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COMMENTS

Section 301 of the Omnibus Trade and Competitiveness Act of 1988: A Formidable Weapon in the War Against Economic Espionage

Marc A. Moyer

I. INTRODUCTION

The illicit practice of conducting economic espionage¹ against a business competitor is not new to the world business community. However, an increasing number of United States corporations have become the target of foreign economic espionage designed to surreptitiously appropriate critical United States technology and information.²

¹ According to Professor Warner of the University of Kentucky, the broad nature of the term "economic espionage" is preferable over the more familiar "industrial espionage" because it is more descriptive of the contemporary economic rivalry and conflict between nations. Professor Warner maintains that in the modern global economy, having secret or at least confidential information about such matters as government trade initiatives or private marketing decisions can be often as valuable as the acquisition of a hard technology or process. The term also serves to distinguish traditional geopolitical or military espionage which specifically target a nation's capabilities and intentions to wage war. William T. Warner, *International Technology Transfer and Economic Espionage* 2 n.2 (1992)(unpublished manuscript, on file with author).

² While testifying before the House Subcommittee on Economic and Commercial law, Geoffrey E. Turner defined "Economic Espionage" as the surreptitious acquisition of corporate trade secrets, advanced technology, product information, business plans, and various types of proprietary information which can provide competitors with a distinct market advantage. *The Threat of Foreign Economic Espionage to U.S. Corporations, 1992: Hearings Before the Subcomm. on Economic and Commercial Law of the Comm. on the Judiciary, 102d Cong., 2d Sess. 192* (1992)[hereinafter *The Threat*](statement of Geoffrey E. Turner, Senior Consultant, Information Security Program, Senior Research Institute).

The intrusion into corporate information systems and the interception of business messages in commercial and private networks through the use of economic espionage is a real and ongoing threat. Unfortunately, many United States corporations are unaware of this danger and are therefore vulnerable to such activity.³ The origin and magnitude of modern economic espionage invariably means that the threat facing American corporations has now spread to all types of United States businesses, not just those sectors which have traditionally been the target of such action.⁴

The resulting damage to United States industry from foreign based economic espionage ultimately serves to weaken the ability of United States corporations to compete in the world market. In an era of global economic interdependence, such an effect constitutes a threat to the United States' economic vitality. This effect in turn, ultimately has a detrimental impact upon the United States' national security.

Current debate over appropriate methods for curbing the threat of economic espionage revolves around unilateral and multilateral forms of action. There are two kinds of solutions on which the United States could focus its resources and efforts. One involves "supply side" solutions, such as export controls and individual corporate security. The other requires the use of foreign governments, United States intelligence agencies, and domestic law enforcement mechanisms to remedy the problem.⁵ Currently, debate exists as to which of these solutions should be emphasized. To a certain extent, the purpose of this comment is to describe the current threat to United States industry from foreign based economic espionage. Within this context, this comment defines the national security threat from economic espionage in economic terms. Consistent with this approach, this comment advocates the use of Section 301 of the Omnibus Trade and Competitiveness Act of 1988⁶ as a stop-gap measure to combat the threat of economic espionage until a more thorough and appropriate solution can be achieved.

³ *Id.*

⁴ Mr. Turner cites the defense industry as one example of an industry that has traditionally been the target of foreign based economic espionage. *The Threat*, *supra* note 2, at 192.

⁵ Professor Warner framed these issues by asserting that if technology transfers cannot be controlled within acceptable societal cost parameters, then alternative policies should be examined to implement foreign policy goals. Warner, *supra* note 1, at 2 n.1.

⁶ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164 (1988)(amending §§ 301-309 of the Trade Act of 1974, 19 U.S.C.A. §§ 2411-2419 (West 1978 & Supp. 1989))[hereinafter Omnibus Trade Act].

II. THE EXTENT OF THE THREAT

The technological revolution, the end of the Cold War, and recent developments in the global economy have brought about the rapid growth of information technology as well as the development of new sophisticated devices and technology for acquiring confidential information from competitors.⁷ The tremendous scientific and technological advances of the past few years have merely heightened the importance of having the right information at the right time.⁸ Foreign efforts to obtain critical information have included eavesdropping, hotel room burglaries, the introduction of "moles," and various other sophisticated intelligence techniques. Economic espionage cases in recent years, for example, have revealed that foreign national and corporate operatives have increasingly assumed such seemingly legitimate positions, such as corporate executives in the United States.⁹ A survey by the American Society for Industrial Security reported that in 1991 alone, thirty-seven percent of the 165 United States firms responding to their survey admitted that they had been the target of foreign based spying.¹⁰ Additionally, a 1987 International Trade Commission study revealed that inadequate protection of United States intellectual property alone caused annual losses to American corporations between forty-three and sixty-one billion dollars.¹¹

As staggering as these numbers are, there is a high probability that a great deal of theft and illicit taking (perhaps even the majority of these activities) remains undetected or is simply not reported.¹²

⁷ George Wei, *Surreptitious Taking of Confidential Information*, 12 *LEGAL STUDIES* 302, 330 (1992).

⁸ *Id.*

⁹ *Foreign Missions Act and Espionage Activities in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Committee on Governmental Affairs*, 99th Cong., 1st Sess. 2 (1985)[hereinafter *Foreign Missions Act*](statement of Senator William V. Roth Jr., Chairman of Governmental Affairs). In addressing the issue of foreign espionage activities in the United States, Senator William V. Roth Jr., Chairman of Governmental Affairs, illustrated some of the methods by which foreign operatives obtain United States business information in an effort to highlight the extent to which American corporations are targeted.

¹⁰ *The Threat*, *supra* note 2, at 6.

¹¹ *Intellectual Property and International Issues, 1991: Hearings before the Subcommittee on Intellectual Property and Judicial Administration*, 102d Cong., 1st Sess. 8 (1991)[hereinafter *Intellectual Property*](testimony of Ambassador Carla A. Hills, United States Trade Representative). Although these figures do not represent a loss resulting exclusively from economic espionage, they do illustrate the staggering potential for loss for American firms and do not consider losses that occurred outside the body of intellectual property.

¹² The decision to not report espionage activities is understandable for several reasons. First, such disclosure could have unfavorable economic repercussions on the corporation such as a decline in the company's stock and a reluctance on the part of investors to continue supporting the company. Second, many corporations feel that the cost and time of attempting to obtain

Unfortunately, sophisticated and often undetectable methods of obtaining critical information and technology are often used to the point where many American companies may not know—and may never know—that they have been targeted.¹³ Accordingly, many corporations may not realize they have been victimized until it is too late.

III. THE ORIGINS OF THE THREAT

In the wake of the Cold War, dramatic changes in economic and military strategic planning make it very likely that the current high level of economic espionage will continue, if not worsen, over the next few years. The rapid changes of the world political climate have added significance to the surreptitious gathering of economic and technological information. Leaders in many countries have begun to realize that economic power is a fundamental component of national power.¹⁴

Specifically, United States corporations face the threat of economic espionage on two fronts. First, private foreign corporations have applied an increasing amount of intelligence gathering assets toward United States industry. These companies may not necessarily be directly affiliated with their respective governments, but they are often involved in a much closer government-to-industry relationship than we traditionally have in the United States. Second, United States corporations face a threat from foreign governments which have diverted their national intelligence assets away from military objectives in order to apply them to economic objectives.¹⁵ However, the lines between government sponsored economic espionage and private based economic espionage are often blurred. This distinction is often difficult to ascertain when a government-to-industry relationship is substantially different than the relationship which prevails in the United States.¹⁶

compensation is overly prohibitive especially when they have been victimized by a foreign entity. Third, it may be impossible for a corporation to quantify the ultimate extent of their loss.

¹³ Milton J. Socolar expressed some of the difficulties in quantifying the scope of economic espionage conducted by foreign entities. *The Threat*, *supra* note 2, at 10 (testimony of Milton J. Socolar, Special Assistant to the Comptroller General).

¹⁴ Warner, *supra* note 1, at 6.

¹⁵ Robert Gates acknowledged this shift in foreign intelligence priorities when he testified that "many foreign intelligence services have turned from politics to economics, and the United States is their prime target." *The Threat*, *supra* note 2, at 53 (testimony of Robert Gates, Former Director of the Central Intelligence Agency).

¹⁶ The government-to-industry relationship in Japan, for instance, makes it difficult to determine if the Japanese government is involved when Japanese companies successfully acquire United States corporate information in an unauthorized manner. In 1982, Hitachi employees pled guilty to conspiring to transport stolen IBM design documents and components for every major part of IBM's newest and most powerful generation of computers which were not yet on

Foreign intelligence gathering efforts directed against United States corporations currently originate from the traditional "enemies" of the United States as well as those countries that have traditionally been thought of as our "allies."¹⁷ In many instances, last year's political/military ally is this year's economic antagonist.¹⁸ Two countries which best exemplify this dichotomy are Russia and France.

As a former economic and military rival of the United States, the Soviet Union's desire to obtain United States technology continued without interruption until the break-up of the Soviet state. It has been generally known for years that the KGB had been misappropriating United States corporate secrets through various channels, including economic espionage. This drive continues unabated in the former Soviet republics and is fueled in part by the stresses associated with the attempted conversion from command management to a free market system.¹⁹ Additionally, the necessity to deal with the economy as a whole is inexplicably tied to the nature of the former Soviet society.²⁰ The disintegration of the Soviet empire, however, left the Soviet intelligence infrastructure intact. The GRU, for instance, is still the primary military intelligence service in Russia.

Economically speaking, Russia currently views economic espionage against American corporate technology as a relatively inexpensive method by which to obtain the critical technology required to save the unraveling Russian economy.²¹ In his testimony before the Congressional Subcommittee on Economic and Commercial Law, former KGB operative Stanislav Levchenko elaborated on continuing Russian economic espionage activities around the world.²² In his testimony, Mr. Levchenko advised the subcommittee that Russian economic espionage activities continue against lucrative targets within the United States. Mr. Levchenko additionally warned the subcommittee that it would be naive to believe that Russia and the newly created

the market. It is still unclear as to whether this was done with the tacit permission of the Japanese government. *The Threat*, *supra* note 2, at 8.

¹⁷ The French, Japanese, British, Swedes, Swiss, Israelis, and various other "allied" governments regularly conduct economic espionage activities using private or private sector intelligence organizations.

¹⁸ Professor Warner explains this behavior by crediting United States internationalist economic policies during the Cold War with creating a strong, independent, and predatory world market economy. Warner, *supra* note 1, at 7.

¹⁹ Professor Warner provides an abbreviated analysis of the motivating factors behind this trend. Warner, *supra* note 1, at 4.

²⁰ *The Threat*, *supra* note 2, at 143.

²¹ Warner, *supra* note 1, at 10.

²² *The Threat*, *supra* note 2, at 143.

republics would not continue to conduct external intelligence operations specifically directed at the United States.²³

French economic espionage, as opposed to Russian espionage, appropriately fits into the gray area between state sponsored and private intelligence activities. In either capacity, the French engage in economic espionage against allies and enemies alike. Specifically, French targets include companies in which the French government has either a direct or indirect financial interest.²⁴ Additionally, many authorities speculate that the French Secret Service, Direction Generale de la Securite Exterieur (DGSE) sometimes goes so far as to buy an interest in a targeted multinational corporations for the express purpose of acquiring its technology and information for the French government.²⁵ A former director of the DGSE, for instance, publicly admitted that he personally directed French industrial and technological intelligence forces to gather economic information from the United States and other countries. In one particular instance, he stated that the service compiled a detailed secret dossier of the proprietary proposals from United States and Soviet companies who were competing with a French company for a billion dollar contract to supply fighter jets to India.²⁶

In other instances, economic espionage operations appear to be the result of the momentum created by the long-standing targeting of United States corporations and the magnitude of resources devoted to these activities.²⁷ This momentum will probably continue, and perhaps intensify, as new governments struggle to gain full control over their intelligence services. In such instances, increased economic espionage activities by national or private intelligence services may ultimately exceed the limited constraints these governments would like to apply towards maintaining good relations with the United States.²⁸

Finally, third world countries may now pose a new threat to American companies. As a result of recent political developments within former Eastern Block countries, unemployed former intelligence service agents' services are now available on the open market. Consequently, both government and non-government third world organizations now pose a threat since they are not constrained by tradi-

²³ *The Threat*, *supra* note 2, at 143.

²⁴ Warner, *supra* note 1, at 5.

²⁵ Warner, *supra* note 1, at 5 n.7.

²⁶ *The Threat*, *supra* note 2, at 10.

²⁷ *The Threat*, *supra* note 2, at 192 (statement of Geoffrey E. Turner, Senior Consultant, Information Security Program, Senior Research Institute).

²⁸ *The Threat*, *supra* note 2, at 193.

tional ethics and principles generally used in international business practices.²⁹

IV. THE TARGETS

Traditional targets of economic espionage usually involve critical technologies which are often "protected" by United States patent, copyright, and trade secret laws.³⁰ Additionally, the Federal Bureau of Investigation has defined critical technologies (sometimes referred to as core technologies or national critical technologies) as those deemed critical to enhance national security and economic competitiveness. Examples of these types of technologies include manufacturing processes and technologies, information and communications technologies, aeronautics and surface transportation systems, and energy and environmental related technologies.³¹ Department of Defense critical technologies focus exclusively on technologies that are essential to maintain the qualitative superiority of United States weapons systems.³² Semiconductor materials, micro electric circuits, software engineering, simulation modeling radar, and superconductivity technologies are some of the technologies that fall into this category.³³

An increasing number of espionage cases have also involved proprietary technology and economic information which falls within the gray area of existing United States law. This area involves, but is not limited to, information concerning unclassified United States business and economic resources, activities, research and development, and policies. While unclassified, the theft of this information often adversely impacts upon the ability of United States corporations to compete in the world marketplace. Arguably, the need for protecting information about corporate negotiating positions, costs, economic feasibility studies, marketing plans, and confidential reports is of vital importance to United States industry. Such information can often di-

²⁹ *The Threat*, *supra* note 2, at 193.

³⁰ Jonathan Kapstein, *The West's Crackdown on High-Tech Smuggling Starts to Pay Off*, BUSINESS WEEK, July 29, 1985, at 46-48.

³¹ *The Threat*, *supra* note 2, at 46-47 (statement of William S. Sessions, former Director of the FBI).

³² *The Threat*, *supra* note 2, at 46-47 (statement of William S. Sessions, Former Director of the FBI).

³³ *The Threat*, *supra* note 2, at 46-47. See CENTRAL INTELLIGENCE AGENCY, SOVIET ACQUISITION OF MILITARILY SIGNIFICANT WESTERN TECHNOLOGY: AN UPDATE (1985)[hereinafter CENTRAL INTELLIGENCE AGENCY], for a thorough description of specific military applications of these technologies. See also Martin Tolchin, *Crucial Technologies: 22 Make the U.S. List*, N.Y. TIMES, Mar. 17, 1989, at D1.

rectly affect the competitive position of a firm more than the unauthorized acquisition of its technology.³⁴ Recently, the United States Department of State emphasized the importance of proprietary information in its publication which credited corporate proprietary information with being corporate America's "chief competitive asset," and recognized its overall importance to both American industry and society alike.³⁵ Unfortunately, information of this sort is often the most difficult to protect since both the intelligence community and business community have not yet agreed on a clear definition of proprietary information. Both groups, however, recognize the implications associated with its disclosure to foreign competition.³⁶

V. IMPACT ON NATIONAL SECURITY

Traditionally, concerns over the effects of espionage on national security have centered upon the transfer of products and technologies with potential military uses. While there are numerous interpretations of military "weapons technology," one publication has defined this technology as the "application of scientific knowledge, technical information, know-how, critical materials, keystone manufacturing and test equipment, and end products which are essential to the research and development as well as the series manufacture of modern high-quality weapons and military equipment."³⁷

From a military standpoint, it is easy to understand why economic espionage directed against defense related industries is a threat to United States national security. It is crucial to United States national security to prevent hostile nations from obtaining crucial military technologies and materials. The domestic economy's ability to satisfy defense needs hinges upon maintaining ample domestic stocks of critical materials.³⁸

³⁴ The harmful effects of compromising this information to foreign competition has been recognized by the FBI and is the focus of a FBI "Threat List Approach" designed to frustrate intelligence activities that threaten United States national security both from traditional sources and non-traditional sources which entail an economic threat resulting from foreign based economic espionage. *The Threat*, *supra* note 2, at 36.

³⁵ The publication asserts that America's livelihood and national strength depend on our country's ability to protect industrial and economic data. BUREAU OF DIPLOMATIC SECURITY, U.S. DEP'T OF STATE, PUB. NO. 10017, GUIDELINES FOR PROTECTING U.S. BUSINESS INFORMATION OVERSEAS 1 (1992).

³⁶ *Id.* at 36.

³⁷ *Intelligence Community Report on Soviet Acquisition of Western Technology*, [Apr.-Sept.] INT'L TRADE REP. (BNA) No. 403, at 58 n.1 (Apr. 13, 1982).

³⁸ Harold Hongju Koh et al., *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW 715, 716 (1992).

Additionally, the theft of United States military technology and production information erodes the qualitative edge of the American military. Defense budget aside, economic espionage threatens the vitality of critical American defense industries. A contemporary example could easily involve the Intel 80386 microprocessor which is currently used in scientific super computers as well as the Army's M-1 tank command systems. Intel spent one hundred million dollars and four years to develop this chip. If a foreign country illegally obtained the design and manufacturing facilities for this powerful chip, they would save at least an equivalent amount of research and development resources.³⁹ Such a theft could conceivably have a two-fold impact upon United States national security. First, the loss of this critical technology would allow a foreign government to divert research and development resources that ordinarily would have gone into developing the stolen technology to other military projects.⁴⁰ Second, since the loss of technological superiority can occur very quickly, a loss in military technology could prevent the emergence of an infant industry that produces defense related products. Since the prohibited costs of research and development under normal circumstances can adversely affect such a fledgling company, the loss of a key technology to foreign competition can often ring the death knoll to such a company.⁴¹ The failure of such a company would then preclude the possibility of drawing upon this resource in the event of a national emergency.

The threat to United States national security from economic espionage expands beyond the confines of defense related industries. Much technology developed for military use in the United States has its beginnings in the private commercial sector and originally may be designed with civilian applications in mind. As a result, this "dual use" technology is often the most sought after information by both foreign governments and corporations alike.⁴² Unfortunately, United States corporations not involved in defense contracting are often ill-prepared to recognize the scope, scale, or intensity of the threat of economic espionage directed against them. They are even less prepared to defend their trade secrets, proprietary technology, and infor-

³⁹ ROBYN SHOTWELL METCALFE, *THE NEW WIZARD WAR* 16 (1988).

⁴⁰ According to French sources, the Soviet Ministry of Aviation Industry saved almost \$256 million in research and development by acquiring Western technology for high-performance aircrafts between 1976 and 1980. These resources were invariably applied to other Soviet defense expenditures. *Id.* at 17.

⁴¹ David Scott Nance et al., *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 949-50 (1990).

⁴² CENTRAL INTELLIGENCE AGENCY, *supra* note 33, at 14.

mation and consequently may be unable to retain their international competitiveness.⁴³ For example, open source documents revealed that a French national working for Corning, Inc. in France sold information and trade secrets to the French Secret Service regarding Corning's latest fiber optic technology. This technology had both military and civilian applications. The Service, in turn, allegedly provided this information to a French competitor of Corning.⁴⁴

In 1960, Secretary of Commerce Luther Hodges acknowledged that obtaining the means of production is often more important than obtaining the technology itself:

It is necessary to distinguish between giving away secrets, know-how, and capability. Our manufacture of these [ballbearings] is no secret . . . but the capability to do it well and economically has taken years to develop and should not be sold to a potential adversary. . . . The situation is not one of selling our adversary a better 'club', but machines which help produce better 'clubs', faster and cheaper.⁴⁵

Consequently, the line between military technology and civilian business technology is often a thin one. Since the loss of both can have equally damaging effects on United States national security, they should be treated equally in the war against economic espionage.

Additionally, foreign based economic espionage constitutes a threat to United States national security in purely economic terms. By definition, the term "espionage" concerns the theft of classified information that bears upon a nation's national security. In a business context, the definition of "economic espionage" naturally extends to the surreptitious taking of classified business information and technology that has a similar impact on national security but in economic terms. In short, United States national security depends heavily upon a healthy domestic economy that is fully capable of supporting United States military and political goals.⁴⁶ Foreign based economic espionage directed against American industry unquestionably threatens the ability of targeted companies to compete on a level playing field in the world market. As discussed previously, information and technology

⁴³ *The Threat*, *supra* note 2, at 193.

⁴⁴ Mr. Socolar's remarks reflect the degree to which foreign governments conduct economic espionage against non-military related United States industry on behalf of foreign private corporations in an effort to obtain dual-use technologies. *The Threat*, *supra* note 2, at 11-12 (remarks of Milton J. Socolar, former Special Assistant to the Comptroller General, U.S. General Accounting Office).

⁴⁵ LINDA MELVERN ET AL., *TECHNO BANDITS* 262 (Houghton Mifflin Co. 1984).

⁴⁶ This note describes how a strong United States national economy is inextricably tied to United States national security and foreign power projection. In particular, the note illustrates how United States national security policy is often framed in economic terms. *See Koh, supra* note 38.

can often be appropriated more quickly and cheaply through the efforts of economic espionage than they can through conventional means. Accordingly, the effects of these actions threaten national security by degrading the overall vitality of the American economy which depends on the collective success of corporate America in the world market. National security no longer can be defined solely in terms of America's ability to fight a war. Rather, maintaining strong national security also entails the United States' ability to effectively compete within the international market economy.⁴⁷

There is yet another reason to maintain strong national security policies in the face of economic espionage. The increasing decline of the threat of nuclear war has recently lead to a concurrent increase in the importance of economic competitiveness in the definition of national security. National relationships previously defined in terms of military alliances change significantly when viewed instead in terms of economic competition. When this occurs, allies become competitors in economic terms. As economic objectives rise in priority in our allies' definition of national security, so does the interest of allied nations in economic espionage.⁴⁸ Accordingly, national security policy and its derivative national policies, with their sole focus on military and intelligence objectives, do not serve the true national interest. Loss of United States corporate proprietary information and trade secrets to economic espionage will increasingly be the consequence of government policy and programs which adhere to an outdated definition of national security. The impact of these problems on United States corporate competitiveness in the international economy will become an increasingly serious concern to the United States national security that will manifest itself through a lack of American economic vitality. A significant component of a nation's security is its continued economic well-being, which depends in large part on its ability to com-

⁴⁷ A number of scholars, such as David Scott Nance and Jessica Wasserman, find that a United States national security policy which involves economic vitality is overly problematic. Nance and Wasserman maintain that a shift to a definition of "national security" based upon long-term economic welfare would require an overly complex determination of national security interests for a given product. Both argue that the United States government would have to derive an integrated, quantifiable scheme of what the United States economy should look like at any given time to maintain its competitiveness. This would result in a "full-blown industrial policy," as the government would decide what industries are necessary for continued economic health and which of these may be allowed to succumb to foreign competition. David Scott Nance et al., *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 948 (1990).

⁴⁸ *The Threat*, *supra* note 2, at 193 (statement of Geoffrey E. Turner, Senior Consultant, Information Security Program, Senior Research Institute).

pete in global markets. Therefore, economic competitiveness must be more carefully balanced with traditional military and intelligence concerns in determining policy to protect national security.

VI. THE SOLUTION

The time has come for United States policy makers to examine the threat of economic espionage against the backdrop of evolving patterns of global interdependence, advancing technology, and increasing economic complexity.⁴⁹ In an era of compressed product life cycles and short-lived technological advances, threats of economic espionage must be stopped quickly and authoritatively to avoid the permanent loss of competitive market positions for United States firms.⁵⁰ Accordingly, there are serious questions facing our national policy makers as to what tools should be used to combat the threat of economic espionage. Can current United States laws recognize and respond quickly enough to the new competitive realities which result from rapid technological and economic changes around the globe?⁵¹ If so, what new mix of domestic and international actions involving "carrots and sticks" will be required to effect such a response?⁵²

Ultimately, the solution to the problem of foreign based economic espionage will not emanate from one source alone. Rather, an effective solution will only be obtained through the well concerted efforts our judicial system, legislative bodies, law enforcement agencies, private industry,⁵³ and through international cooperation. Additionally, efforts to stem the tide of economic espionage activities will require the regular use of economic power as a tool, either as a stick to sanction hostile nations or as a carrot to encourage the economic cooperation and development of friendly ones.⁵⁴ To be effective however, these economic controls must apply with sufficient force to our

⁴⁹ *Intellectual Property*, *supra* note 11, at 239.

⁵⁰ *Intellectual Property*, *supra* note 11, at 237.

⁵¹ Mr. Johnson framed this question in recognition of the growing trend to equate United States economic competitiveness with United States National security. Mr. Johnson's remarks highlighted the connection between the two interests particularly in the area of strategic United States industry sectors which affect our defense industrial base for cutting edge technologies. The importance of a healthy economy within these sectors is further heightened by the increasing number of United States corporations which are dependent on foreign generated technology to remain competitive in the world market. *Intellectual Property*, *supra* note 11, at 231. (remarks of Richard Johnson, former Associate General Counsel for the International Trade Administration, U.S. Dept. of Commerce).

⁵² *Intellectual Property*, *supra* note 11, at 233.

⁵³ BUREAU OF DIPLOMATIC SECURITY, U.S. DEP'T OF STATE, PUB. NO. 10017, GUIDELINES FOR PROTECTING U.S. BUSINESS INFORMATION OVERSEAS 1 (1992).

⁵⁴ Koh, *supra* note 38, at 716.

adversaries as well as our allies so as to ensure implementation of a unified and coordinated national policy.⁵⁵ Additionally, these tools must be equally effective against both foreign government action as well as foreign private espionage activities if they are to properly address existing concerns.

The urgency of the present situation calls for a quick and authoritative response to foreign based economic espionage activities directed against American industry. Until the United States can mount a coordinated effort in combating foreign based economic espionage however, the provisions of Section 301 of the Omnibus Trade and Competitiveness Act of 1988 will serve as powerful, yet flexible, stop-gap measure in curbing the tide of foreign based economic espionage. The invocation of these provisions are most appropriate when directed against those countries conducting or condoning the most egregious economic espionage activities.

VII. SECTION 301

Section 301 has been described as the "primary United States statute providing authority for the President to take action against unfair trade practices of other governments which adversely affect United States commerce."⁵⁶ In short, the purpose of Section 301 is to enable the President to vigorously combat unfair trade practices so as to ensure fair and equitable conditions for United States commerce. Although Section 301 has primarily been used in this context, its overall purpose, historical development, and current statutory language make it a logical choice as a weapon in the fight against economic espionage.

In order to understand the utility of Section 301 against economic espionage activities, a description of the section's historical development is appropriate. The present version of Section 301 is actually a series of nine separate sections of the Trade Act of 1974 as amended.⁵⁷ A review of the historical development of the present version of Section 301 will reveal that with each amendment there has been systemic broadening of the scope of foreign activities which fall under the purview of Section 301. Accordingly, the current version of Section 301, as it exists in the Omnibus Trade and Competitiveness Act of 1988, is

⁵⁵ Koh, *supra* note 38, at 716.

⁵⁶ Shirley A. Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How*, 6 N.C.J. INT'L L. & COM. REG. 381 (1981).

⁵⁷ Omnibus Trade Act, *supra* note 6.

sufficiently broad in purpose and language to add economic espionage to the list of actionable activities.

The origins of Section 301 spring from Section 252 of the Trade Expansion Act of 1962, Section 301's immediate predecessor. Much like today's Section 301, Section 252 granted the President the authority to respond to foreign practices that hindered United States trade or restricted access to foreign markets. This desire to act unilaterally in an effort to redress trade grievances later manifested itself in the original Senate report to Section 301 of the Trade Act of 1974.⁵⁸

The original purpose of Section 301 of the Trade Act of 1974 was to combat unfair trade practices by granting the President authority to "vigorously" invoke retaliatory action against trading partners engaging in "unfair" trade practices.⁵⁹ In addition to having a remedial purpose, Section 301 was also designed for preventative purposes. Specifically, the provisions of Section 301 were designed to act as a deterrent against unfair foreign trade practices by placing trading partners on notice that "if they insist on maintaining unfair advantages, swift and certain retaliation . . . will occur."⁶⁰ Thus, Section 301 was also drafted for the purpose of providing the President sufficient negotiating leverage to effectively reduce a foreign country's unfair trade practices.⁶¹

Under the Trade Act of 1974, the President had the authority to take "all appropriate and feasible steps within his power to obtain the elimination of such restrictions or [policies or] subsidies . . ."⁶² Prior to invoking retaliatory action, the President had to initially determine that a foreign government or instrumentality: 1) maintained unjustifiable or unreasonable tariffs or other import restrictions;⁶³ 2) engaged in acts or policies which were unjustifiable or unreasonable;⁶⁴ 3) provided subsidies on its exports to the United States;⁶⁵ or 4) imposed unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semi-manufactured products

⁵⁸ See generally, Kenneth J. Ashman, Note, *The Omnibus Trade Act and Competitive Act of 1988—The Section 301 Amendments: Insignificant Changes from Prior Law?*, 7 B.U. INT'L L.J. 115, 119-20 (1989).

⁵⁹ S. REP. NO. 1298, 93d Cong., 2d Sess. 164 (1974)[hereinafter S.REP.NO. 1298].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Trade Act of 1974, Pub. L. No. 93-618, § 301(a), 88 Stat. 1978 (1974)(codified as amended at 19 U.S.C. § 2101 (1994))[hereinafter Trade Act of 1974].

⁶³ *Id.* § 301(a)(1).

⁶⁴ *Id.* § 301(a)(2).

⁶⁵ *Id.* § 301(a)(3).

which burdened or restricted United States commerce.⁶⁶ Additionally, the Trade Act of 1974 allowed an "interested party" to file a complaint with the Special Representative for Trade Negotiations (STR), alleging any restrictions, policy or subsidy, and request a public hearing on the matter.⁶⁷

Although Congress did not specifically define unfairness, the 1973 House Report on the Trade Act of 1974⁶⁸ defined "unjustifiable" actions as "restrictions which are illegal under international law or inconsistent with international obligations."⁶⁹ "Unreasonable" actions were defined as "restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or otherwise discriminate against or unfairly restrict or burden United States commerce."⁷⁰ The 1974 Senate Report stated that "unfair discrimination" involved "discriminatory rules of origin, government procurement, licensing systems, quotas . . . restrictive business practices . . ."⁷¹ In short, the definition of "unreasonable" primarily referred to discrimination unfairness claims because such claims "nullify or impair" existing international trade benefits accorded to the United States.⁷²

Based on the breadth of these definitions and the Congressional debate surrounding the Trade Act of 1974, it is reasonable to conclude that foreign based economic espionage would fall within the realm of actionable activities under the original Section 301. The House Committee, for example, deliberately intended the new bill to "open the scope of retaliatory measures available to combat foreign practices of all types which . . . burden United States commerce."⁷³ The House Committee fully understood that burdening United States commerce was an easy standard to meet. As such, the undeniable role economic espionage plays in nullifying and impairing the United States' ability to compete in the international market place logically fits into the type of foreign practices Congress intended to combat through the use of Section 301.

⁶⁶ *Id.* § 301(a)(4).

⁶⁷ *Id.* § 301(d)(2).

⁶⁸ HOUSE COMM. ON WAYS AND MEANS, REPORT ON THE TRADE REFORM ACT OF 1973, H.R. REP. NO. 571, 93 Cong., 1st Sess. (1973)[hereinafter WAYS AND MEANS].

⁶⁹ *Id.* at 65.

⁷⁰ *Id.*

⁷¹ S. REP. NO. 1298, *supra* note 59, at 164.

⁷² Tyler Goldman et al., Project, The Fair in Fair Trading: A Positivist Determination of Fair Trading Under § 301 of the 1974 Trade Act, 18 (1992)(unpublished senior research, Northwestern University School of Law).

⁷³ WAYS AND MEANS, *supra* note 68, at 66.

Within this context, the House committee not only permitted, but "expected," the President to depart from international obligations when national interests dictated and international procedures were inadequate to deter unjustifiable or unreasonable practices.⁷⁴ Today, the sheer amount of economic espionage activities which occur within our borders is *prima facie* evidence that international procedures are inadequate or incapable of preventing this type of threat to United States industry. Accordingly, executive action taken under Section 301 against the threat of economic espionage would be an appropriate execution of this mandate.

Furthermore, invocation of Section 301 against foreign economic espionage activities would be consistent with the *zeitgeist* that dominated United States foreign trade policy at the time the original version of Section 301 was enacted into law. The Burke-Hartke Trade Bill,⁷⁵ which was competing for passage with the Trade Act of 1974, typically illustrated many of Congress' concerns over the United States' ability to compete in the international marketplace. The bill, like Section 301, was ultimately designed to protect United States industry. Although the bill was never passed despite significant support, Congressman Burke and his supporters used as their rallying cry the credo that "new times require[d] new policies."⁷⁶ Interestingly, the very concerns that plagued Congress in the early 1970's, namely the continuing shrinking role of United States influence in the world economy, global interdependence, advancing technology, and increasing economic complexity, continue to be significant in today's global economy. As such, it appears that by applying Section 301 against the threat of economic espionage today, we would be utilizing its provisions in the same spirit as those who originally promoted its use back in 1974.⁷⁷

Finally, Congress was particularly concerned about the President's ability to safeguard United States interests through international agreements. This issue manifested itself in situations where it was impossible in practice for the United States to obtain a determination with respect to certain practices of United States trading partners which appear to be clear violations of international agreements.⁷⁸ Ac-

⁷⁴ WAYS AND MEANS, *supra* note 68, at 65.

⁷⁵ *Tariff and Trade Proposals, Part 1-16, Hearings Before the Comm. on Ways and Means, House of Representatives, 91st Cong., 2d Sess. 1895-97 (1970)*[hereinafter *Tariff and Trade Proposals*].

⁷⁶ *Id.*

⁷⁷ Goldman, *supra* note 72, at 29.

⁷⁸ Goldman, *supra* note 72, at 67.

cordingly, the original Section 301 went so far as to make foreign unfair trade practices actionable under United States law regardless of the legality of the practices as determined under international trade agreements.⁷⁹ In particular, Congress was especially concerned about the dispute resolution process under the GATT. Since the structural decision making progress of the GATT dictates that decisions are made on the basis of a consensus, no assurances could be made that disputes would be resolved impartially.⁸⁰ Today, this same concern logically extends to the current version of the GATT and other international agreements or international law tribunals. In the context of international adjudication of economic espionage activities against American industry, the United States has no assurances that international tribunals will consider certain actions objectionable or could effect appropriate changes even if they did.⁸¹ This is particularly true in instances where activities may not violate "the letter of the law," but are nonetheless inconsistent with international standards of conduct. Similar problems can also occur in instances where the government-to-industry relationship of a particular country results in the position that certain actions are not actionable due to that country's particular cultural views regarding the role of economic espionage in promoting economic competition.⁸²

The Trade Agreement Act of 1979 merely added procedural amendments to Section 301 in an attempt to "encourage the use of the President's authority."⁸³ In short, these amendments were designed to correct some of the shortcomings of the original Section 301. However, the revised Section 301 was still intended to cover "all [the] acts, policies, [and] practices" of the original Section 301.⁸⁴

One of the most significant amendments to Section 301 under the Trade Agreements Act of 1979 was the imposition of stricter time limits for the conclusion of Section 301 actions and investigations.⁸⁵ An-

⁷⁹ Trade Act of 1974, *supra* note 62, § 301(a)(1).

⁸⁰ Goldman, *supra* note 72, at 67.

⁸¹ Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 315-16 (1990). Under many international agreements, no external authority exists to force participating parties into honoring their agreements. In the GATT for example, a single nation, including the signatory in violation of the agreement, can block a consensus vote necessary to invoke sanctions.

⁸² See *infra* note 16.

⁸³ Marsha A. Echols, *Section 301: Access To Foreign Markets From An Agricultural Perspective*, 6 INT'L TRADE L.J. 4, 16 (1980-81).

⁸⁴ S. REP. NO. 249, 96th Cong., 1st Sess. 236 (1979)[hereinafter S. REP. NO. 249].

⁸⁵ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 301, 93 Stat. 144 (1979)(codified as amended at 19 U.S.C. § 2501 (1982)). The imposition of stricter time limits were in response to objections that Section 301 actions took too long to terminate. Accordingly, Congress required

other important amendment provided the President with expressed authorization to initiate independent investigations without having to receive a request for action by an interested party.⁸⁶

The imposition of stricter time limits required the United States Trade Representative (USTR) to make a recommendation to the President on a course of action regarding a Section 301 petition within one year of the petition's filing.⁸⁷ The President then had twenty-one days to decide on an appropriate response based upon the USTR's recommendation.⁸⁸ However, the President still retained total discretion over his response. In placing these time limits on the President, Congress shared a common recognition among Section 301 petitioners that "in order for [an] action on matters . . . to be effective, it must be timely."⁸⁹

Similarly, the authorization of the President to initiate Section 301 cases of his own volition may have been the result of the relatively small number of private petitions that were filed between January 1975 and July 1979, when the Trade Agreement Act passed.⁹⁰ Some commentators have suggested that Congress specifically enacted this provision in conjunction with the procedural changes in an effort to resuscitate Section 301 by placing this power in the hands of the President who was in a much better position to assert such claims.⁹¹

Despite the 1979 amendments to Section 301, a great deal of discontent still existed over continuing trade problems resulting from unfair trade practices on the part of United States trading partners.⁹² This discontent was exacerbated by the economic recession of the early 1980's; in turn, it created a general sentiment that the new wave of protectionism which was upon the United States "constitutes a serious threat to the Western alliance."⁹³ Accordingly, Congress once again amended Section 301 through the Tariff and Trade Act of 1984.

the United States Trade Representative to make a recommendation to the President on a course of action regarding a Section 301 petition within one year of the petition's filing. The President then had twenty-one days to decide on an appropriate response based upon the United States Trade USTR's recommendation. However, the President still retained total discretion over his response.

⁸⁶ *Id.* § 301(c)(1). Prior to this amendment, the President only had implied authority to initiate such investigations.

⁸⁷ S. REP. NO. 249, *supra* note 84, at 240.

⁸⁸ S. REP. NO. 249, *supra* note 83.

⁸⁹ S. REP. NO. 249, *supra* note 83, at 241.

⁹⁰ During this period, the USTR initiated eighteen cases under Section 301.

⁹¹ Goldman, *supra* note 72, at 31.

⁹² Ashman, *supra* note 58, at 125-26.

⁹³ Ashman, *supra* note 58, at 125.

Among some of these amendments to Section 301 were more thorough definitions of the terms "discriminatory," "unreasonable," and "unjustifiable."⁹⁴ Specifically, "unjustifiable" was defined as "any act, policy or practice [which was] in violation of, or inconsistent with, the international legal rights of the United States."⁹⁵ "Unreasonable" was defined as those practices which were "unfair and inequitable," but which were "not necessarily in violation of, or inconsistent with, the international legal rights of the United States."⁹⁶ Although the Act of 1984 required a petitioner to show that the practices in question had inflicted an injury, the Act merely required that "the trade practice 'burden or restrict United States commerce'."⁹⁷ By creating such a lenient test however, it appears as though Congress intended to continue to fulfill one of the primary purposes of the original Section 301—"to eliminate unfair trade practices through the mere threat of retaliation."⁹⁸

The final version of Section 301 was enacted into law by President Reagan on August 23, 1988. Like its predecessors, Section 301 still authorized the President to use Section 301 authority to enforce United States rights under trade agreements or to respond to the "unfair" trade practices of foreign nations. Pursuant to this goal, this version ultimately provides the USTR, and ultimately the President, with a great deal of flexibility and discretion in determining the existence of, and appropriate retaliatory responses to, these practices.⁹⁹

In actuality, Section 301 transfers authority from the President to the USTR to determine whether a foreign trade practice is actionable. If the USTR determines that a foreign government practice is inconsistent with international agreements, unreasonable, unjustifiable, or burdens United States commerce, he must take "all appropriate and feasible action authorized . . . subject to the specific direction, if any, of the President . . . to obtain the elimination of [these foreign] act[s],

⁹⁴ Prior to the Trade and Tariff Act of 1984, the terms "unreasonable" and "unjustifiable" were not defined in the statute itself. Rather, these terms were only defined by the House Report on the Trade Reform Act of 1973. See *Ways and Means*, *supra* notes 69-71.

⁹⁵ Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304(f)(2), § 2411 (e)(4)(A), 98 Stat. 2948 (1984) [hereinafter Trade Act of 1984].

⁹⁶ *Id.* § 2411(e)(3)(A). This definition implies a mandate to the President to retaliate beyond the confines of international trade agreements, such as the GATT. See also Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 518 (1975).

⁹⁷ Trade Act of 1984, *supra* note 95, § 2411(a)(1)(B)(ii).

⁹⁸ Ashman, *supra* note 58, at 128.

⁹⁹ Omnibus Trade Act, *supra* note 6.

polic[ies], or practice[s].”¹⁰⁰ To accomplish this, the USTR has the authority to impose various import restrictions on the offending nation’s exports to the United States or withdraw the benefits of United States trade agreements. The USTR also has expressed authority to enter into binding agreements designed to eliminate or phase out the foreign acts or policies at issue.¹⁰¹

To assert a violation under Section 301, a petitioner must demonstrate that the conduct of a foreign government was “unjustifiable,” “unreasonable,” or “discriminatory.”¹⁰² However, the flexibility that Section 301 gives the USTR in determining whether a foreign country’s actions satisfy these requirements is one of the attributes that makes the Section so appropriate in addressing foreign based economic espionage activities. Specifically, the breadth of the Section’s statutory language makes it possible to include foreign based economic espionage into the realm of activities covered by Section 301.

A. Unreasonable Actions

Perhaps the greatest expansion of a petitioner’s ability to state a cause of action involving economic espionage activities involves “unreasonable” governmental practices. Section 301 currently defines “unreasonable” activities as those which “while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, [are] otherwise unfair and inequitable.”¹⁰³ Included in this definition are three specific foreign practices. These practices fall under the headings of workers rights, export targeting, and market access.¹⁰⁴ Of the three, only export targeting and market access are applicable to our discussion.

1. Export Targeting

Section 301(d)(3)(E) specifically defines export targeting as: any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.¹⁰⁵

¹⁰⁰ Trade Act of 1984, *supra* note 95, § 1301, § 301(b)(2).

¹⁰¹ Trade Act of 1984, *supra* note 95, § 1301, § 301(c)(1)(C)(i).

¹⁰² Trade Act of 1984, *supra* note 95, § 1301, § 302(a)(1).

¹⁰³ Trade Act of 1984, *supra* note 95, § 1301, § 301(d)(3)(A).

¹⁰⁴ Trade Act of 1984, *supra* note 95, § 1301, § 301 (d)(3)(B)(iii)(I)-(V).

¹⁰⁵ Trade Act of 1984, *supra* note 95, § 1301, § 301 (d)(3)(E).

Traditionally, this type of activity involves the directing of private capital as well as government financial resources to a particular industry on a preferential basis, or providing preferential sources for government procurement.¹⁰⁶ However, this definition can easily be interpreted to apply to egregious instances of governmental sponsored economic espionage activities, which by definition, have the effect of assisting a particular industry or enterprise in becoming more competitive in the international marketplace.¹⁰⁷ As discussed previously in this comment, information and technology can often be appropriated more quickly and cheaply through the efforts of economic espionage than through conventional means. Accordingly, United States industries targeted for economic espionage suffer from an inherent disadvantage when attempting to trade goods and services in the global market. This is especially evident when these industries are forced to compete with the very countries who misappropriated their technology and information. Ultimately, this disadvantage translates into an export advantage for the industries benefiting from the use of economic espionage. Moreover, the definition of export targeting does not require that the foreign government necessarily be successful in making the beneficiaries of their espionage activities more competitive in the export of their goods and services. Instead, the statute defines a particular action as export targeting even when it merely assists the enterprise in achieving this particular "effect." Additionally, by defining export targeting as any plan which may involve actions carried out "severally or jointly," the statute suggests that the President may invoke the provisions of Section 301 in the face of a single incident of economic espionage directed against a targeted industry. This latitude is especially important in the context of economic espionage since it is often difficult for a targeted industry to prove that a government has either been systematically or repeatedly conducting espionage activities against them.¹⁰⁸

2. *Market Access*

A second government practice considered "unreasonable" by Section 301 are those that deny fair and equitable market opportunities.¹⁰⁹ These actions include "[t]he toleration by a foreign govern-

¹⁰⁶ HOUSE COMM. ON WAYS AND MEANS, REPORT ON THE TRADE AND INTERNATIONAL ECONOMIC POLICY REFORM ACT OF 1987, H.R. REP. NO. 40, 100th Cong., 1st Sess., pt.1, 65 (1987)[hereinafter ECONOMIC POLICY].

¹⁰⁷ See *infra* note 44.

¹⁰⁸ See *infra* note 12.

¹⁰⁹ Omnibus Trade Act, *supra* note 6, § 1301, § 301(d)(3)(B)(i)(I).

ment of systematic anticompetitive activities by private firms or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms.”¹¹⁰

Just as the export targeting provision of Section 301 addresses unreasonable government actions, this provision allows the President to invoke Section 301 measures in an effort to stop similar actions on the part of foreign private entities. Having established how economic espionage affects the ability of targeted industries to compete in the global economy, it is easy to understand how economic espionage falls within the list of activities which are “inconsistent with commercial considerations.” However, the debilitating effects of privately sponsored economic espionage activities are further exacerbated when they are conducted with the assistance of foreign governments. In short, such activity on the part of private firms, when coupled with the failure of a foreign government to intervene to eliminate such behavior, can act as a barrier to market access which is as great as any formal governmental act, policy, or practice.¹¹¹ Accordingly, this provision inherently provides the President with the required flexibility to address the threat of economic espionage activities condoned or sponsored by foreign governments. The leverage provided to the President under this provision is particularly applicable to addressing the problems of foreign espionage activities originating from corporations in countries where the government-to-industry relationship is often difficult to discern.¹¹² In such a case, the United States could ordinarily expect to encounter substantial obstacles toward obtaining an appropriate remedy for its grievances. Under this particular provision however, the President will have an effective course of action that will place needed pressure on foreign governments to police their corporations’ espionage activities regardless of the extent of government involvement.

B. Unjustifiable Actions

Foreign trade practices may also be actionable under Section 301 if the USTR determines that they are “unjustifiable” and “burden or restrict United States commerce.” An act, policy, or practice is considered unjustifiable if “it is in violation of, or inconsistent with, the international legal rights of the United States” including, but not lim-

¹¹⁰ Omnibus Trade Act, *supra* note 6, § 1301, § 301(d)(B)(i)(III).

¹¹¹ Ashman, *supra* note 58, at 135.

¹¹² See *infra* note 16.

ited to, "any act, policy, or practice described [above] which denies . . . the right of establishment or protection of intellectual property rights."¹¹³ Although the terms "inconsistent" and "burden or restrict" are not defined or explained, they presumably include practices that do not necessarily violate the letter of a trade agreement or other international legal obligation but nonetheless deny commercial benefits.¹¹⁴ This definition thus operates as a "catch-all" phrase which can encompass a variety of foreign trade practices to include those involving economic espionage. Within this context, the provision provides private parties broad authority to initiate Section 301 actions irrespective of the "legal technicalities" of international agreements or the laws of particular countries.¹¹⁵ The broad nature of this language has often lead to a debate as to whether the definition of "unjustifiable" was meant to encompass activities outside the scope of existing international agreements. Some commentators have suggested that the intended meaning of "unjustifiable" is one which "embrac[es] conduct which only has to violate the spirit, if not the letter, of binding international agreements."¹¹⁶ Similarly, it is also likely that informal international agreements or state practices could be invoked under Section 301 in challenging "unfair but technically legal conduct."¹¹⁷

In applying this rationale, the statutory language used for defining unjustifiable foreign practices is particularly applicable to the unauthorized taking of industrial proprietary information. As mentioned earlier in this comment, proprietary information often falls within the gray area between United States and international law. Although the surreptitious taking of such information may not necessarily be prohibited by United States law, and thus may be technically legal, it certainly violates the international spirit of free trade and co-operation reflected by most trade agreements and international law.¹¹⁸ Similarly, the statutory language of Section 301 leaves nothing open to interpretation in terms of intellectual property protection.

¹¹³ Omnibus Trade Act, *supra* note 6, § 1301, § 301(d)(4)(A) and (B).

¹¹⁴ K. Blake Thatcher, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices By the Japanese Government*, 81 NW. U. L. REV. 492, 504 (1987).

¹¹⁵ *Id.* at 499, 504.

¹¹⁶ Bart S. Fisher et al., § 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital, 14 LAW & POL'Y INT'L BUS. 569, 597 (1982).

¹¹⁷ *Id.*

¹¹⁸ This spirit has also been reflected in recent attempts to establish an international code of conduct which establishes standards of conduct for both corporations and their national governments. U.N. Code of Conduct on Transnational Corporations: Hearings Before the Subcomm. on International Economic Policy, Trade, Oceans, and Environment of the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess. 2 (1990).

Accordingly, there can be little doubt that economic espionage activities are "unjustifiable" practices when they infringe or impair United States intellectual property rights and laws.¹¹⁹

VIII. PURPOSE AND SCOPE

To the extent that Section 301's ultimate economic purpose is "to foster United States economic growth" and development in the United States, the inclusion of economic espionage to the list of actionable activities logically fulfills this imperative.¹²⁰ Such an expansion of the traditional bounds of Section 301 is not without precedent in the statute's history. On the contrary, Section 301 petitions have been acted upon to address a broad spectrum of burdensome foreign practices. For example, the types of goods that have been the subject of investigations under Section 301 have included rice, silk, leather, and cigars.¹²¹ Likewise, the types of foreign practices that have come under Section 301 scrutiny have been sufficiently broadened to include restrictions on the practice of law by foreign attorneys in Japan.¹²²

Regardless of the details involving each of these claims, these petitions historically represent the potential breadth of actionable foreign practices under Section 301. Although trade in goods has traditionally been the subject of Section 301 cases, the expansion of 301 jurisdiction into areas inadequately covered by international agreements or international law represents the importance of Section 301 in helping to fill the gaps in areas that are increasingly gaining importance to United States trade policy.¹²³

IX. PRACTICAL CONSIDERATIONS

There are a number of reasons why Section 301 is particularly well suited to be used as a weapon against foreign based economic espionage. Besides being applicable to both government and private action alike,¹²⁴ Section 301 has other characteristics which readily lend themselves to the fight against the surreptitious taking of critical

¹¹⁹ Another provision of Section 301, Section 1303, § 182(a)(1) (known as "Special" 301) specifically mandates that the USTR identify and take appropriate action against countries that deny adequate protection for intellectual property rights.

¹²⁰ Trade Act of 1974, *supra* note 62, § 2102. *See also* Trade Act of 1984, *supra* note 95, § 2102 (Supp. IV 1986).

¹²¹ Thatcher, *supra* note 115, at 500.

¹²² Thatcher, *supra* note 115, at 500-01.

¹²³ Thatcher, *supra* note 115, at 501.

¹²⁴ *See infra* note 118.

United States industrial information. These provisions include the opportunity for private entities to initiate Section 301 investigations, the transfer of authority from the President to the USTR, and the establishment of expressed time limits for the implementation of Section 301 actions.

Through Section 301, private entities can file a petition with the USTR whenever they believe they have evidence that they have been the victim of economic espionage activities perpetrated by a foreign government or corporation.¹²⁵ Since most conventional trade agreements only offer dispute resolution mechanisms to nation-states, this process offers a targeted corporation a method by which to address its grievances that does not ordinarily exist. Additionally, this provision increases the likelihood that private corporations will step forward and admit they have been victimized.

Ordinarily, a single company would not be likely to assert such a claim because it would seem futile to single-handedly resist actions that are already difficult to detect, much less resist. However, this provision gives hope to such a corporation through the knowledge that the power and resources of the national government will be applied toward investigating their claim and taking action when deemed appropriate. These private petitions, in turn, will ultimately provide the government with a better picture of the nature and extent of current espionage activities. This information will then enable the USTR to focus its resources in an effort to prevent subsequent occurrences through its application of the negotiating leverage provided by Section 301. If the USTR seeks a bilateral resolution with the country, or presents the case pursuant to GATT, this provision has the added benefit of ensuring appropriate private sector involvement. To this extent, private corporations will enjoy participation in the preparatory and on-going aspects of United States involvement in the consultative and dispute settlement procedure.¹²⁶

The transfer of authority and mandatory response provisions also make Section 301 an attractive tool against economic espionage. As mentioned previously, Section 301 transfers authority from the President to the USTR to determine whether a foreign practice warrants a response from the United States. The Act requires the USTR to initiate an investigation and ultimately take action based on that investigation, subject to the discretion of the President. This transfer of authority will enable the USTR to take a more effective course of

¹²⁵ Omnibus Trade Act, *supra* note 6, § 1301, § 302(a)(1).

¹²⁶ S. REP. NO. 249, *supra* note 84, at 239.

action in pursuing allegations of economic espionage since it is not subject to the same political pressures as the President.¹²⁷ Some commentators suggest that by delegating this decision making power to the USTR, Congress sent a direct signal to the President that, except for very extraordinary situations, Congress wants the USTR decisions to be made based on the merits of the petition alone and not in the light of other policy decisions.¹²⁸ This sentiment was reflected in the Senate's explanation for enacting this provision. For example, the Senate declared that if the President does not adhere to the USTR's recommendations, his "discretion must be exercised in light of the need to vigorously ensure fair and equitable conditions for U.S. commerce."¹²⁹

Furthermore, the USTR's investigative power, its primary role in negotiating trade agreements, and its overall legal expertise make it the most logical agency for making and enforcing economic assessments relating to economic espionage activities.¹³⁰ Advocates of the delegation of power argue that the USTR's retaliatory authority facilitates a more rapid response to violations, thereby creating a more effective deterrent.¹³¹ This deterrent primarily results from the knowledge on the part of our trading partners that under Section 301, the USTR can invoke sanctions without Congressional approval.

Since the need for Congressional approval often involves extensive floor debates resulting in unrelated amendments that may weaken a retaliatory response, trading partners might conclude that threats of retaliation are not credible when such approval is necessary.¹³² In addition, the mandatory response provision of Section 301 provides the USTR with additional leverage by requiring the USTR to retaliate any time it finds a foreign practice to be "unjustifiable."¹³³ This requirement ultimately "provide[s] greater certainty of response by the United States to enforce United States rights under trade agreements and to remove or redress foreign practices recognized as illegal or otherwise unjustifiable."¹³⁴ In short, the deterrent effect of

¹²⁷ Ashman, *supra* note 58, at 131.

¹²⁸ N. David Palmeter, *Section 301: The Privatization of Retaliation*, 3 TRANSNAT'L LAW 101, 106 (1990).

¹²⁹ S. REP. NO. 249, *supra* note 84, at 238.

¹³⁰ As noted earlier, the elimination or reduction of economic espionage activities will only come about as the result of the cumulative efforts of several agencies.

¹³¹ Sykes, *supra* note 81, at 311.

¹³² Sykes, *supra* note 81, at 311.

¹³³ Omnibus Trade Act, *supra* note 6, § 1301, § 301(a).

¹³⁴ ECONOMIC POLICY, *supra* note 106, at 62.

Section 301 is further strengthened when countries know that retaliation will be compelled when their espionage activities are discovered.

Finally, the strict time limits placed on USTR actions by Section 301 will ensure that economic espionage cases are investigated and resolved quickly.¹³⁵ Under these provisions, the USTR must determine whether a foreign action was unfair within thirty days after the conclusion of formal dispute resolution. Section 301 also empowers the USTR to make final determinations (as opposed to recommendations), and limits the time for determination to eighteen months after the initiation of an unfairness investigation.¹³⁶ The effect of this second requirement is that the USTR must make an unfairness determination notwithstanding an on-going dispute settlement procedure. This time period is further abbreviated to twelve months when an unfairness investigation involves non-trade agreements.¹³⁷ In instances of cases involving "priority" countries¹³⁸ violating American intellectual property rights, unfairness determinations must be made within six to nine months.¹³⁹

As previously noted, actions to prevent or mitigate damages resulting from economic espionage activities must be done expeditiously if they are to be effective.¹⁴⁰ Prior to 1988, countries could effectively (and legally) delay dispute resolution without fear of retaliatory action. Typically, countries would negotiate in "good faith" by making long and complicated arguments in an attempt to justify their actions. Historically, such tactics have been known to last for years or until the United States could secure an impartial ruling.¹⁴¹ However, Section 301 offers a powerful response to this common tactic. Because of the mandatory time provisions of Section 301, trading partners have little incentive to engage in such delay tactics.

¹³⁵ Omnibus Trade Act, *supra* note 6, § 1301, § 304.

¹³⁶ Omnibus Trade Act, *supra* note 6, § 1301, § 304(a)(2)(A)(ii).

¹³⁷ Omnibus Trade Act, *supra* note 6, § 1301, § 304(a)(2)(B).

¹³⁸ Priority countries are those "which are not making progress in granting intellectual property rights protection or market access for United States persons that rely on such protection, where the foreign practice is particularly onerous and most adversely affects United States products." Ashman, *supra* note 58, at 137 n.138.

¹³⁹ Ashman, *supra* note 58, at 137 n. 138. Since most economic espionage cases will not invoke trade agreement provisions, or may involve the violation of intellectual property rights, most investigations will probably fall under these abbreviated time restrictions.

¹⁴⁰ See *infra* note 12.

¹⁴¹ Sykes, *supra* note 81, at 316.

X. CONCLUSION

The proposition that Section 301 will provide a flexible, powerful response to foreign governments engaged in economic espionage remains to be tested. Ultimately the decision to use this powerful tool must be considered in conjunction with international trade issues, existing United States obligations, and United States national security issues. Admittedly, the ultimate remedy to the problem of economic espionage will not spring from the invocation of economic sanctions alone. What seems clear at present, however, is that the rising threat of economic espionage in America must be addressed quickly and effectively. Until the United States can develop a more effective solution to the problem of foreign economic espionage practices, Section 301 offers the United States a valuable tool for deterring these activities and an intimidating response should such deterrence fail.