83. The Act mandated the use of Section 301 in case the USTR found that the EU had “failed to implement satisfactorily its obligations under the Exchange of Letters” of 1997 and the SPS Agreement.

¹²⁴ In response to the EU ban, the U.S. retaliated by blocking EU (predominantly French) poultry exports (worth \$2 million a year according to the 1997 Year in Trade USTR Report), until completion of the inspection of EU plants. The measure was announced by Agriculture Secretary Dan Glickman and USDA news release N° 0143.97, and was estimated to affect US\$300 million in EU exports. The EU requested consultations at the WTO on 18 August 1997 against the ban on imports of poultry (WT/DS100).

Efforts were made to resolve this dispute within the framework of the Agreement on Technical Barriers to Trade (the U.S. requested consultations on 12 January 1987, and still in 1987, an investigation and the establishment of an expert group) and GATT 1947 (on 28 November 1988, the EC asked for a ruling by the GATT Council on the measures announced by the US, L/6438). The U.S. noted that “the EC had blocked these multilateral efforts to resolve the dispute” and stated their “expectations that the EC would allow appropriate dispute settlement procedures to proceed expeditiously” (52 FR 49140 as reported in 61 FR 37309). The USTR imposed the increased duties effective January 1, 1989 (53 FR 53115), and extended their application to Austria, Finland, and Sweden in December 1994, when these countries became EC member states. The list of products was revised 5 times.

Case 62 is considered a failure, with retaliation imposed.

Case 62a, EU Ban on hormone treated beef, 25 March 1999 – to date

The Directive was successfully challenged at the WTO by the U.S. (WT/DS26, consultations requested 26 January, 1996, 61 FR 33149) and Canada (WT/DS48, consultations in July). Pending the panel ruling, however, the application of increased duties was suspended, effective July 15, 1996 (61 FR 37309, following consultations at the WTO on these U.S. increased tariffs requested in April by the EC, WT/DS39). On August 18 1997, the panels on the EC Directives ruled against the EC, the ruling later confirmed by the Appellate Body (16 January 1998). An Arbitrator determined the period of implementation to be of 15 months as of 13 February 1998.

On 26 July 1999, after the EU had not complied with the WTO ruling, the DSB authorized the suspension of concessions to the EC (retaliation) by the United States and Canada in the respective amounts determined by arbitration: US\$ 116.8 million for the United States and CDN\$ 11.3 million for Canada (US\$ 7.48 million approximately).

On 13 January 2005, the EU modified its directive and requested the establishment of dispute settlement panels at the WTO against the retaliatory duties of the U.S. and Canada (WT/DS320 a WT/DS321 respectively). Both panel reports were issued three years later, on 31 March 2008, appealed, and consequently modified on 16 October 2008. The Appellate Body was unable to determine whether the EU’s modified hormone regime was WTO-consistent but confirmed that the original authorization to impose additional duties was still valid. 100% *ad valorem* duties had been imposed in 1999 on about \$117 million in imports from the EU. The list of products was reviewed and modified in January 2009.

Case 62a is considered is partial success, with retaliation imposed.

Other cases

Case 88, China Market access (QRs, licensing, technical barriers, and lack of transparency in import regulations), 10 October 1991 – 1 October 1992

Bayard & Elliott considered this case ongoing back in 1994. The final part of their report mentions delays in China's compliance with a Memorandum of Understanding (MOU) signed in 1992. The 1995 USITC Year in Trade report mentions that "although the MOU eliminated import barriers on some product groups ahead of schedule in 1993, the first year of the agreement, it did not lift the restrictions scheduled to be eliminated at the end of 1994 until June 30, 1995". The ITC assessment is that relations were strained due to a pending dispute on IPR (Section 301 case 86) and negotiations on China's accession to the WTO.

Finally, China eliminated restrictions on 176 items on schedule at the end of 1995. The 1998 ITC Report mentions that "several items for which abolition of import restrictions were required at the end of 1996 were no longer listed in China customs publications as being subject to non-tariff measures", and that "import control measures on 13 eight-digit products were phased out on December 13, 1997".

On the dark side, the Report also mentions that "new alternative measures and some aspects of China's new industrial policies may be undercutting the market access gains that had been anticipated" including: the "automatic registration" requirement, electro-mechanical product import control measures, regulations on the administration of medical equipment, and camera import control measures. About 400 products covered by the annex to the 1992 market access MOU were now subject to these automatic registration requirements.

In Case 88, there was a retaliation threat, the case is considered a partial success.

Case 89, Taiwan Copyright, 29 April 1992 – 5 June 1996

Bayard & Elliott considered this case ongoing back in 1994. In the final part of their report, they mention extensive legislative amendments passed on 28 December 1993, but warn that ultimately "the proof of the pudding will be in the eating".

The U.S. retained Taiwan on the Special 301 "watch list" (mainly for "inadequate retroactive copyright protection, lack of protection for integrated circuit layout designs, lack of adequate protection for trade secrets, and unfinished discussions for a bilateral agreement to establish reciprocal patent and trademark filing benefits"). Taiwan then enacted laws on integrated circuit layouts and personal data and had pending laws on copyright and trade secrets. Enforcement was improved as well, against piracy and counterfeiting in particular, so that in April 1996, Taiwan's status under Special 301 was "downgraded" from the "watch list" to the

“special mention list”. In response to an USTR out-of-cycle review in November 1996, Taiwan implemented an 18-point program and the U.S. removed Taiwan from the “special mention list”. For the first time since 1992, Taiwan was not cited under Special 301 provisions.¹²⁵

The case is considered a partial success.

Case 91, Brazil Intellectual Property, 28 May 1993 – 25 February 1994

The case was initiated on 28 May 1993, for Brazil’s failure to adequately and effectively protect patents, copyrights, and trade secrets. In February 1994, the Section 301 investigation of was terminated, and Brazil was removed from the priority foreign country list due to Brazil’s decision to amend its industrial property law and improve intellectual property protection (USTR Fact sheet to Congress, July 1994).

On April 30, 1995, however, the USTR put Brazil together with 6 other countries in a Priority Watch List for inadequate protection to IPRs.

Case 92, China Intellectual Property, 30 June 1994 – 26 June 1996

On June 30, 1994, China was identified as a priority foreign country under the “special 301” clause; the same day, the USTR self-initiated an investigation with respect to the protection of intellectual property rights in China (59 FR 35558).

On January 1995, the USTR proposed the application of sanctions in the form of increasing duties on a list of products originating in China to 100% *ad valorem* in \$2.5 billion of U.S. imports from China (60 FR 1829, 3032). On February 1995, “after 198 sets of written comments” and “the oral testimony of 53 witnesses”, the USTR published the definitive retaliatory hitlist with applicable duties of 100% *ad valorem*, effective February 26, 1995 (60 FR 7231). The USTR reported that the “United States” [sic] estimated the damage caused by China’s failure to provide adequate intellectual property protection or market access for persons who rely on intellectual property protection at “at least \$1.08 billion on an annual basis” (60 FR 7231).

After extensive negotiations, the United States and China entered into an Exchange of Letters (including an Action Plan for the Effective Protection and Enforcement of Intellectual Property Rights). Among other things, China agreed to establish a system at the central, provincial and local levels to provide “strong, transparent and responsive enforcement of IPRs”; enhanced resources allocated to enforcement of IPRs; establish an effective border enforcement regime; ensure the transparency of its legal regime, including the publication of all laws and regulations concerning intellectual property protection; and provide U.S. right holders with

¹²⁵ The update on this case is based on USITC, The Year in Trade Reports, 1995 to 1997.

enhanced access to the Chinese market (60 FR 12582), so that sanctions were never effectively applied.

On May 17, 1996, the USTR reported that while some progress had been made, particularly with respect to enforcement of copyrights at the retail level, deficiencies remained regarding piracy at the production, distribution and export levels: “products pirated in China have flooded Southeast Asia, Russia and the other Commonwealth of Independent States (CIS) countries. Latin American and European markets have also been targeted and the U.S. Customs Service has seized pirated CDS and CD-ROMs entering the United States from China.” In addition, the USTR considered that “no significant progress (had) been made in providing market access to U.S. firms and products that rely on IPR protection” (61 FR 25000).

Consequently, the USTR threatened to impose prohibitive tariffs on a list of products. In addition, expeditious action was taken to prevent surges of imports of certain textile and apparel products subject to quantitative restrictions, and imports of these products were limited to 15% of the 1996 adjusted quota over a 30-day period as of May 15, 1996 (61 FR 25000). On June 12, 1996, that limitation was extended for a 30-day period (61 FR 30597).

Effective June 26, 1996, the USTR decided to cease the imposition of these limitations and not to impose the prohibitive tariffs in view of “the measures that China has taken and will take in the future to implement key elements of the 1995 Agreement”. In addition, China’s designation as a “priority foreign country” under Section 182 of the Trade Act was revoked (61 FR 33147).

In the database, the case was terminated at that date. In it is considered a case in which retaliation was threatened but not imposed, and a nominal success (for reasons explained below).

Eleven years later, in April 2007, the United States requested WTO dispute settlement consultations with China over deficiencies in its legal regime for protecting and enforcing copyrights and trademarks on a wide range of products. A WTO panel was established to examine this matter on September 25, 2007. On March 20, 2009, the panel ruled in favor of the United States that “(1) China’s denial of copyright protection to works that do not meet China’s content review standards is impermissible under the TRIPS Agreement; and (2) China’s customs rules cannot allow seized counterfeit goods to be publicly auctioned after only removing the infringing mark. With respect to the third claim concerning China’s thresholds for criminal prosecution and conviction of counterfeiting and piracy, while the United States prevailed on the interpretation of the important legal standards in Article 61 of the TRIPS Agreement, including the finding that criminal enforcement measures must reflect and respond to the realities of the commercial marketplace, the panel found that it needed additional evidence before it could uphold the overall U.S. claim that China’s criminal thresholds are too high”. In the 2009 Special 301 Report, dated April 30, 2009, China was still in the Priority Watch List.

Case 93, Japan Automobiles and parts inspection system & other regulations (anticompetitive practices), 1 October 1994 – 28 June 1995

On October 1, 1994, the USTR self-initiated an investigation regarding specific barriers to access to the auto parts replacement and accessories market (“after-market”). After extensive consultations, negotiations failed. On May 18, 1995 the USTR requested comments on a proposal to impose prohibitive (100% *ad valorem*) duties upon luxury-type motor vehicles from Japan. In the meantime, the USTR asked the Customs Service to withhold liquidation of the entries of the goods entered, or withdrawn from warehouse for consumption, on or after May 20, 1995, date of entry into force of the proposed duty increases (60 FR 26745).

Japan requested consultations at the WTO on the U.S. measure on 17 May 1995 (WT/DS6). Negotiations followed, an agreement was reached to the satisfaction of the U.S. and the USTR terminated the investigation on 28 June 1995 (60 FR 35253).

Retaliation threatened, nominal success.

Case 95, Korea Sausages and other meat health, technical regulatory barriers, 18 November 1994 – 20 July 1995,

On 18 November 1994, The National Pork Producers Council, the Council American Meat Institute and the National Cattlemen’s Association filed a petition alleging that U.S. meat producers were denied access to the Korean market through a series of barriers including: “outdated, scientifically unsupported and discriminatory shelf-life standards; excessively long inspection procedures; contract tender procedures that prevent U.S. producers from meaningfully participating in the bidding process; local processing and repackaging requirements; discriminatory fixed weight requirements; dual standards for residue testing; and unreasonably short pork temperature reduction requirements” (60 FR 42925). The investigation was initiated on 22 November 1994 (59 FR 61006).

On 3 May 1995, the U.S. requested consultations with Korea under the WTO (WT/DS5). The U.S. alleged violations of Articles III and XI of GATT, Articles 2 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Article 4 of the Agreement on Agriculture (on 4 April 1995, a similar request had been filed regarding Measures Concerning the Testing and Inspection of Agricultural Products - WT/DS3). Canada and Japan joined the consultations. The parties notified a mutually agreed solution on 31 July 1995, regarding, among others, the shelf-life of products. On July 20, 1995, the investigation was terminated.

In the following year, 5 addenda were submitted by Korea (the last one dated 20 September 1996) to notify of the corresponding Harmonized System Headings of the products which remained subject to shelf-life requirements in the Korean Food Code.

The case is considered a nominal success.

Case 96, (refer to 94 and 100), Colombia Exports of Bananas to the EU (EU import preference scheme), 9 January 1995 – 10 January 1996.

Case 97, (refer to 94 and 100), Costa Rica Exports of Bananas to the EU (EU import preference scheme), 9 January 1995 – 10 January 1996.

These cases are related to the petition made on September 2, 1994, by Chiquita Brands International, Inc. and the Hawaii Banana Industry Association with respect to certain acts, policies and practices of the Governments of Colombia and Costa Rica affecting U.S. companies that export bananas from Costa Rica to the European Union. After commitments by these countries both investigations were terminated in 9 January 1995.

Both cases are considered partial successes.

Case 98, Canada, Communications practices (cable television) license of US-owned country music cable station revoked, 23 December 1994 – 6 February 1996

On December 23, 1994, Country Music Television filed a petition regarding the authorization for distribution via cable carriage of US-owned programming services, as theirs had been revoked (60 FR 8101). At the time, CMT had been operating in Canada for almost 10 years, with close to 2 million viewers (another 25 million in the US) via 450 cable operators¹²⁶. The day the Section 301 investigation was opened, USTR Mickey Kantor sent a letter the Chairman of the Federal Communications Commission, Reed Hundt, to ask if he had the authority to block applications for broadcast licenses made by Canadian-owned companies, and possibly to revoke licenses already granted, in retaliation¹²⁷.

Negotiations aimed at restoring CMT's access were ongoing when the investigation was terminated on February 6, 1996 (61 FR 5603). Among other threats, Kantor said he considered "(holding) up a Federal Communications Commission license on Teleglobe, Canada's \$50 Million underwater cable off the east coast of Canada"¹²⁸ (according to several sources, the FCC provided two possible targets: Teleglobe Canada, and "Telesat Canada, which was seeking earth station licenses for its Anik satellites". Other potential targets identified included MuchMusic, which is carried on some American cable and direct-to-home satellite systems, and imports of Quebec maple syrup¹²⁹.

¹²⁶ Lorraine Woellert, "Foreign Backlash Grows Vs. U.S. Culture" THE WASHINGTON TIMES (4 February 1996; Part A; Pg A1), cited in <http://www1.american.edu/TED/cmtvcan.htm>, see also Company Town - U.S. Begins Probe of Canada's Cutoff of Broadcaster, by CRAIG TURNER, TIMES STAFF WRITER February 07, 1995.

¹²⁷ Kantor Expands Investigation of Canada's TV Access to U.S. Market, John Maggs, The Journal of Commerce Knight-Ridder/Tribune, Business News.

¹²⁸ Peter Morton, "Kantor's Attack On Canada is Warning World" FINANCIAL POST (12 March 1996), cited in <http://www1.american.edu/TED/cmtvcan.htm>.

¹²⁹ Tweaking the Eagle's Beak: Canada's Cultural Policy in an Era of Trade Liberalisation, Master of Law thesis, Kevin D. Ackhurst, University of Toronto, 1997.

On March 7, 1996, the USTR announced that CMT and the New Country Network had signed an agreement to form a single Canadian country music network.

Case 98 is considered a partial success after retaliation was threatened.

Case 99, Japan Barriers to Access to the Market for Consumer Photographic Film and Paper (anticompetitive practices), 18 May 1995 – 30 January 1998

On May 18, 1995, the Eastman Kodak Company filed a petition related to the denial of access to the market of photographic film and paper in Japan (initiated on 7 July 1995, 60 FR 35447). Consultations under the WTO were requested on 13 June 1996 (WT/DS44, 61 FR 30929). On 31 March 1998, the WTO panel report essentially ruled in favor of Japan, mixed at best (WT/DS44/R).

This is one of the two Section 301 cases, together with case 6, in which the U.S. lost a case under GATT/WTO. Consequently, both cases were failures.

Case 101, EU Enlargement (Austria, Finland, Sweden), 24 October 1995 – 30 October 1996

The USTR claimed that whenever a customs union is formed by WTO members, full and permanent compensation to relevant affected trading partners must be provided so that it engaged in negotiations with the European Union (EU) regarding the EU's provision of full and permanent compensation to the United States for withdrawing concessions and increasing tariffs on trade into the territories of Austria, Finland and Sweden upon their accession to the EU on January 1, 1995 (60 FR 55076).

On October 27, 1995, the USTR proposed, if necessary, to determine that U.S. benefits under a trade agreement were being denied and that the appropriate action in response was to suspend concessions on selected products for which the EU was the principal supplier and, if necessary thereafter, to impose tariffs of up to 100 percent *ad valorem* on those products.

The EU then began compensation negotiations pursuant to Article XXIV: 6 and Article XXVIII of the GATT 1994. In the absence of agreement on compensation, WTO members are entitled to modify or withdraw “substantially equivalent concessions.” On November 29, 1995, the EU and the United States reached an agreement. On December 4, 1995, the European Council formally approved the Agreement, and on July 22, 1996, representatives of both sides formally signed the Agreement with effect from December 30, 1995 (61 FR 56082).

The case is considered a large success, with retaliation threatened.

Case 102, Canada Practices Affecting Periodicals, 11 March 1996 – 11 September 1997

On March 11, 1996, the USTR self-initiated an investigation with respect to acts, policies, and practices of Canada that restrict, prohibit and discriminate against imports of certain periodicals into Canada (61 FR 11067).

Consultations under the WTO followed (WT/DS31). The Panel Report, circulated on 14 March 1997, found that the following three Canadian measures violated Canada's obligations under the GATT: (1) Canada's import ban on certain periodicals; (2) Canada's 80 percent excise tax on so-called "splitrun" periodicals, and (3) Canada's discriminatory "commercial" postal rates. On June 30, 1997, the Appellate Body affirmed the above panel findings and in addition, found that a fourth Canadian measure -- Canada's discriminatory "funded" postal rates -- was also inconsistent with Canada's GATT obligations. On September 11, 1997, based on the results of the WTO dispute settlement proceedings, the USTR determined that Canada's practices violate its obligations under the GATT 1994 (62 FR 50651). The USTR further determined that Canada's commitment to comply with the WTO panel and Appellate Body reports within a reasonable period of time constituted the taking of satisfactory measures to grant the rights of the United States under the GATT 1994.

The case, considered as terminated by September 1997, is assessed as a large success; however, later events give a nuanced picture.

The reasonable period of time for Canada's implementation of the reports expired on October 30, 1998. Prior to this deadline, Canada repealed its ban on split-run imports, eliminated the 1995 special excise tax on split-runs, eliminated the discrimination in its postal rates, and modified its postal subsidy program for magazines.

At the same time, however, Canada introduced Bill C-55, which, according to the United States, was designed to accomplish the same result as the import ban and excise tax. The USTR asked the Canadian Government to refrain from enacting C-55 and stated it was prepared to negotiate a solution or to "respond by denying U.S. trade benefits of an equivalent commercial effect". According to a report on the bill by Government of Canada, Library of Parliament, on 28 January 1999 (<http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/LS/c55-e.htm>):

"There was considerable speculation in the Canadian press about how the U.S. would respond to the bill. One scenario had the U.S. introducing retaliatory measures with effects of commercial value equal to the effects of Bill C-55 on the magazine industry. In January 1999, Canadian newspapers reported that the U.S. planned to retaliate by blocking Canadian products from four sectors (steel, textiles and apparel, wood, and plastics). Estimates of the cost to Canada of such measures have ranged from \$350 million (or less) to \$4 billion. As of the beginning of 1999, the situation can best be described as a "phony war." The U.S. has put nothing in writing and has said it will wait until Bill C-55 is enacted before deciding how to respond. Thus, how the U.S. will respond or the cost of this response is unknown. What is known is that the U.S. vehemently opposes Bill C-55."

In the Report on Trade Expansion Priorities of 1999, the USTR said that "if negotiators are unsuccessful in resolving this dispute and Bill C-55 is enacted, the United States will take action of an equivalent commercial effect to protect its interests (64 FR 24439). It was even speculated at the time that Canada might seek a WTO ruling on the bill.

On July 1, 1999, the Foreign Publishers Advertising Services Act came into force. Unlike the tax on split-run periodicals, it made it a criminal offence, subject to fines, for Canadian advertisers to place advertisements in foreign magazines. It also made it an offence for a foreign

periodical publisher to supply advertising services directed at the Canadian market to Canadian advertisers.

In the 2000 Country Reports on Economic Policy and Trade Practices released by the Bureau of Economic and Business Affairs of the US. Department of State, March 2001, it is reported that:

“under an agreement negotiated with the U.S. government, smaller circulation foreign-based publishers are exempted from the Act, as are foreign-controlled publications that contain 12% or less of advertising measured by revenue in a given issue, directed primarily at the Canadian market. Canada committed to increasing this percentage to 15 percent on December 3, 2000 and to 18 percent on June 3, 2002.”

Case 103, Portugal IP Term of Existing Patent Protection, 30 April 1996 – 21 October 1996

The Section 301 case was initiated on April 30, 1996 (61 FR 11970); on the same date consultations were requested at the WTO (WT/DS37). Portugal issued a decree-law to implement properly its patent term-related obligations under the TRIPS Agreement and the USTR terminated the investigation (61 FR 55351). A Mutually Agreed Solution was notified to the WTO on 8 October 1996 (WT/DS37/2 and */Corr.1). Case considered a large success.

Case 104, Pakistan Patent Protection for Pharmaceuticals and Agricultural Chemicals, 30 April 1996 – 8 June 1997

On 30 April 1996, there were consultations under the WTO (WT/DS36) and the Section 301 case was officially initiated (61 FR 19971). On July 4 1996 the United States requested the establishment of a panel. The United States claimed that the absence in Pakistan of (i) either patent protection for pharmaceutical and agricultural chemical products or a system to permit the filing of applications for patents on these products and (ii) a system to grant exclusive marketing rights in such products, violated the TRIPS Agreement. The DSB considered the request at its meeting on 16 July 1996, but did not establish a panel due to Pakistan's objection. A detailed mutually agreed solution was notified to the WTO on 7 March 1997 (WT/DS36/4). Among others, Pakistan agreed to establish a system for the filing of patent applications by 1 January 1995. A system to grant exclusive marketing rights was established in Ordinance No. XXVI of 1997. The investigation was terminated on 8 June 1997 (62 FR 33695). Case considered a large success.

Case 105, Turkey Discriminatory Tax on Box Office Revenues, 12 June 1996 – 3 December 1997

The case was initiated on June 12, 1996 (61 FR 30646 & 32883). Following consultations under the WTO (WT/DS43 and 62 FR 6827), Turkey agreed to equalize any tax imposed on box office receipts from the showing of domestic and imported films and the USTR determined to terminate the investigation effective December 3, 1997 (62 FR 64907). A mutually agreed

solution had been notified to the WTO on 24 July 1997 by which Turkey agreed to equalize these “as soon as reasonably possible” (WT/DS43/3). The case is considered a large success.

Case 106, India Patent Protection for Pharmaceuticals and Agricultural Chemicals, 2 July 1996 – 27 May 1998

On July 2, 1996, USTR self-initiated an investigation with respect to certain acts, policies, and practices of the Government of India that result in the denial of patents and exclusive marketing rights to U.S. individuals and firms involved in the development of innovative pharmaceutical and agricultural chemical products (61 FR 35857). Pursuant to a U.S. request, a WTO dispute settlement panel was formed on November 20, 1996 (WT/DS50). On September 5, 1997, the panel found that India must establish a TRIPs-consistent filing system and provide exclusive marketing rights for pharmaceuticals and agricultural chemical products. On December 19, 1997, the WTO Appellate Body affirmed the panel’s findings on these points. Subsequently, the panel and Appellate Body reports were adopted on January 16, 1998. Effective May 8, 1998, the Section 301 case was terminated, based on a commitment of India to comply with the determined rulings and recommendations by April 19, 1999 (63 FR 29053).

On 14 January 1999, the U.S. requested consultations with India in accordance with Article 21.5 on compliance regarding the Patents (Amendment) Ordinance, 1999, promulgated by India to implement the rulings and recommendations of the DSB. On 29 January 1999, the European Communities requested to join the consultations. At the DSB meeting on 28 April 1999, India presented its final status report on implementation of this matter which disclosed the enactment of the relevant legislation to implement the recommendations and rulings of the DSB. The case is considered a large success.

Case 107, Australia Subsidies on Leather, 19 August 1996 – 25 May 1999

On August 19, 1996, the Coalition against Australian Leather Subsidies filed a petition alleging that certain subsidy programs were inconsistent with or otherwise denied benefits to the United States under the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). On October 3, 1996, the USTR initiated an investigation of the Australian subsidy practices under Section 301 (61 FR 55063), and WTO consultations were held on October 31, 1996 (WT/DS57). On November 25, 1996, Australia agreed to excise automotive leather from its Import Credit Scheme and its Export Facilitation Scheme by April 1, 1997.

Subsequently, however, Australia decided to provide a new package of subsidies to the sole Australian exporter of automotive leather. Although it was not designated a Priority Foreign Country Practice under Super 301, this case was put under the ‘Strategic Enforcement’ section on the ‘Super 301’ report of 1997 (62 FR 52604). The United States requested WTO consultations on the new Australian measures on November 10, 1997 and May 4, 1998 (WT/DS106,

Automotive Leather I). At its meeting on 22 January 1998, the DSB established a panel in accordance with the accelerated procedure under the Subsidies Agreement. On 11 June 1998, the U.S. withdrew its request for a panel.

DS126, Automotive Leather II, deals with this same issue, with the United States as complainant and the EC and Mexico as third parties. On that particular case there was a preliminary ruling by which the Panel noted, *inter alia*, that the DSU does not expressly prohibit the establishment of multiple panels for the same matter. Consultations were requested on 4 May 1998, the panel report is dated 25 May 1999, there was a compliance panel report on 21 January 2000 and a mutually agreed solution notified on 31 July 2000. That agreement included: (1) the repayment to the Australian Government of the prohibited grants (\$4.3 million approximately); (2) the removal of automotive leather from eligibility for support for a period of 12 years; (3) the suspension of certain custom duties on a most favored nation basis, with effect from 1 July 2000 (a list including aircraft pneumatic tyres, glass-ceramic glassware, microwave ovens, video projectors and skis among others), and (4) binding arbitration in the event of a dispute over the implementation or application of the mutually satisfactory solution¹³⁰. The case is considered a large success.

Case 108, Argentina Specific Duties, 4 October 1996 – 3 April 1998

On October 4, 1996, the USTR self-initiated an investigation concerning the imposition of (1) specific duties on apparel, textiles, and footwear; (2) a discriminatory statistical tax; and (3) a “burdensome” labeling requirement on apparel and textiles (61 FR 53776). Through consultations at the WTO (WT/DS56, with a similar panel by the European Communities in 1997, WT/DS77), the parties resolved their differences on the labeling requirement.

On February 25, 1997, however, a WTO dispute settlement panel was established to resolve the United States’ remaining complaints. In its report, circulated November 25, 1997, the panel found that the specific duties on textiles and apparel violated Argentina’s tariff bindings under GATT Article II, and that the statistical tax violated GATT Article VIII. Argentina appealed the panel’s findings and the Appellate Body affirmed the determination in a report circulated on March 27, 1998. Based on these findings, the USTR terminated the investigation effective April 3, 1998 (63 FR 25539).

By October 1998, Argentina had implemented the panel and Appellate Body recommendations in most aspects. The one remaining provision, capping the maximum changes imposed under the statistical tax, was to be implemented no later than May 30, 1999. With

¹³⁰ The USTR DOC Joint Report to Congress on Subsidies Enforcement of February 1999, 2000 and 2001 have additional details on the case.

respect to Argentina's specific duties on footwear, the panel never reviewed the measure because Argentina had revoked those duties prior to the establishment of the Panel.

Instead, Argentina replaced the specific duties with a safeguard measure pursuant to the Agreement on Safeguards. The footwear safeguard was the subject of two WTO procedures (WT/DS121, with the EC as complainant and the United States and 4 other countries as third parties, which went all the way to the Appellate Body and WT/DS123 with Indonesia, consultations only), and was eventually modified. That modification still did not satisfy the U.S. who requested consultations at the WTO (WT/DS164, 1 March 1999 and 64 FR 45581 of August 1999), a panel was established but never composed. The case is considered a large success.

Case 109, Indonesia Promotion of the Motor Vehicle Sector, 8 October 1996 – 22 July 1999

On October 8, 1996, the USTR self-initiated an investigation on a trade and investment regime which Indonesia instituted for its automotive sector, concerning the grant of conditional tax and tariff benefits intended to develop a motor vehicle sector in Indonesia (61 FR 54246). Consultations were requested at the same time at the WTO to examine the consistency of Indonesia's practices with provisions of GATT 1994 and the TRIMs, TRIPs and SCM Agreements.

The USTR-DOC Joint Report to Congress on subsidies enforcement of 1999 reports what follows:

"Since 1993, Indonesia granted tax and tariff benefits to producers of automobiles and automotive parts based on the percentage of local content of the finished automobile or part. In 1996, the Indonesian government established the "National Car Program", which granted 'pioneer' companies luxury tax- and tariff-free treatment if they met gradually increasing local content requirements. Pioneer companies had to be Indonesian-owned, produce the automobile in Indonesia, and use a unique, Indonesian-owned trademark on the automobile. Pioneer companies also could be granted the right, over a one-year period, to import finished automobiles and still receive the exemption from the luxury tax and tariffs on the imported automobiles; in this case, the foreign company manufacturing the 'national car' outside of Indonesia had to enter a counter trade arrangement. One company, PT Timor Putra Nasional¹³¹, was granted pioneer status and was given the right to import up to 45,000 finished cars in a one-year period from its Korean partner, Kia Motors Corporation. The United States contended that, among other things, the tax and tariff benefits constituted subsidies that caused serious prejudice to U.S. trade interests. The United States also alleged that a \$690 million government-directed loan to PT Timor constituted a subsidy that caused, or threatened, serious prejudice."

Extensive WTO consultations were held on these practices (WT/DS59) on November 4 and December 4, 1996. On July 30, 1997, a panel was established in response to a U.S. request and consolidated with a panel previously established to consider similar complaints by Japan and the EU (WT/DS54, 55 and 64). In addition, pursuant to a request by the EU, an information-

¹³¹ The Report further notes that "the loan to PT Timor was not provided until after the panel had been established (...) therefore, as a threshold matter, the panel dismissed the claims concerning the loan".

gathering process regarding subsidies and serious prejudice was initiated under Annex V to the Subsidies Agreement.

On April 22, 1998, the panel found that Indonesia had indeed violated Articles I and III: 2 of GATT 1994, Article 2 of the TRIMs Agreement, and Article 5(c) of the Subsidies Agreement (serious prejudice to EU exports).¹³² The U.S. did not appeal the report as it “adequately addressed the commercial problem”, nor did any of the other parties. The ‘reasonable period of time’ for implementation of panel ruling was determined by binding arbitration to be of 12 months, expiring on 23 July 1999, “in light of the severe economic crisis in Indonesia”. Indonesia’s second and last compliance status report is dated July 15, 1999, by which it considered to have “now fully implemented the recommendations and rulings of the DSB”. The case is considered a large success.

Case 110, Brazil Practices Regarding Trade and Investment in the Auto Sector October 1996 – March 16, 1998

On August 13, 1996, the U.S. “and four other WTO Members” held consultations with Brazil concerning a local content regime for automotive investment introduced in December 1995. The U.S. questioned the consistency of the tariff concessions of the regime with the Subsidies Agreement. On October 1 the U.S. and Brazil agreed to enter into talks with the goal of removing the discriminatory impact of Brazil’s practices on U.S. exports (USTR-DOC Joint Report on Subsidies Enforcement, February 1998). And on October 11, 1996, the USTR self-initiated an investigation concerning the grant of tariff-reduction benefits contingent on satisfying certain export performance and domestic content requirements (61 FR 54485).

On January 10, 1997, the United States requested WTO consultations with Brazil concerning its new auto incentive programs (WT/DS65). As noted by the WTO Secretariat on its website, this request included measures covered by a previous case (WT/DS52), i.e. benefits to companies investing in the North, Northeast and West Central regions of Brazil; “benefits to certain companies located in Japan, the Republic of Korea, and the EC” in the form of reduced tariff quotas; and benefits to manufacturers of motor vehicles and parts, in the form of import duty reductions conditional on average local content requirements and trade-balancing among

¹³² The USTR-DOC Joint Report says that with respect to the U.S. claims under the Subsidies Agreement, “the panel ruled against the U.S., essentially because there were no exports of U.S.-origin passenger cars to Indonesia”. However, General Motors and Ford passenger cars were sourced in Europe, so even though the U.S. lacked ‘standing’ to complain about the effect of Indonesian subsidies on exports from these companies, the subsidies were found to have caused serious prejudice to the interests of the EU, and thus to General Motors and Ford. In the case of Chrysler, which planned on sourcing its passenger cars in the U.S. the panel “appeared to agree with the U.S. position that actual exports did not have to be shown to demonstrate serious prejudice”, although the panel found that the U.S. had not provided sufficient evidence that Chrysler’s export intentions “had gone beyond the tentative planning stage”. Finally, the panel did not accept a subsidiary claim by the U.S. under Article 28, a transition provision that gave WTO Members three years to bring subsidy programs into conformity with its provisions, during which Members were not to extend their programs.

other criteria imposed by the Ministry of Trade. A parallel complaint was filed by the EC (WT/DS81).

On March 16, 1998, settlement between the parties was reached, whereby Brazil agreed to rectify its WTO-inconsistent measures by not extending its automotive trade-related investment measures beyond December 31, 1999, and the investigation was terminated (63 FR 13718). The case is considered a large success.

Case 111, EC Subsidies Affecting Access to the Market for Modified Starch, 22 January 1997 – 6 June 1997

Back in 1996, the USTR had consulted with the EC, pursuant to the bilateral Agreement on Grains signed with the EC on July 22, 1996. The agreement covered cereals and rice and included a provision for consultations in case the EU's wheat gluten import market share increased relative to its 1990-92 average.

The U.S. Wheat Gluten Industry Council, composed of two U.S. producers of wheat gluten, Midwest Grain Products and Manildra Milling Corporation, filed a petition on January 22, 1997. The petition alleged four categories of practices which it claimed were actionable subsidies under the WTO Subsidies Agreement: (i) a wheat export tax, (ii) the starch production refund program; (iii) the starch export restitution program; and (iv) quotas and other production limits on other starches.

The investigation was initiated on March 8 (62 FR 12264) with respect to the starch production refund program. Consultations under WTO dispute settlement provisions were delayed for up to 90 days to ensure an adequate basis for the consultations. In the interim, at the invitation of the USTR, the WGIC filed on March 27 a request for additional information on the subsidy practices of various European countries with respect to the production and exportation of wheat gluten and wheat starch, and a procedure under section 308 of the Trade Act of 1974 was initiated to collect such information. On June 6, 1997, the USTR announced that it would postpone a decision on whether to request WTO consultations with the EU pending the outcome of another round of consultations under the provisions of the bilateral grain agreement, and terminated the investigation effective June 6, 1997 (62 FR 32398).

Posterior events would show that this dispute was far from solved. In July 1997, the U.S. held technical-level consultations with the EU about the growing wheat gluten imports from the EU, which did not produce a satisfactory result. On September 19, 1997, U.S. wheat gluten producers filed a Section 201 escape clause petition with the ITC, requesting that the ITC investigate whether wheat gluten imports from all sources were a substantial cause of serious injury to the domestic industry. The petition asked for the establishment of a four-year quota. On January 15, 1998, the ITC determined the injury by a 3-0 vote (USTR DOC Joint Report to Congress on Subsidies, 1998), and definitive safeguard measures in the form of import quotas on

wheat gluten from all sources were imposed effective June 1, 1998 by Presidential Proclamation and Memorandum (Proclamation 7103).

On 17 March 1999, the EC requested consultations with the U.S. claiming that the safeguard measures were in violation of Articles 2, 4, 5 and 12 of the Agreement on Safeguards; Article 4.2 of the Agreement on Agriculture; and Articles I and XIX of GATT 1994 (WT/DS166). On 3 June 1999, it requested a panel. Australia, Canada and New Zealand reserved third-party rights. The report was circulated on 31 July 2000. The panel, in essence, found the U.S. in violation of its commitments¹³³; the U.S. appealed on September; the Appellate Body report was adopted on 19 January 2001. The reasonable period of time for implementation was determined by mutual agreement to be of four months and 14 days, that is from 19 January 2001 to 2 June 2001.

The case is considered a failure with retaliation. This case is similar to the cases on Specialty steel (301-27, 28a, 30), in that the U.S. addressed the dispute with escape clause safeguards.

Case 112, Japan Market Access Barriers to Agricultural Products, 7 October 1997 – 22 January 1999

Although it was not designated a Priority Foreign Country Practice under Super 301, this case was put under the ‘Strategic Enforcement’ section on the “Super 301” report of 1997 (62 FR 52604). On October 7, 1997, the USTR self-initiated an investigation concerning Japan’s prohibition on imports of certain U.S. agricultural products (62 FR 53853). Japan required “that established quarantine treatments for an agricultural product be retested each time a country wishes to export additional varieties of that product. For example, even though the U.S. demonstrated that a quarantine treatment successfully killed pests on red and golden delicious (sic?) apples, Japan required the United States to retest that same quarantine treatment when the U.S. sought to export additional apple varieties. Until retesting has been completed, no exports of the additional varieties are permitted”.

The United States alleged that these practices were inconsistent with certain provisions of the WTO Agreements on the Application of Sanitary and Phytosanitary Measures. A WTO panel was established on November 18, 1997 (WT/DS76), and on October 27, 1998, the panel determined that Japan’s testing requirement was not supported by scientific evidence and was non-transparent. The WTO Appellate Body upheld this result and expanded the scope of its product coverage on February 22, 1999. The WTO reports that “on 31 December 1999, Japan abolished the varietal testing requirement as well as the “Experimental Guide” and a mutually

¹³³ The page on the WTO website on the case explains in detail the conclusions of the panel.

agreed solution “with respect to conditions for lifting import prohibitions on the fruits and nuts at issue in the dispute” was notified on 23 August 2001. The case is considered a large success.

Case 113, Canada Export Subsidies and Market Access for Dairy Products, 5 September 1997 – 17 January 2003

On September 5, 1997, the National Milk Producers Federation, the U.S. Dairy Export Council, and the International Dairy Foods Association filed a petition alleging that certain Canadian export subsidies, along with Canada’s failure to implement a tariff rate quota (TRQ) for fluid milk, were inconsistent with, or otherwise denied benefits under Agreement on Agriculture and the GATT 1994.

According to the USTR-DOC Joint Report to Congress on Subsidies Enforcement Canada of February 1999, Canada provided subsidies to exports of dairy products without regard to its Uruguay Round reduction commitment; maintained a tariff-rate quota on fluid milk under which it only permitted the entry of milk in retail-sized containers by Canadian residents for their personal use; claimed that cross-border purchases of milk imported by Canadian consumers fulfilled the tariff-rate quota. The USTR believed these measures inconsistent with Canada’s obligations under Article II of the GATT 1994, the Agreement on Import Licensing, and Articles 3, 8, 9 and 10 of the Agreement on Agriculture.

On October 1, 1997, the USTR singled out Canada in its “Super 301” designations and announced that it would begin trade enforcement actions against Canada on dairy products based on export subsidy and market access commitments made under the Agreement on Agriculture of the WTO. On October 8, 1997, it initiated formal WTO consultations (WT/DS103) and on October 11, 1997, it initiated the investigation under Section 301 (62 FR 53851). New-Zealand initiated a WTO procedure as well on December 29 (WT/DS113; the request did not include the tariff-rate quota issue, the U.S. participated as third-party).

WTO consultations took place on November 19; the U.S. requested a panel on February 2, 1998, which was established on March 25 for both the U.S. and New Zealand cases with Australia and Japan as third parties. The panel ruled against Canada. The panel report was appealed, two compliance panel reports followed, both appealed and on 15 May 2003 a mutually agreed solution with the U.S. and New-Zealand was reached. Canada eliminated the commercial export milk (CEM) program at the provincial level as of 30 April 2003. The case is considered a partial success.¹³⁴

¹³⁴ Refer to USTR-DOC Joint Report to Congress on Subsidies Enforcement, 2001-2003 editions for details.

Case 114, EU Circumvention of Export Subsidy Commitments on Dairy Products, 8 October 8 1997 – 30 September 2009

Although it was not designated a Priority Foreign Country Practice under Super 301, this case was put under the ‘Strategic Enforcement’ section on the “Super 301” report of 1997 (62 FR 52604). The USTR self initiated this investigation claiming that the EU was bound by the Uruguay Round to limit the amount of cheese that may be exported with export subsidies and that it was circumventing these commitments by exporting processed cheese under subsidy and counting these exports against other export subsidy commitments relating to powdered milk and butterfat (62 FR 53852). The same day consultations were requested under the WTO (WT/DS104). Canada, Australia and Japan joined the consultations. No panel was requested, neither was any agreement notified. In the 1998 edition of the USTR-DOC Joint Report to Congress on Subsidies Enforcement, these agencies state that “as in the case involving Canadian dairy, we will continue to work closely with the domestic industry in order to reach a satisfactory solution of this problem.” However the case was not pursued at the WTO nor at the Section 301 level, neither does subsequent reports refer to the issue. The case is considered a large success.

Case 115, Korea Barriers to Motor Vehicles, 20 October 1997 - 20 October 1998

On October 20, 1997, the USTR initiated an investigation with respect to barriers to imports of U.S. autos into the Korean market (62 FR 55843). While some of these barriers were addressed in a 1995 bilateral agreement between the United States and Korea, implementation of that agreement was considered disappointing by the US. On 20 October 1998, a new Memorandum of Understanding was signed with Korea and the investigation was terminated (63 FR 59836). The case is considered a large success.

Case 116, Honduras Protection of Intellectual Property Rights, 31 October 1997 – 30 June 1998

In May 1997, the Trade Policy Staff Committee (TPSC) determined that the Government of Honduras had failed to provide adequate and effective means under its laws for foreign nationals to secure, exercise and enforce exclusive rights in intellectual property, especially due to “blatant copyright piracy”. The International Intellectual Property Alliance evaluated losses at \$5 million (letter dated November 24, 1997). The TPSC recommended a partial suspension of GSP and Caribbean Basin Initiative (CBI) concessions, which was assessed by the USTR as early as May 29, 1997 (62 FR 28915).

On October 31, 1997, the USTR self-initiated an investigation and proposed the partial suspension of GSP tariff preferences (62 FR 60299). In April 3 1998, retaliation was imposed, effective April 20 1998 (63 FR 16607). In light of Honduras measures to combat television piracy and to protect intellectual property rights of the U.S., piracy (it temporarily shut down two television stations and imposed and collected fines from the stations), the USTR terminated its investigation on June 30, 1998 (63 FR 35633 and 37943). The case is considered a large success.

Case 117, Paraguay Intellectual Property Laws and Practices, 17 February 1998 – 17 November 1998

On 16 January 1998, the USTR identified Paraguay as a Priority Foreign Country under the “Special 301” provisions. On February 17, 1998, the USTR self-initiated an investigation with respect to intellectual property rights protection, with inclusion of a retaliatory list of products that might be exempted of GSP treatment issued on October 1998 (63 FR 9292 extended in 63 FR 43227). The U.S. and Paraguay signed a Memorandum of Understanding (MOU) on November 17, 1998 and the USTR determined not to take further action and to terminate the GSP review of Paraguay’s intellectual property practices (63 FR 64982). The case is considered a large success. A new MOU was signed on April 20, 2008, effective until December 2009.

Case 118, Mexico Practices affecting high fructose corn syrup, 2 April 1998 – 27 Dec 2006

On April 2, 1998, the Corn Refiners Association filed a petition alleging that Mexico denies fair and equitable market opportunities by facilitating an agreement between the Mexican sugar industry and Mexican soft drink bottlers (63 FR 28544). On May 27, 1999, the USTR decided to “explore further the nature and consequences of Mexican Government involvement in this matter” and to continue consultations “because the matters investigated suggest that the Government of Mexico unreasonably encouraged and supported an agreement between representatives of the Mexican sugar industry and the Mexican soft drink bottling industry to limit the soft drink industry’s purchases of HFCS” (64 FR 28860).

There was a related WTO case (WT/DS132) on Mexico’s imposition of AD duties on U.S. HFCS, with the Appellate Body Report issued in 22 October 2001, which ruled against Mexico. Mexico removed the AD duties but adopted a tax on soft drinks made with HFCS effective January 1, 2002.

The tax was then challenged at the WTO (WT/DS308), consultations started on 6 March 2004, the Appellate Body Report was dated 16 March 2006 and ruled in favor of the U.S. Mexico had to comply with the finding by 31 January 2007. In January 12, 2007, Mexico notified that “the Federal Revenue Law for 2007 was published in the Official Journal of the Federation on 27 December 2006. This Law repeals the provisions of Section I, Article 2, paragraphs G and H of the Law on the Special Tax on Production and Services, thus abolishing the tax found to be inconsistent.”

The case is considered a partial success.

Case 119, Practices of the Government of Canada and of the Province of Ontario Regarding Measures Affecting Tourism and Sport Fishing, 29 April 1999 – 15 February 2000

On October 29, 1999, the Province of Ontario announced that it had revoked the provincial measures that were under investigation. On November 4, 1999, the Government of Canada agreed that the immigration measure under investigation would be reviewed by the NAFTA

Temporary Entry Working Group. The USTR determined that these measures and agreements provided a satisfactory resolution of the matters and decided to terminate the investigation on February 15, 2000.

Case 120, Canada Trading Practices of the Canadian Wheat Board, 8 September 2000 – 1 August 2005

On September 8, 2000, the North Dakota Wheat Commission filed a petition alleging that certain wheat trading practices were unreasonable and burdened U.S. commerce. The investigation was initiated on October 23, 2000 (65 FR 69362). A report on the market conditions was issued by the ITC in December 2001.

The USTR requested WTO consultations in December 2002 and a panel on December 17, 2002 (WT/DS276). The panel report was issued on April 6, 2004, and the Appellate Body report on August 30, 2004, both with mixed results for the US. On 1 August 2005, and following 4 status reports, Canada notified its full compliance with the DSB's recommendations and rulings. Seven third parties participated in the panel, most interested in systemic issues regarding state trading enterprises. The case is considered a partial success.

Case 121, Ukraine IPR laws and practices, 12 March 2001 - 3 February 2006

Alleging inadequate and ineffective IPR protection, in December 2001 the USTR suspended GSP benefits (which benefited \$40 million in imports from Ukraine in 2000, 66 FR 16515). When bilateral negotiation on optical media piracy failed, the USTR additionally imposed 100% *ad valorem* duties on \$75 million in imports from Ukraine. In August 2005, Ukraine amended its Laser-Readable Disc Law and the USTR terminated the retaliatory duties. In January 2006, "in recognition of Ukraine's continuing efforts to improve IPR protection and enforcement", GSP benefits were reinstated.

Appendix B Section 301 petitions not initiated

Elliot & Richardson (1997) included 8 cases not formally investigated in their empirical study. The Federal Register reference could not be found for all of them.

ECSC – Japan Agreement on Steel (48 FR 8878).

France, UK, Taiwan, Korea, Brazil and Japan – Diversion of footwear exports to the U.S. (48 FR 36729). On June 29, 1983, a petition was filed by Footwear Industries of America, Inc., *et al.* alleging that France, the UK, Taiwan, Korea, Brazil, and Japan had diverted footwear exports to the US. The practices involved were: restraints agreements between France and the UK each with Taiwan and Korea; the suspension of footwear import licenses and excessive tariffs in Brazil; Japan's global quota on leather footwear through its licensing system; France's "Leather Plan". The USTR decided not to initiate an investigation on grounds that the information presented by the petitioners was insufficient.

EC, Netherlands, Colombia, Mexico, Guatemala, Costa Rica, Dominican Republic and Israel – Roses case (50 FR 40250).

Japan – Amorphous metals (55 FR 18693). The U.S. obtained a commitment from Japan to expedite talks on market access in Japan for amorphous metals, a paradigm of high technology market access in Japan, which was the subject of a section 301 petition filed by an American firm. Rather than initiate a one-year section 301 investigation, the U.S. used the leverage of section 301 to obtain Japan's commitment to seek solutions to this issue within 150 days, with the understanding that an industry-filed 301 petition will be accepted if solutions are not reached.

China, Denial of workers' rights (69 FR 26204, 11 May 2004). On March 16, 2004, the American Federation of Labor and Congress of Industrial Organizations filed a petition on the denial of workers' right to manufacturing workers. The USTR decided not to initiate an investigation, effective April 28, 2004.

China – Currency undervaluation (69 FR 78516).

China – Currency undervaluation (70 FR 46259, August 9, 2005). On April 20, 2005, the Congressional China Currency Action Coalition filed a petition alleging that acts, policies, and practices of the government of China have resulted in a significant undervaluation of China's currency, and that the undervaluation amounts to a prohibited export subsidy inconsistent with several provisions of the Agreement on Subsidies and Countervailing Measures, GATT 1994 and

the Agreement on Agriculture of the WTO and the Agreement of the International Monetary Fund. The USTR determined not to initiate an investigation, effective May 27, 2005.

China – Currency undervaluation (72 FR 46688, August 21, 2007). On May 17, 2007, the Bipartisan China Currency Action Coalition filed a petition on China's currency undervaluation. The USTR decided not to initiate an investigation, effective June 14, 2007.

Canada – Subsidies on the filming of US-produced television shows and theatrical films within Canada, September 2007. The petition alleged that the Canadian subsidies were inconsistent with Canada's obligations under the WTO Agreement on Subsidies and Countervailing Measures. The USTR determined not to initiate an investigation.

Israel – Intellectual Property Rights (74 FR 31789, July 2, 2009). On May 13, 2009, The Institute for Research: Middle Eastern Policy (IRMEP) filed a petition alleging that Israel had breached obligations under the WTO Agreement to protect intellectual property rights (TRIPS, article 39). The USTR decided not to initiate an investigation on several grounds, among others, arguing that the “to the extent the petition does describe any TRIPS Agreement issues, those issues would be addressed more effectively through the established Special 301 process”. Decision effective June 25, 2009.

Main sources:

Federal Register, GATT/WTO websites, Bayard & Elliott (1994), Elliott and Richardson (1997), Zeng (2004) and database sent by email, Greg Mastel for cases 63 EU Oilseeds 1987, 66 Japan Citrus 1988, 80 Canada Beer 1990 and 88 China Market access 1991.

U.S. International Trade Commission, The Year in Trade Reports, years 1995-2008; USTR, Trade Policy Agenda Reports, years 1999, 2002-04, 2007-09; USTR and U.S. DOC, Subsidies Enforcement Annual Report to the Congress, Joint Report of the Office of the United States Trade Representative and the U.S. Department of Commerce, years 1998-2009.

United State Trade Representative. 1994. Intellectual Property Rights - U.S. Trade Representative Investigations Of Foreign Country Practices. Fact Sheet for the Honorable Frank R. Lautenberg, U.S. Senate, GAO/GGD-94-168FS, July 7, 1994.

Back in 2004, the USTR, had a summary listing with details on each case. I have the copy dated 9 August 2002. The file is not on the website anymore. Liberty Park, USA foundation kept an earlier version of this same file up to case 116 and posted it:

<http://www.libertyparkusafd.org/lp/Hamilton/US%20Trade%20Representative%5CSeccion%20301%20Cases.pdf>