

HEINONLINE

Citation: 1 Minn. J. Global Trade 175 1992



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 4 14:59:49 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies

Andrea J. Hageman

INTRODUCTION

An examination of the United States' policy regarding tobacco products reveals a striking inconsistency. While one government sector aggressively employs U.S. trade laws to open foreign markets to U.S. tobacco products, another group actively campaigns against smoking, both domestically and internationally. Domestic tobacco consumption has fallen,¹ and the U.S. tobacco industry has tried to compensate for the diminishing domestic market by increasing sales abroad.² The industry has enlisted the assistance of U.S. trade officials, who use section 301 of the Trade Act of 1974³ effectively to open foreign markets to U.S. tobacco products. Section 301 authorizes the U.S. government to take unilateral action in response to a foreign government's unreasonable restrictions on trade which burden U.S. commerce.⁴ Its retaliatory threat has been a powerful tool in opening markets for U.S. tobacco exporters.

The conflicting goals of promoting tobacco exports and discouraging smoking have created a dichotomy in U.S. policy⁵

1. U.S. consumption of tobacco products decreased from 9.7 pounds per capita in 1970 to 5.8 pounds in 1989. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 1322, at 755 (1991). The proportion of U.S.-produced tobacco which Americans consume has also declined from approximately 95% in the 1960s to an estimated 75% in 1991. U.S. DEP'T OF AGRIC., TOBACCO SITUATION AND OUTLOOK YEARBOOK 14, Table 1 (1991).

2. See generally Fred H. Jones, Comment, *U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets*, 14 N.C. J. INT'L L. & COM. REG. 439 (1989).

3. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. § 2411 (1988)).

4. For a discussion of the types of foreign government practices that can prompt section 301 action, see *infra* notes 20-56 and accompanying text.

5. [A] policy level conflict exists between U.S. trade goals and health policy objectives regarding the export of tobacco products. On the one hand, federal resources are used to facilitate the export of U.S. tobacco and tobacco products, while on the other hand, the federal government has directed a major domestic antismoking effort and is a participant in the international antismoking movement.

which the United States Congress is currently addressing. Congress is considering legislation that would integrate health concerns into tobacco export policy by including a representative from the Department of Health and Human Services (HHS) in the interagency section 301 committee which evaluates actions brought under section 301.⁶

This Note analyzes the dichotomy between the simultaneous efforts to promote tobacco exports and discourage smoking. Part I is a description of these competing goals. Part II explains the dichotomy between these two conflicting U.S. goals. Part III analyzes the likely impact of the Cigarette Export Reform Act's proposal to add an HHS representative to the section 301 committee and concludes that this is an appropriate means to ensure that health concerns are integrated into tobacco export policy.

I. THE CONFLICTING GOALS OF U.S. TRADE AND HEALTH POLICIES

A. PROMOTING EXPORTATION OF TOBACCO

Section 301⁷ is the main tool that the U.S. government employs to open foreign markets for U.S. tobacco exporters. It became part of U.S. trade law in the Trade Act of 1974, and was designed to promote U.S. exports⁸ by expanding the president's

NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: TRADE AND HEALTH ISSUES: DICHOTOMY BETWEEN U.S. TOBACCO EXPORT POLICY AND ANTI-SMOKING INITIATIVES 1 (1990) [hereinafter GAO REPORT].

6. Cigarette Export Reform Act, H.R. 2781, 102d Cong., 1st Sess. (1991).

7. Section 301(a)(1), as amended, provides that:

(1) If the United States Trade Representative determines under section 304(a)(1) that -

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country-

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

Trade Act of 1974 § 301(a)(1) (codified as amended at 19 U.S.C. § 2411(a)(1) (1988)).

8. Jones, *supra* note 2, at 447. "In order to . . . boost U.S. exports, section 301 was created to 'provide the President with negotiating leverage to insure

authority to respond unilaterally to objectionable trade practices.⁹ The United States has invoked section 301 five times in response to trade barriers to tobacco exports,¹⁰ and each time the United States has successfully negotiated an agreement for removal of those barriers, eliminating the need to retaliate.¹¹ By invoking section 301, the United States has effectively opened foreign tobacco markets for U.S. exporters.¹²

1. Section 301 of the Trade Act of 1974

Congress has enhanced the law governing U.S. response to objectionable trade practices¹³ through a series of legislative actions. Section 252 of the Trade Expansion Act of 1962¹⁴ required

fair and equitable conditions for United States commerce and to eliminate [trade] barriers . . . and . . . distortion on a reciprocal basis.''' *Id.* (quoting Patricia I. Hansen, Note, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1127 (1987) (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 166, reprinted in 1974 U.S.C.C.A.N. 7168, 7302)).

9. Jeanne S. Archibald, *Section 301 and the Trade Act of 1974*, in *MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAWS*, Part VII at VII-2 (William K. Ince & Leslie A. Glick eds., 1984).

10. See *infra* note 12.

11. For a description of these agreements, see *infra* notes 73-96 and accompanying text.

12. U.S. cigarette exports to Asian countries, particularly Japan, Taiwan, South Korea, and Thailand, have increased dramatically. FOREIGN AGRIC. SERVICE, U.S. DEP'T OF AGRIC., U.S. AGRICULTURAL EXPORTS, Jan. 15, 1992 [hereinafter U.S. AGRICULTURAL EXPORTS]. The United States has invoked section 301 in response to barriers facing U.S. tobacco exports twice against Japan, and once each against Taiwan, South Korea, and Thailand. It was first used against Japan in 1979. 44 Fed. Reg. 19,083-88 (1979). In that year, the U.S. exported approximately 3.7 million cigarettes to Japan. U.S. AGRICULTURAL EXPORTS, *supra*. By 1991, U.S. exports of cigarettes to Japan had increased to an estimated 62 million. *Id.* In 1986, the United States used section 301 against Taiwan. 51 Fed. Reg. 39,639 (1986). The United States exported approximately 209,000 cigarettes to Taiwan in that year, but this rose to 3 million by 1991. U.S. AGRICULTURAL EXPORTS, *supra*. Similarly, U.S. producers exported 312,000 units of cigarettes to South Korea in 1987, and nearly 4 million in 1991. *Id.* Finally, U.S. cigarette exports to Thailand rose from zero in 1990, to an estimated 550,000 in 1991. *Id.*

13. The U.S. Congress authorized the president to respond unilaterally to offensive foreign trade activities in recognition of the helplessness of U.S. exporters frustrated by closed foreign markets. The United States' existing statutory tools, such as those authorizing antidumping and countervailing duties in response to dumping and subsidies, did not permit the United States to respond to other types of improper foreign trade practices. Archibald, *supra* note 9, at VII-1. Similarly, GATT's dispute resolution system had been ineffective in eliminating barriers to U.S. exports. Jones, *supra* note 2, at 447.

14. Trade Expansion Act of 1962 § 252(c), Pub. L. No. 87-794, § 252, 76 Stat. 872, 879 (1962) repealed by Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975).

the president to respond to foreign import restrictions that violated tariff commitments¹⁵ or trade agreements.¹⁶ Section 252 also gave the president discretionary authority to respond to import restrictions, other than those proscribed by trade agreements, which directly or indirectly substantially burdened U.S. commerce.¹⁷ If the president determined that use of his discretionary authority was warranted, he could deny trade concessions previously granted to the offending country,¹⁸ or refrain from implementing any existing trade agreements with that country.¹⁹ A history of legislative amendments which strengthen this section of U.S. trade law illustrates Congress's special concern with eliminating foreign trade barriers.

Section 301 of the Trade Act of 1974 superseded section 252(c). Section 301 represented the first major enhancement of the U.S. government's ability to take unilateral action to respond to foreign governments' discriminatory, unjustifiable, or unreasonable acts or policies which burden or restrict U.S. commerce.²⁰ As a result of the Trade Act of 1974, the president's arsenal of retaliatory measures is no longer limited to denying trade concessions and refusing to implement trade agreements. Section 301 gave the president authority to impose duties or other import restrictions on the products and trade-related services²¹ of the offending country.²² Furthermore, section 301 au-

15. *Id.* § 252(a).

16. *Id.* § 252(b).

17. *Id.* § 252(c).

18. *Id.* § 252(c)(1).

19. *Id.* § 252(c)(2).

20. Discriminatory acts, policies, and practices include denial of national treatment or most-favored-nation (MFN) status for U.S. goods, services, or investment. 19 U.S.C. § 2411(d)(5) (1988). An act, policy, or practice is unjustifiable if it violates the international legal rights of the United States. 19 U.S.C. § 2411(d)(4)(A). Unjustifiable acts include those which deny U.S. products national or MFN treatment. 19 U.S.C. § 2411(d)(5). Unreasonable acts, policies, and practices are those which do not necessarily violate the international legal rights of the U.S., but are otherwise inequitable. 19 U.S.C. § 2411(d)(3)(A).

It is difficult to assess which acts, policies, or practices fall into the category of "unreasonable" trade restrictions. Several commentators have criticized this category of actionable trade restrictions for its vagueness, and have offered more concrete definitions. See, e.g., David M. Pedley, Comment, *A Definition for "Unreasonable" in Section 301 of the Trade Act of 1974: A Consideration of the United States-Thailand Tobacco Dispute*, 5 EMORY INT'L L. REV. 285 (1991). For a discussion of possible interpretations of "unreasonable" immediately following passage of Section 301, see Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 521 (1975).

21. Section 301 broadened the definition of "commerce" to include services

thorized private parties to petition under section 301,²³ thereby enlarging the class of complainants eligible to bring such actions.

Amendments to section 301 in 1979 broadened the scope of retaliation available to the president.²⁴ The president was no longer limited to retaliating against the offending country; he could also retaliate in a nondiscriminatory manner.²⁵ In addition, the 1979 amendments granted the president authority to respond to trade restrictions against any service, even those that were not trade-related.²⁶

At the same time that Congress increased the president's discretion and authority, it imposed time limits for the initiation

associated with international trade. Trade Act of 1974 § 301(a)(4) (codified as amended at 19 U.S.C. § 2411 (d)(1)(A) (1988)).

22. The president "may impose duties or other import restrictions on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate." *Id.* § 301(a)(4)(B) (repealed 1979).

23. Any interested party may file a complaint with the United States Trade Representative (USTR), who must review the petition to determine whether it warrants an investigation. Trade Act of 1974, § 301(d)(2) (codified as amended at 19 U.S.C. § 2412(a)(1)-(2) (1988)). "Interested persons" includes "domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by [section 301] actions." 19 U.S.C. § 2411(d)(9) (1988).

24. Section 301, as amended by the Trade Agreements Act of 1979, provided:

(a) DETERMINATIONS REQUIRING ACTION.—If the President determines that action by the United States is appropriate—

- (1) to enforce the rights of the United States under any trade agreement; or
- (2) to respond to any act, policy, or practice of a foreign government or instrumentality that—
 - (A) is inconsistent with the provisions of, or otherwise denies any benefits to the United States under, any trade agreement, or
 - (B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;

the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 295 (1979) (codified as amended at 19 U.S.C. § 2411 (1988)).

25. *Id.*

26. As amended, section 301(d) provided: "For purposes of this section, the term "commerce" includes, but is not limited to, services associated with international trade, whether or not such services are related to specific products." Trade Agreements Act of 1979 § 901 (rewriting § 301(d)(1) of the Trade Act of 1974). This change made clear that services such as insurance, broadcasting, and banking are included in the scope of section 301. Archibald, *supra* note 9, at VII-3.

and conclusion of investigations by the United States Trade Representative (USTR) and for presidential action in response to the USTR's investigations.²⁷ These time limits assure prompt action on section 301 complaints by preventing the USTR from deferring action.

Congress made technical changes in section 301 in 1984,²⁸ but the Omnibus Trade and Competitiveness Act of 1988 embodied the most substantial amendments to section 301.²⁹ Most significantly, these amendments transferred the authority to act under section 301 to the USTR, and created a category of situations in which the USTR is required to act.³⁰ Section 301 now requires retaliation when the USTR determines that a foreign government is denying the United States' trade agreement benefits³¹ and when a foreign government's act, policy, or practice is unjustifiable and burdens or restricts U.S. commerce.³² Several

27. Trade Agreements Act of 1979, § 901 (rewriting §§ 301-02 of the Trade Act of 1974).

28. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 2948, 3002 (1984).

29. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107 (1988) (codified at 19 U.S.C. § 2411 (1988)). As of July 1992, the 1988 Act represents the most current rewriting of section 301 and is identical to the version at 19 U.S.C. § 2411 (1988).

30. 19 U.S.C. § 2411(a) (1988). Sections 301(a) and (b) authorize the USTR to determine whether action is warranted under both the mandatory and discretionary response provisions. The purpose of this shift in authority was to ensure that trade considerations alone controlled in section 301 decisions, thereby avoiding the possibility that trade benefits would be exchanged for foreign policy, defense, or other nontrade considerations. Fusae Nara, Note, *A Shift Toward Protectionism Under § 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law*, 19 HOFSTRA L. REV. 229, 242 (1990) (summarizing the debate regarding transfer of authority described in Judith H. Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1, 8 (1988) [hereinafter *Heart of the 1988 Trade Act*], also published in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 49, (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM]).

The extent to which the shift in authority achieves this goal is questionable, however, because the USTR "still serves at the pleasure of the president, and therefore is unlikely to take actions of which the president disapproves." *Heart of the 1988 Trade Act, supra*, at 57. See also Archibald, *supra* note 9, at VII-7 (suggesting that foreign policy issues and other considerations unrelated to trade may be raised during the interagency review process and affect the outcome of the inquiry).

31. 19 U.S.C. § 2411(a)(1)(A).

32. 19 U.S.C. § 2411(a)(1)(B).

In addition to this new mandatory response provision, the 1988 amendments made two other changes to section 301 that greatly enhanced the United States' ability to open foreign trade markets to its exports. The first change,

situations remain, however, in which section 301 does not mandate retaliation.³³

Currently, the president,³⁴ private parties,³⁵ and the USTR can initiate section 301 actions.³⁶ Private parties must indicate the product, service, or intellectual property right which the offensive practice affects,³⁷ describe what rights of the United States are being violated or denied, and identify the foreign country engaging in the offensive practice.³⁸ After the party files a petition with the USTR, the USTR has forty-five days to decide whether to initiate an investigation under section 302.³⁹ If the USTR determines that the section 301 complaint is actionable, an investigation begins.⁴⁰

While considering whether to investigate or recommend that the president retaliate, the USTR consults with the inter-agency section 301 committee.⁴¹ This committee is chaired by a representative of the USTR and consists of officials from other agencies concerned with the particular issue raised by a section

Super 301, requires the USTR to identify "priority practices" which create barriers for U.S. exports and "priority foreign countries" which employ such practices. 19 U.S.C. § 2420(a). Super 301 also establishes strict time limits for USTR investigations of priority practices, 19 U.S.C. § 2420(b), and for negotiation of agreements to eliminate the practices. 19 U.S.C. § 2411(c). The second change, Special 301, extends similar trade protection to intellectual property rights. 19 U.S.C. § 2242(a)(1)(A-B).

Super 301 and Special 301 are powerful weapons for the United States in its battle against foreign trade barriers, and have been the object of considerable criticism because they give the United States extraordinary authority to take unilateral action. *See, e.g.,* Hugh T. Patrick, *Commentary on Super 301 and Japan, in AGGRESSIVE UNILATERALISM, supra* note 30, at 242.

33. These situations include cases in which a GATT panel has ruled against the United States, the USTR is satisfied with the other nation's response to the U.S. complaint, or U.S. action would do more harm than good to the U.S. economy or national security. 19 U.S.C. § 2411(a)(2) (1988).

34. 19 U.S.C. § 2411(a)(1).

35. 19 U.S.C. § 2412(a)(1).

36. 19 U.S.C. § 2412(b).

37. 15 C.F.R. § 2006.1(a)(1-5) (1988).

38. Section 301 actions are limited to responding to the acts of a foreign country. 19 U.S.C. § 2411(a). It therefore provides no remedy for the unfair trade practices of private foreign actors. *See Jones, supra* note 2, at 455. "Thus, private actions by foreigners such as collusion or predatory pricing are not actionable under section 301." *Id.*

39. 19 U.S.C. § 2412(a)(2) (1988). Section 302 is the investigatory provision accompanying section 301 and is codified at 19 U.S.C. § 2412.

40. *Id.*

41. 15 C.F.R. § 2002.3 (1977). "The committee considers such issues as whether to initiate dispute settlement, what legal arguments to make, whether to negotiate a solution and, if so, on what basis, and whether to recommend retaliation to the President." Archibald, *supra* note 9, at VII-7.

301 complaint.⁴² Typically, representatives from the Departments of State, Commerce, Treasury, Agriculture and Labor attend section 301 committee meetings.⁴³ The 301 committee reviews complaints received under section 301 and assists the USTR in deciding whether a complaint is actionable and warrants an investigation.⁴⁴ If the USTR initiates an investigation, the 301 committee holds public hearings about the complaints.⁴⁵

When the USTR, upon recommendation of the 301 committee, determines that a foreign trade practice is actionable, the USTR must also request bilateral consultations with the offending government.⁴⁶ These negotiations may lead to a successful resolution of the problem. In addition, the United States may refer the matter to GATT for consideration, and GATT panel consideration of the issue may facilitate an acceptable agreement between the U.S. and the offending country.⁴⁷ If the 301 committee approves a bilateral agreement for removal of trade barriers reached during the section 302 investigation,⁴⁸ that agreement may cause the USTR to terminate the section 301 investigation.⁴⁹

If these attempts to negotiate an acceptable agreement fail, the interagency committee may recommend that the USTR take further action.⁵⁰ The United States may then retaliate under

42. 15 C.F.R. § 2002.3. The USTR invites agencies to join the 301 committee and, in practice, the same agencies participate in all section 301 cases, although they may be represented by different officials. Archibald, *supra* note 9, at VII-7.

The section 301 committee is a staff level committee, 15 C.F.R. § 2002.3(a)(3), and may refer matters to higher level committees such as the Trade Policy Staff Committee. 15 C.F.R. § 2002.2 (1977). "If the [section 301] committee is unable to reach a consensus on any given issue, the question must be referred to a higher level interagency committee for resolution. Occasionally, differences must be resolved at the Cabinet level." Archibald, *supra* note 9, at VII-7.

43. Archibald, *supra* note 9, at VII-7.

44. *Id.* at VII-6.

45. 15 C.F.R. § 2002.3(b)(2). The 301 committee's public hearings are not the only opportunities for public comment on section 301 actions. Upon deciding to initiate an investigation, the USTR publishes a notice and request for public comment in the Federal Register. 19 U.S.C. § 2412(a)(4).

46. 19 U.S.C. § 2413(a)(1).

47. *See, e.g.*, 46 Fed. Reg. 1388 (1981) (announcing that the United States's section 301 investigation of Japan's tobacco trade policies was terminated while a GATT panel was considering the matter).

48. The USTR consults with the 301 committee to decide whether to negotiate a solution with the offending country, and if so, on what basis to make such an agreement. Archibald, *supra* note 9, at VII-7.

49. 19 U.S.C. § 2417.

50. 19 U.S.C. § 2414(a)(3).

section 301.⁵¹ Because the threat of retaliation is usually sufficient to compel the foreign government to remove its trade barriers,⁵² especially in those cases in which U.S. law mandates retaliation,⁵³ the United States rarely retaliates under section 301.⁵⁴

The USTR has broad discretion in determining its means of section 301 retaliation. Section 301 authorizes the USTR to retaliate by suspending or withdrawing trade agreement benefits, or by imposing duties or restrictions on goods and services from the offending country.⁵⁵ Moreover, the USTR may retaliate by discriminating against an offending country's goods and services "without regard to whether or not such goods . . . were involved in the act, policy, or practice" involved in the section 301 action.⁵⁶ Such retaliation, however, does not compensate the private petitioner allegedly damaged by the offensive trade practices.⁵⁷ Instead, the value of section 301 to the private petitioner stems from its threat of retaliation, which induces the for-

51. 19 U.S.C. § 2411(b). If the foreign trade measure at issue is one for which section 301 requires mandatory action, the USTR has no discretion and must retaliate. 19 U.S.C. § 2411(a)(1).

52. Section 301's threat of retaliation has been called "the economic equivalent of John Foster Dulles' nuclear brinkmanship—a tactic of massive retaliation that taunts trading partners to call America's bluff. The prospect of punitive sanctions is usually enough to wring concessions from the other side." Peter Schmeisser, *Pushing Cigarettes Overseas*, N.Y. TIMES, July 10, 1988, § 6 (Magazine) at 16, 18 [hereinafter *Pushing Cigarettes Overseas*].

53. See *supra* notes 30-33 and accompanying text.

54. For a summary of U.S. retaliation resulting from section 301 actions, see Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, Annex 2, in *IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* 9, 37 (Michael Hart & Debra Steger eds., 1992). Hudec summarizes nine instances prior to 1990 where the United States retaliated and notes that, in some of those cases, the United States' legal authority to retaliate stemmed from provisions other than section 301. *Id.* at 4.

55. 19 U.S.C. § 2411(c)(1)(11).

56. 19 U.S.C. § 2411(c)(3)(B).

57. Although private petitioners do not recover any damages as a result of section 301 retaliation, U.S. action under this provision provides substantial benefits to them. Indeed, it is a remedy clearly intended to help U.S. exporters and is an effective tool for expanding markets for U.S. industries by breaking down barriers to U.S. exports. Jones, *supra* note 2, at 453. Section 301 may in fact provide a more powerful remedy than antidumping and countervailing duty laws, if commentators who claim that section 301 is not subject to judicial review are correct. *Id.* (quoting Judith H. Bello & Alan F. Holmer, *Section 301 Recent Developments and Proposed Amendments*, 35 FED. B. NEWS & J. 68 (1988) [hereinafter *Section 301 Recent Developments*]). For a discussion of potential review of section 301 fairness determinations, see Erwin P. Eichmann & Gary Horlick, *Political Questions in International Trade: Judicial Review of Section 301?*, 10 MICH. J. INT'L L. 735 (1989).

eign government to eliminate its objectionable trading practice.⁵⁸

2. Use of Section 301 to Promote Tobacco Exports

The threat of section 301 retaliation has been effective in eliminating barriers to the export of U.S. tobacco products. The United States has invoked section 301 to promote tobacco exports to Taiwan, South Korea, and Thailand, and twice to promote tobacco exports to Japan. In each instance, the United States persuaded the country concerned to eliminate the questionable trade practices, thus paving the way for increased tobacco exports to these newly-opened markets.⁵⁹ The resulting increases in tobacco exports have helped U.S. tobacco companies to offset the decline in domestic tobacco consumption.⁶⁰

The United States first used section 301 to promote tobacco exports in 1979. Two tobacco trade associations filed petitions with the USTR alleging that Japan was employing restrictive trade practices. The Cigar Association of America (CAA) filed the first petition on March 14, 1979.⁶¹ The CAA's complaint alleged that Japan's tobacco monopoly⁶² employed unreasonable import restrictions and trade practices which burdened U.S. commerce in cigars.⁶³ Specifically, the CAA accused Japan's tobacco monopoly of setting unreasonably high retail prices for cigars.⁶⁴ Furthermore, the CAA complained of Japan's excessive restrictions on cigar advertising.⁶⁵ If Japan were to eliminate these restrictions, the CAA alleged, U.S. producers would sell

58. See Jones, *supra* note 2, at 454 (arguing that "the *threatened* use of section 301 to block access to U.S. markets is much more effective than *actual* retaliation") (emphasis in original) (citing *Section 301 Recent Developments*, *supra* note 57, at 70).

59. See *supra* note 12 for a description of how tobacco exports to Asian countries have increased since the United States first invoked section 301.

60. See *supra* note 1 for a description of the decline in U.S. domestic tobacco consumption.

61. 44 Fed. Reg. 19,083-88 (1979).

62. The term "foreign country" in section 301 includes foreign instrumentalities, such as Japan's tobacco monopoly. 19 U.S.C. § 2411(d)(4)(B)(7) (1988).

63. 44 Fed. Reg. 19,083.

64. *Id.*

65. *Id.* at 19,084. The CAA complained of the following restrictions on cigar advertising and marketing: (1) an unreasonably long test market period for new products; (2) a ban on all press releases announcing the introductions of new cigars, except those of the Japanese tobacco monopoly; (3) advertising permitted only to announce a price change; and (4) a regulation limiting access to information about imported cigars by permitting publication of such information only in the monopoly's catalog. *Id.*

many more cigars in Japan.⁶⁶

The Associated Tobacco Manufacturers (ATM) filed the second petition on October 22, 1979,⁶⁷ alleging that Japan's tobacco monopoly maintained restrictions on imported pipe tobacco similar to those on cigars.⁶⁸ The ATM criticized the Japanese tobacco monopoly for tightly restricting advertising of U.S. pipe tobacco, while merely "exercising restraint" in the advertising of Japanese tobacco.⁶⁹

Because these two complaints were similar, the USTR consolidated them into one investigation.⁷⁰ At the United States' request, a GATT panel was formed to consider the matter.⁷¹ Bilateral discussions led to an agreement before the GATT panel completed its examination of the dispute, and the U.S. terminated its section 301 investigation on January 6, 1981.⁷² The agreement reduced tariffs and liberalized the other Japanese restrictions on importation and distribution of imported cigars and pipe tobacco.⁷³

In 1985, the United States again invoked section 301 in response to Japan's trade restrictions on tobacco. On September 16, the USTR initiated an investigation into Japan's allegedly restrictive policies regarding various tobacco products.⁷⁴ The complaint asserted that, while Japan had taken steps to liberalize restrictive trade policies, it continued to impose high tariffs, prohibit foreign firms from manufacturing tobacco products in Japan,⁷⁵ and restrict distribution of U.S. tobacco products.⁷⁶

66. *Id.*

67. 44 Fed. Reg. 64,938-40 (1979).

68. *Id.* See *supra* note 65 for a description of the alleged restrictions on advertising and marketing of cigars.

69. 44 Fed. Reg. 64,939. The ATM asserted that this disparate treatment resulted in imported U.S. pipe tobacco brands receiving very limited public exposure. *Id.*

Japanese restraint regarding advertising was effective, even though not required by law. See, e.g., Peter Schmeisser, *When Health and Trade Policies Clash*, NAT'L J., Apr. 16, 1988, at 1016, 1017 [hereinafter *When Health and Trade Policies Clash*]. Japanese producers observed an informal agreement with government health authorities regarding advertising. *Id.* Under that agreement, Japan's cigarette manufacturers agreed not to advertise cigarettes during television movies, sports broadcasts, and music video shows that were popular among women and teenagers. *Pushing Cigarettes Overseas*, *supra* note 52, at 18-19.

70. 46 Fed. Reg. 1388-89 (1981).

71. *Id.* at 1389.

72. *Id.*

73. *Id.*

74. 50 Fed. Reg. 37,609 (1985).

75. The tobacco industry complained that there was no way for foreigners to circumvent tariff and non-tariff barriers employed by the Japanese tobacco

Negotiations produced an agreement that Japan would remove the barriers and on October 6, 1986, President Reagan directed the USTR to suspend its investigation.⁷⁷

The United States next invoked section 301 against Taiwan. In October of 1985, Taiwan had agreed to provide greater access to its tobacco market, but a year later President Reagan determined that Taiwan had not met its obligations under that agreement.⁷⁸ As a result, the president announced on October 30, 1986, that he planned to implement proportional countermeasures until Taiwan removed its restrictions.⁷⁹ Taiwan quickly eliminated its restrictive policies, and the United States terminated its section 301 proceeding on December 5, 1986.⁸⁰ In the agreement, Taiwan gave the United States the right to conduct a wide range of promotional and advertising activities for tobacco

monopoly because Japan barred manufacturing investment there by non-Japanese. *Unfair Trade Practices: U.S. Settles Tobacco Dispute with Japan, No Deal Reached with Brazil on Informatics*, 3 Int'l Trade Rep. (BNA) 1215 (Oct. 8, 1986) [hereinafter *U.S. Settles Tobacco Dispute with Japan*].

Japan's prohibition against investment by foreign tobacco firms may have been targeted in this dispute because U.S. tobacco firms consider such investment to be an essential step in their attempts to gain a strong foothold in Asian tobacco markets. Investment in foreign firms was a factor in successfully expanding tobacco markets in Latin America in the 1960s. See *When Health and Trade Policies Clash*, *supra* note 69, at 1016.

[The U.S. tobacco industry] "conquered the Latin market in three steps." After first breaking down the barriers that restricted the sale of foreign brands, U.S. firms saturated Latin consumers with advertising. Finally, . . . after carving out a niche in the market, the U.S. companies "began to buy out and take over most of the national cigarette firms in Latin America."

Id. (quoting Philip L. Shepherd of Florida International University).

76. 50 Fed. Reg. 37,609 (1985).

77. 51 Fed. Reg. 35,995-96 (1986). In his memorandum to the USTR, President Reagan specifically noted that the agreement negotiated "should accomplish our goal of obtaining increased access for U.S. firms to Japan's cigarette market." *Id.* at 35,996.

Under the agreement, Japan suspended its tariff on foreign tobacco products, reduced the approval time for cigarette price changes, and removed delays and other impediments to distribution of foreign tobacco products. *U.S. Settles Tobacco Dispute with Japan*, *supra* note 75, at 1215.

78. Memorandum for the United States Trade Representative, Oct. 27, 1986, 51 Fed. Reg. 39,639 (1986). The 1985 agreement with Taiwan involved beer and wine, as well as tobacco products. Under that arrangement, Taiwan agreed to: (1) lift its import ban on beer; (2) allow the sale of U.S. products at all retail outlets where Taiwanese products were sold; (3) refrain from marking up retail prices of imported products at a rate higher than domestic products; and (4) allow market forces to determine how much of these products it would import. *Id.*

79. *Id.*

80. 51 Fed. Reg. 44,958 (1986).

products and guaranteed U.S. producers direct access to all of Taiwan's retail outlets.⁸¹

The next country against which the U.S. invoked section 301 regarding tobacco trade policies was South Korea. On January 22, 1988, the Cigarette Exporters Association (CEA) filed a section 301 complaint against South Korea, alleging that the Korean tobacco monopoly maintained practices that restricted the export of U.S. cigarettes to Korea.⁸² The CEA claimed that a high tariff and discriminatory retail pricing caused imported cigarettes to be sold at unreasonably high prices.⁸³ The CEA also complained that the monopoly maintained restrictions on the distribution and brand mix of imported cigarettes, and prohibited non-Korean firms from investing in the Korean tobacco industry.⁸⁴ The USTR initiated an investigation on February 16, 1988.⁸⁵ Again, the section 301 action induced a quick agreement which provided foreign producers nondiscriminatory access to South Korea's tobacco market.⁸⁶ The agreement permitted foreign cigarette firms to advertise in South Korean magazines and to conduct sales promotions, such as sponsored events.⁸⁷ Accordingly, the United States terminated its section 301 action on May 31, 1988.⁸⁸

Most recently, the United States initiated a 301 action to address Thailand's restrictions on tobacco trade. On April 10, 1989, the CEA filed a petition with the USTR, complaining that the Thai Tobacco Monopoly effectively banned imports.⁸⁹ The petition further stated that this ban—combined with Thailand's high tariffs, discriminatory internal taxes, and distribution re-

81. *Unfair Trade Practices: U.S. Scraps Retaliation Plans After Taiwan Agrees to Import U.S. Beer, Wine, Cigarettes*, 3 Int'l Trade Rep. (BNA) 1484 (Dec. 10, 1986).

82. 53 Fed. Reg. 4926-27 (1988).

83. *Id.*

84. *Id.*

85. *Id.*

86. 53 Fed. Reg. 20,406 (1988).

87. *Unfair Trade Practices: U.S., South Korea Settle Section 301 Case Against Import Barriers to U.S. Cigarettes*, 5 Int'l Trade Rep. (BNA) 684 (May 11, 1988). Advertising and promotions by foreign cigarette firms were previously banned in South Korea. *Id.*

88. 53 Fed. Reg. 20,406.

89. 54 Fed. Reg. 23,724-25 (1989). Thailand allowed only licensed entities to import cigarettes. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37th Supp. 200, ¶ 6 (1991) (GATT panel report adopted Nov. 7, 1990), reprinted in 30 INT'L LEG. MAT. 1122 (1991) [hereinafter *Panel Report on Thai Restrictions*]. Licenses had been granted solely to the Thai Tobacco Monopoly, which imported cigarettes on only three occasions. *Id.*

strictions—denied U.S. firms fair access to Thai cigarette markets.⁹⁰ The USTR initiated an investigation into Thailand's practices on May 25, 1989.⁹¹

After unsuccessful attempts to negotiate an acceptable solution, the United States requested a GATT panel determination.⁹² The panel concluded that Thailand's quantitative restrictions on imported cigarettes were inconsistent with its obligations under the GATT.⁹³ After the panel's determination, Thailand eliminated its ban on imported cigarettes and agreed to grant imported tobacco products national, nondiscriminatory treatment.⁹⁴ In response, the United States terminated its section 301 procedure on November 23, 1990.⁹⁵ Although Thailand opened its market to imports, it then imposed a stiff ban on cigarette advertising.⁹⁶

The section 301 actions against these Asian countries illustrate that the United States has consistently used its trade laws to help U.S. tobacco producers increase their exports. At the same time, the United States has discouraged the use of these same products at home and abroad.

B. ANTISMOKING EFFORTS

The Department of Health and Human Services (HHS) began addressing the health risks associated with smoking in the 1960s and has since attempted to inhibit tobacco promotion and decrease domestic tobacco consumption. Similarly, the U.S. government participates in antismoking campaigns designed to discourage tobacco use worldwide.

Over the past thirty years, the United States has imple-

90. 54 Fed. Reg. 23,724-25 (1989).

91. *Id.*

92. The United States requested consultations with Thailand under GATT Article XXIII:1 on December 22, 1989. *Panel Report on Thai Restrictions*, *supra* note 89, ¶ 1.

93. *Id.* ¶ 87. In contrast, the panel found that Thailand's internal taxes did not violate its GATT obligations. *Id.*

94. 55 Fed. Reg. 49,724-25 (1990). "The decision was seen as a victory for U.S. cigarette producers trying to penetrate one of the last major Asian markets still closed to them." *Thailand Gives in to U.S. Pressure to Open Market*, *Reuter Bus. Rep.*, Oct. 9, 1990, available in LEXIS, Nexis Library, OMNI File.

95. 55 Fed. Reg. 49,724.

96. Pete Engardio, *Asia: A New Front in the War on Smoking*, *BUS. WK.*, Feb. 25, 1991, at 66. See also Morton Mintz, *Tobacco Roads: Delivering Death to the Third World*, *THE PROGRESSIVE*, May 24, 1991, at 24, 27 (describing the United States' success in the GATT complaint as a Pyrrhic victory because the Thai government responded by imposing high import duties, cumbersome customs clearance procedures, and a stiff ban on cigarette advertising).

mented specific measures to discourage domestic tobacco use. In 1964, the Surgeon General released an influential report warning of the health risks associated with cigarette smoking.⁹⁷ Since then, Congress has enacted various legislation intended to discourage tobacco use. One year after the Surgeon General's report, Congress required all cigarette packages sold domestically to display conspicuously a warning disclosing health risks associated with smoking.⁹⁸ Significantly, this 1965 Act and its successors have not applied to exports.⁹⁹ In 1984, Congress expanded the 1965 Act to require that health warnings appear on cigarette advertisements;¹⁰⁰ Congress had already banned all cigarette advertisements from television and radio, effective January 1, 1971.¹⁰¹

In addition to restricting domestic cigarette promotion, the U.S. government has enacted other legislation designed to decrease domestic tobacco consumption. For example, in 1988, the Federal Aviation Administration announced a ban on smoking on all domestic airline flights less than two hours in duration.¹⁰² This ban has since been expanded to prohibit smoking on virtu-

97. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964). The report concluded that cigarette smoking is a factor in cancer of the mouth, lungs, esophagus and urinary bladder. SUMMARY OF THE SURGEON GENERAL'S ADVISORY COMMITTEE ON SMOKING AND HEALTH (1964), *quoted in* Jones, *supra* note 2, at 441 n.15. The report also announced that smoking contributes to chronic bronchitis, pulmonary emphysema, bronchopulmonary disease, cardiovascular disease, and low infant birth weight in babies whose mothers smoke. *Id.*

98. The 1965 Act required the following warning to be placed clearly and conspicuously on all cigarette packages: "Warning: The Surgeon General Has Determined that Cigarette Smoking is Hazardous to Your Health." Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (1988)). Congress has since amended the labeling requirement, ordering that labels include one of the following stronger warnings: SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy; SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Risks to Your Health; SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight; SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide. 15 U.S.C. § 1333 (1988).

99. Federal Cigarette Labeling and Advertising Act § 4. This remains in the law's current version at 15 U.S.C. § 1333(a)(1) (1988).

100. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201 (1984) (codified at 15 U.S.C. § 1333 (1988)).

101. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (1970) (codified as amended at 15 U.S.C. § 1335 (1988)).

102. 52 Fed. Reg. 12,358 (1988).

ally all domestic flights.¹⁰³ Moreover, Congress has required the Secretary of Health and Human Services to establish and implement a comprehensive educational program to inform the public about the health dangers of smoking cigarettes.¹⁰⁴ Antismoking efforts such as these have greatly contributed to the decline¹⁰⁵ in U.S. tobacco consumption.¹⁰⁶

The U.S. government has also taken steps to discourage smoking worldwide. For example, the United States is an active member of the World Health Organization (WHO), contributing twenty-five percent of its budget.¹⁰⁷ Through its membership in the WHO, the United States participates in a global program to discourage tobacco use and increase awareness of the health perils of smoking.¹⁰⁸ The WHO's Expert Committee on Smoking Control Strategies in Developing Countries recommends tactics which developing countries can employ to reduce smoking.¹⁰⁹ The WHO has also recently published a catalog of the antismoking legislation adopted by various countries which will assist governments wishing to curtail domestic tobacco use.¹¹⁰ Furthermore, the U.S. Overseas Private Investment Corporation (OPIC), an organization sponsored by the U.S. government, encourages and facilitates U.S. investment in developing countries by providing loans and political risk guarantee insurance.¹¹¹ In recognition of the adverse health consequences of smoking,¹¹² OPIC has consistently denied U.S. tobacco companies' requests for investment assistance.¹¹³

The U.S. government discourages smoking domestically through legislation, and internationally by sponsoring organizations whose agendas include deterring tobacco use. These antismoking activities conflict directly with the United States' aggressive use of section 301 to open foreign markets for exports of U.S. tobacco products.

103. 49 U.S.C. § 1374(d)(1)(A) (Supp. 1991).

104. 15 U.S.C. § 1341 (1988).

105. See *supra* note 1 (describing the decline in U.S. tobacco consumption).

106. Jones, *supra* note 2, at 441.

107. GAO REPORT, *supra* note 5, at 36.

108. *Id.*

109. *Panel Report on Thai Restrictions*, *supra* note 89, ¶ 56.

110. WORLD HEALTH ORGANIZATION, LEGISLATIVE RESPONSES TO TOBACCO USE (1991). This book is "a most valuable tool for exchange of information on legislative strategies to control promotion and use of tobacco." Ruth Roemer, *Foreword to id.*, at ix. As Roemer points out, "[l]egislation is one of the strongest weapons to combat the world smoking epidemic." *Id.*

111. GAO REPORT, *supra* note 5, at 36.

112. *Id.*

113. *Id.*

II. THE DICHOTOMY BETWEEN U.S. POLICIES PROMOTING TOBACCO EXPORTS AND DISCOURAGING SMOKING

The inconsistency between U.S. tobacco export and antismoking programs has diminished both the U.S. government's reputation and the effectiveness of both endeavors. For these reasons, the dichotomy must be addressed. A variety of prominent critics have attacked the U.S. government for actively promoting tobacco exports. For example, C. Everett Koop, the former Surgeon General, compared U.S. tobacco policy to the export of cocaine to the United States by foreign countries and declared that it is the "height of hypocrisy for the United States to export tobacco."¹¹⁴ The American Medical Association has also derided U.S. trade policy, stating that it "perpetuates the problem of smoking by trying to develop overseas a market that is drying up at home."¹¹⁵

Trade and health officials work at cross purposes,¹¹⁶ decreasing the effectiveness of both tobacco export promotion and antismoking efforts. Increasing U.S. tobacco exports has a destructive effect on the U.S.-sponsored worldwide antismoking campaign. Similarly, to the extent that these campaigns are successful, they undermine U.S. export promotion by shrinking foreign tobacco markets.

The conflict between tobacco export and antismoking activities results from the independent formulation of trade and health policies.¹¹⁷ U.S. trade officials develop trade policy without considering health issues and absent HHS input. Likewise, the United States pursues antismoking campaigns without regard to their impact on U.S. tobacco exports.¹¹⁸ U.S. trade and health officials have conflicting goals with respect to the promotion of U.S. tobacco exports and, accordingly, develop divergent policies.

U.S. trade officials view tobacco exports strictly as a matter of international trade, and therefore believe health concerns are

114. Barbara Rudolph, *Fuming over a Hazardous Export*, TIME, Oct. 2, 1989, at 82.

115. *A.M.A. Assails Nation's Export Policy on Tobacco*, N.Y. TIMES, June 27, 1990, at A1, A12.

116. GAO REPORT, *supra* note 5, at 5.

117. *Id.* The lack of communication between the two policy formulating entities is responsible for the resulting incoherence in U.S. policy. *Trade Policy: Bush Administration Export Policies at Odds with Public Health Goals*, GAO Report Says, 7 Int'l Trade Rep. (BNA) 726 (May 23, 1991).

118. GAO REPORT, *supra* note 5, at 35-37.

irrelevant.¹¹⁹ They claim that their efforts to expand tobacco exports to Asia merely ensure that U.S. exporters are able to sell tobacco products in existing Asian markets on the same terms as their foreign domestic competitors.¹²⁰ Furthermore, the USTR asserts that U.S. tobacco companies will accept willingly any restrictions which foreign governments place on the marketing of both imported and domestic tobacco products.¹²¹ As long as tobacco products are being sold in foreign markets, these officials argue, there is no reason to exclude foreign exports.¹²²

The actions of U.S. trade officials and tobacco exporters, however, do not reflect their stated intentions. U.S. tobacco exporters are not content with gaining a portion of the existing Asian tobacco markets and seem unwilling to accept foreign governments' nondiscriminatory regulations on tobacco products. Rather, U.S. companies seek the USTR's assistance to compel foreign governments to change their laws governing cigarette marketing. By conducting negotiations under section 301, the USTR has helped U.S. tobacco companies secure the right to employ their sophisticated advertising and promotional techniques to expand Asian tobacco markets.

The USTR's assistance to U.S. tobacco exporters in securing advertising rights in Asian countries has been an important factor in increasing cigarette sales in these markets. U.S. tobacco exporters have gained the right to advertise their products in Japan, Taiwan, and South Korea. Prior to the section 301 actions against Japan, Japanese tobacco producers censored their own advertising.¹²³ After the actions, the Japanese abandoned their self-imposed advertising restraint and began cigarette advertising campaigns that rival those of U.S. producers.¹²⁴ Simi-

119. *Pushing Cigarettes Overseas*, *supra* note 52, at 18. "We are concerned about trade policy, period. . . . [W]e are not telling people to smoke, we are simply gaining access to an existing market." *Id.* (statement of Catherine R. Field, USTR Assistant General Counsel).

120. *Id.* "All we wanted was a fair crack at their markets. Just the chance to compete on equal footing with their domestic brands; nothing more, nothing less." *Id.* (USTR negotiator's description of the Thailand tobacco dispute).

121. *Id.* at 22. "If they want to print strict warnings, prohibit sale to minors, or possibly ban smoking altogether, then we'll be the first to fall in line." *Id.* (statement of Peter F. Allgeier, Assistant United States Trade Representative).

122. A statement by the USTR to the Government Accounting Office epitomizes the attitude of trade officials: "As long as cigarettes remain a legal commodity in the United States and abroad, there is no legal basis to deny cigarette manufacturers assistance in gaining market access." Mintz, *supra* note 96, at 24.

123. *See supra* note 69.

124. *When Health and Trade Policies Clash*, *supra* note 69, at 1017. Be-

larly, South Korea and Taiwan had banned cigarette advertising almost completely before the United States employed section 301 to open their cigarette markets.¹²⁵ As a result of the agreements the USTR negotiated during the respective section 301 actions, Taiwan and South Korea changed their advertising laws to allow foreign producers to advertise their products.¹²⁶

The ability to advertise their cigarettes in foreign markets has enabled U.S. tobacco exporters to increase their sales by increasing their market share and by expanding overall demand. When U.S. tobacco producers enter a foreign market, they employ marketing techniques far more sophisticated than those of the foreign country's domestic firms.¹²⁷ Consequently, U.S. exporters capture a share of the existing tobacco market. As domestic firms develop advanced advertising techniques to rival those of U.S. tobacco companies, the growing volume and effectiveness of combined cigarette advertising attracts new smokers, increasing overall demand for cigarettes.¹²⁸ U.S. tobacco companies allegedly have also sought to develop demand in newer market segments by using advertising and promotional campaigns to entice women and teenagers to begin smoking.¹²⁹

tween 1986 and 1988, the number of advertisements for cigarettes on Japanese television doubled. *Id.*

125. *Pushing Cigarettes Overseas*, *supra* note 52, at 18.

126. *Id.* at 20.

127. See Mike Levin, *U.S. Tobacco Firms Push Eagerly into Asian Market*, *MARKETING NEWS*, Jan. 25, 1991, at 2. Marketing industry experts identify sophisticated marketing techniques as the main reason for U.S. tobacco producers' success in Asian markets. *Id.*

In Japan, for example, Japanese producers' lack of marketing expertise was one reason that U.S. brands succeeded immediately upon entering the Japanese market. Masayoshi Kanabayashi, *In 'Tobacco Smoker's Paradise' of Japan, U.S. Cigarettes Are Epitome of High Style*, *WALL ST. J.*, Sept. 23, 1991, at B1.

128. For example, cigarette sales in Japan reached record levels by rising 3.3% in the year ending March 31, 1991. Kanabayashi, *supra* note 127, at B1.

129. See, e.g., Michael Di Cicco, *Asian Group Fights U.S. Tobacco Blitz*, *UPI*, Jan. 11, 1991, available in LEXIS, Nexis Library, OMNI File. U.S. tobacco firms categorically denied allegations that they direct marketing efforts at women and children. *Id.* There are, however, specific examples of U.S. marketing directed at these groups, and smoking has increased among women and teenagers. *Id.* For example, the Asia Pacific Association for the Control of Tobacco (APACT) asserts that U.S. companies have redoubled their marketing efforts directed at women, using advertising campaigns for brands such as Virginia Slims, which are intended to appeal to women. *Id.* APACT also criticized U.S. promotions in which smokers could exchange empty cigarette packages for free admission to concerts and discos as being specifically directed at teenagers. *Id.* R.J. Reynolds cancelled three such concerts amid a storm of protest. Levin, *supra* note 127, at 14.

Japanese tobacco marketers have also begun to target women and teenag-

Critics argue that helping companies market cigarettes abroad under standards less stringent than those that apply in the United States is hypocritical¹³⁰ and sends a message "that Asian lungs are more expendable than American ones."¹³¹ Furthermore, the United States' attempts to relax foreign countries' laws restricting cigarette advertising conflict with its stated intent to help nations that seek to adopt antismoking regulations.¹³² In fact, such attempts sabotage U.S.-sponsored antismoking campaigns designed to help other countries develop antismoking strategies.

The independent development of tobacco export and antismoking policies emerges from the conflicting goals of trade and health officials. Trade policy officials enthusiastically promote tobacco exports, without regard to the impact this has on U.S. antismoking programs. Similarly, U.S. health officials ignore the effect that antismoking programs have on promoting U.S. tobacco exports. Communication among trade and health officials could reconcile this conflict in U.S. policy by integrating health concerns into the formulation of tobacco export policy. Such communication will foster a coherent U.S. tobacco policy capable of addressing both trade and health interests.

III. RESOLVING THE CONFLICT BETWEEN U.S. TRADE AND HEALTH POLICIES

A. THE CIGARETTE EXPORT REFORM ACT

Recent congressional initiatives suggest that Congress has

ers, introducing new brands such as "Dean" (named for James Dean) and "Misty." *When Health and Trade Policies Clash*, *supra* note 69, at 1017.

130. See *supra* notes 115-16, and accompanying text.

131. *When Health and Trade Policies Clash*, *supra* note 69, at 1017 (quoting Rep. Chester Atkins, Foreign Affairs Subcommittee on Asian and Pacific Affairs). See, e.g., *Trade Policy: Rep. Waxman Criticizes Sullivan's Decisions to Block HHS Testimony on Tobacco Exports*, 7 Int'l Trade Rep. (BNA) 725 (May 23, 1990). Assistant Secretary of Health and Human Services Dr. James Mason stated that it is unconscionable for cigarette producers to be "peddling their poison abroad, particularly because their main targets are less-developed countries." James Mason, Address to the Seventh World Health Conference on Smoking and Health (Apr. 5, 1990), *quoted in* Mintz, *supra* note 96, at 25. Mason accused U.S. tobacco exporters of playing "our free-trade laws and export policies like a Stradivarius violin, pressuring our trade-promotion agencies to keep open — and even *force* open in some cases — other nations' markets for their products." *Id.*

132. See, e.g., Irwin Arieff, *Sullivan Denies U.S. Policy Conflict Over Tobacco Exports*, Reuters, May 24, 1990, available in LEXIS, Nexis Library, OMNI File. (HHS Secretary Sullivan offered U.S. assistance to nations that wish to adopt nondiscriminatory antismoking measures.)

recognized the necessity and feasibility of integrating health concerns into tobacco export strategy. In contrast, the Administration has ignored this dichotomy in U.S. policy, repeatedly suppressing HHS efforts to inject health concerns into trade policy formulation.¹³³

In 1990, the United States General Accounting Office (GAO), at Congress's direction, undertook a comprehensive study of trade and health considerations relevant to tobacco export policy formulation.¹³⁴ The report concluded that "a policy level conflict exists between U.S. trade goals and health policy objectives in regard to the export of tobacco products."¹³⁵ The GAO report outlined three possible courses of congressional action. If Congress believes that trade considerations should be foremost in the development of tobacco export policy, the GAO stated, it should maintain the status quo by continuing to employ section 301 to overcome barriers to tobacco exports while promoting awareness of the health risks associated with using those products.¹³⁶ Under this course of action, U.S. trade policy would continue to develop without consideration of the health consequences of tobacco use, and without HHS's involvement in the

133. For example, in February 1987, HHS announced a meeting of the Interagency Committee on Smoking and Health. The scheduled topic was "International Health Implications of U.S. Tobacco Trade Policy." *Pushing Cigarettes Overseas*, *supra* note 52, at 20. A week before the meeting, the USTR instructed HHS to change the topic. Apart from the absence of representatives from the Departments of State and Commerce, the meeting proceeded as scheduled. *Id.* at 21. This attempt to silence HHS demonstrates how far the Administration is willing to go to avoid acknowledging the conflict between U.S. tobacco export and health policies. *Id.*

In another episode, shortly after Mason's emphatic outcry against tobacco exports, *see supra* note 131, he was invited to testify at a congressional hearing addressing the health effects of U.S. tobacco exports. Mintz, *supra* note 96, at 26. His attendance was cancelled just prior to the hearing, and HHS Secretary Dr. Louis Sullivan later explained that the real issue in the debate over tobacco exports was equitable treatment for U.S. products, not health policy considerations. *Id.* Because these statements conflict so drastically with prior HHS speeches decrying U.S. tobacco export policy, this abrupt shift probably resulted from pressure by the Administration to have HHS and the USTR present a united front.

134. GAO REPORT, *supra* note 5, at 1. The Representatives requesting the report were Henry Waxman (Chairman, Subcommittee on Health and Environment, Committee on Energy and Commerce), Pete Stark (Chairman, Subcommittee on Health, Committee on Ways and Means), Chet Atkins, Michael A. Andrews, Jim Bates, Barbara Boxer, Richard Durbin, James Hansen, Mel Levine, Mike Synar, Robert Torricelli, and Pete Visklosky.

135. *Id.*

136. *Id.* at 37.

section 301 committee.¹³⁷ If Congress determines that health considerations should predominate, however, it should make HHS responsible for making export policy decisions regarding tobacco products.¹³⁸ Finally, if Congress believes that neither trade nor health concerns alone should dictate tobacco export policy, it should include an HHS representative on the section 301 committee.¹³⁹ Recent initiatives suggest that Congress will choose the third option.

Members of the House of Representatives have introduced the Cigarette Export Reform Act, which proposes that the interagency section 301 decision-making process regarding tobacco exports integrate both health and trade interests.¹⁴⁰ To this end, the Act provides that an HHS representative sit on section 301 committees considering barriers to U.S. tobacco exports.¹⁴¹ In addition to altering the composition of the 301 committee, the Cigarette Export Reform Act would forbid the U.S. government from seeking to change a foreign country's laws pertaining to the sale, distribution, taxation, or advertisement of tobacco if that country imposes the same conditions on all brands sold domestically.¹⁴² The proposed legislation's restructuring of the

137. *Id.* at 5.

138. *Id.* at 37.

139. *Id.*

140. H.R. 2781, 102d Cong., 1st Sess. (1991).

141. The Cigarette Export Reform Act provides:

The Section 301 Committee established by section 2002.3 of title 15, Code of Federal Regulations, as in effect on March 1, 1991, or any other interagency committee established to assist the United States Trade Representative in performing the functions vested in the Trade Representative under section 301 of the Trade Act of 1974, shall include, with respect to any case under such section 301 that involves cigarettes, little cigars, snuff, chewing tobacco, or smokeless tobacco, representatives of the Department of Health and Human Services in the Trade Policy Staff Committee, the Trade Policy Review Group, and the Economic Policy Council.

Id. § 3. The Act assigns one member of HHS to each interagency committee that considers section 301 actions involving cigarettes and chewing tobacco. 137 CONG. REC. E2381 (daily ed. June 26, 1991) (extension of remarks of Rep. Atkins).

The Cigarette Export Reform Act, introduced on June 26, 1991 by Mr. Atkins, Mr. Waxman and others, was an attempt to "temper the Administration's enthusiasm for cigarette exports." *Id.* The bill was referred to the House Committee on Ways and Means and to the House Foreign Affairs Committee. *Bill Tracking Rep.: H.R. 2781, available in LEXIS, Legis Library, BLTRCK File.*

142. H.R. 2781, § 2. Section 2 of the Cigarette Export Reform Act provides:

No funds appropriated by law may be used by any officer, employee, department, or agency of the United States to seek, through negotiation or otherwise, the removal or reduction by any foreign country of any restrictions which that country imposes or may impose on the ad-

section 301 committee and greater deference to foreign law represents congressional desire to integrate health concerns into the formulation of tobacco export policy.¹⁴³

B. INTEGRATING HEALTH CONCERNS INTO TOBACCO EXPORT POLICY FORMULATION

The Cigarette Export Reform Act's proposed inclusion of an HHS official on the section 301 committee would address the conflicts between U.S. policies by ensuring that the committee considers health concerns while formulating tobacco export policy. Although HHS input may have little impact on trade policy formulation, the potential for greater harmony between trade and health policies provides a persuasive reason for HHS participation on the section 301 committee.

At first glance, it may appear that HHS membership in the 301 committee would have little effect on tobacco export policy. The goals of HHS and trade officials seem irreconcilable. The current representatives on the 301 committee favor promoting tobacco exports because they represent agencies whose constituents benefit directly from increased exports.¹⁴⁴ Trade and especially tobacco industry officials would prefer that U.S. tobacco companies be allowed to sell unlimited quantities of tobacco products abroad, without any restrictions on promotional tech-

vertising, manufacture, packaging, taxation, or sale or distribution of cigarettes, little cigars, snuff, chewing tobacco, or smokeless tobacco, that is produced in that foreign country.

Id.

143. The tobacco industry has said that it will lobby hard to defeat such legislation. Greg Rushford, *Butt Out: Tobacco Lobby Challenged Over Markets in Far East*, LEGAL TIMES, Oct. 9, 1989, at 1, 22-23. This opposition, however, will encounter a growing antismoking coalition in Congress, where it has become "fairly safe, even trendy, to attack the tobacco industry." Myron Levin & Alan C. Miller, *For the Tobacco Industry, Ex-Smoker Waxman is the No. 1 Foe in Congress*, L.A. TIMES, June 19, 1990, at D1.

Recent developments indicate that the U.S. tobacco industry may be willing to incorporate health concerns into its export and regulate itself in order to avoid broader government-imposed restrictions. Philip Morris has reportedly volunteered to put warning labels on exported cigarette packages like those the United States requires on packages of cigarettes sold domestically. Lourdes L. Valeriano, *Philip Morris Said to Agree to Change in Labeling Policy*, WALL ST. J., Feb. 6, 1992, at B2. The U.S. company plans initially to use warning labels in English "until such time as dialogue with agencies of the local governments in question results in warnings calling for different content and/or language." R.J. Reynolds is also considering a similar measure. *Id.*

144. For example, the Department of Labor represents U.S. laborers, who benefit from increased exports. See text accompanying note 43, *supra*, for a list of the current members of the 301 committee.

niques.¹⁴⁵ The 301 committee member from HHS, on the other hand, would discourage increasing U.S. tobacco exports. An HHS representative would probably favor a flat prohibition of tobacco exports or at least restrictions on exports analogous to the restrictions placed on tobacco products sold domestically.¹⁴⁶ However, some argue that the HHS representative's input would be overpowered by the collective voices of trade officials less concerned about health issues.

Nevertheless, HHS participation in the 301 committee process would not be merely symbolic. Rather, it would contribute to a tobacco export policy which reflects the competing goals of trade and health representatives. U.S. trade representatives and tobacco industry officials have incentives to incorporate HHS input into trade policy.¹⁴⁷ An HHS representative could convince trade officials that they should be content with obtaining a portion of existing foreign tobacco markets for U.S. producers.

The HHS representative could advise trade and tobacco industry officials that efforts to change foreign tobacco regulations would be as ineffective as they were in Thailand. When the U.S. invoked section 301 to open the Thai tobacco market to its exports, in addition to seeking access to a portion of Thailand's existing tobacco market, USTR and tobacco industry officials lobbied the Thai government to eliminate its restrictions on cigarette promotion.¹⁴⁸ These efforts to manipulate foreign regulations met strong opposition from well-organized international health advocates¹⁴⁹ and were unsuccessful in pressuring Thailand to loosen its advertising ban.¹⁵⁰ The United States's efforts to attack Thailand's advertising regulations as GATT violations

145. While conducting negotiations with Asian countries pursuant to section 301 actions, the USTR has also bargained for advertising and promotional rights for U.S. exporters. See *supra* notes 65-96 and accompanying text.

146. See *supra* notes 98-101 and accompanying text (discussing restrictions on cigarettes sold in the United States).

147. Tobacco industry representatives are aware that they are "in an embattled industry where [they do not] even want to blink or someone will cry foul." Levin, *supra* note 127, at 14. By limiting their goals to obtaining part of existing tobacco markets, industry representatives will respond to the criticism that they are fighting for the right to direct American tobacco producers' sophisticated marketing techniques at women and children abroad. See *supra* note 129.

148. See *supra* notes 90-97 and accompanying text.

149. See, e.g., Seth Shulman, *Global Smoke Out*, TECH. REV., May/June 1991, at 20. An international computer network called Globalink helped generate a flood of letters that "served to remind the United States that the international tobacco-control community is united." *Id.* (quoting John Bloom of the Advocacy Institute, a smoking-control research center in Washington, D.C.).

150. See *supra* notes 92-96 and accompanying text.

were equally ineffective.¹⁵¹ Instead, the GATT panel decision marked the first instance that a major international trade body had promoted tobacco control.¹⁵²

The worldwide antismoking coalition that resisted U.S. efforts in the Thailand 301 dispute will most likely mobilize again to defeat similar endeavors, and will use the Thai cigarette GATT panel report as ammunition. Furthermore, many foreign governments have begun to display their hostility toward promotion of tobacco products, adopting more rigid advertising controls.¹⁵³ This trend toward more restrictive advertising regulations will probably intensify in Asian countries as those governments learn more about the health care costs that smoking creates.¹⁵⁴ Indeed, as health advocates herald the exportation of the U.S. antismoking movement to Asia "years before its time," this is a likely development.¹⁵⁵ By focusing trade officials' attention on these obstacles, the HHS representative could convince the 301 committee to limit its actions to ensuring that U.S. tobacco companies compete on a level playing field for a proportion of foreign tobacco markets, rather than trying to expand these markets at the expense of human health.

Passage of the Cigarette Export Reform Act in its current form would actually *require* trade officials to consider HHS's recommendations. The Act prohibits the U.S. government from attempting to change other countries' laws restricting tobacco promotion.¹⁵⁶ The section 301 committee oversees negotiations between the USTR and foreign governments regarding section 301 violations, and must approve any resulting agreements before the USTR terminates the 301 action.¹⁵⁷ The Cigarette Export Reform Act would force the 301 committee to ensure that these agreements do not liberalize other countries' nondiscriminatory restrictions on tobacco promotion. The HHS representative would prevent the committee from ignoring this statutory prohibition. Consequently, the addition of an HHS

151. *Panel Report on Thai Restrictions*, *supra* note 89, ¶ 78. The GATT panel report condoned continuation of the advertising ban under the health exceptions to GATT requirements.

152. Shulman, *supra* note 149, at 20.

153. *See Governments Move to Put Damper on Tobacco Ads*, *ADVERTISING AGE*, Aug. 5, 1991, at 9.

154. Canada has recently decided that its health care system cannot afford the costs of tobacco-related diseases, and has enacted extraordinarily tough laws to discourage smoking. *See* Shulman, *supra* note 149, at 21.

155. Rushford, *supra* note 143, at 1.

156. H.R. 2781, 102d Cong., 1st Sess. (1991).

157. *See supra* note 48 and accompanying text.

representative to the section 301 committee would allow the U.S. tobacco industry to expand its market share abroad, rather than the market itself. The result would be a more harmonious expression of the conflict between antismoking and free trade policies.

CONCLUSION

The U.S. government must address the dichotomy between its trade and health policies relating to tobacco. While using its trade laws to remove foreign restrictions on the sale of U.S. tobacco, the United States discourages both domestic and international tobacco use because of the accompanying health hazards. These conflicting policies subject the United States to criticism and inhibit the success of both efforts.

Congress should pass the proposed Cigarette Export Reform Act as an appropriate means to reconcile these competing interests. The Act's proposed addition of an HHS representative to the section 301 committee would successfully incorporate both trade and health concerns into the process of formulating tobacco export policy without permitting health policy to transcend trade considerations. The HHS representative would ensure that trade officials' attempts to eliminate trade barriers preventing U.S. tobacco producers from obtaining a portion of foreign markets do not induce foreign governments to ease their restrictions on tobacco promotion.

Unifying U.S. tobacco export policy may lead to resolving a broader problem. In addition to its tobacco export policy, the United States has been criticized for allowing U.S. companies to sell certain dangerous pesticides and medications abroad while prohibiting their domestic sale.¹⁵⁸ Addressing the conflict regarding tobacco exports would be an initial step in defining the United States' responsibility for controlling the exportation of hazardous products.

158. See, e.g., Brad Knickerbocker, *U.S. Export Policy: Profit Over Principle*, CHRISTIAN SCI. MONITOR, June 20, 1991, at H10.