

SECTION 301 AND THE NEW WTO DISPUTE SETTLEMENT UNDERSTANDING

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I. INTRODUCTION

Section 301 of the Trade Act of 1974 (as amended) is the principal United States statute designed to address foreign unfair practices affecting United States exports of goods and services, and to achieve improved intellectual property protection as well as equitable rules for investment abroad.¹ From the United States perspective, Section 301 has been successful in opening markets to United States exporters and investors around the world.² Unfortunately, it is also one of the most controversial

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1. Judith H. Bello & Alan F. Holmer, *The Post Uruguay Round Future of Section 301*, 1994 A.B.A. URU. ROUND TRADE AGREEMENTS 3.

2. A total of eighty-three cases with clear market-opening objectives or related goals involving exports to third world markets, barriers to foreign investment, access to raw materials, or intellectual property protection have been filed pursuant to Section 301 since 1974. For a discussion on the practical consequences of Section 301, see Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL. INT'L. BUS. 263 (1992).

pieces of United States trade legislation, especially since it was amended by the Omnibus Trade and Competitiveness Act of 1988.³

The consequences of Section 301 laws for the multilateral trading system have been the object of various complaints by United States trading partners who have pointed out the contradictions inherent in a law aimed at opening markets which is based on the threat of closing the United States market.⁴ Another criticism to Section 301 is that it forces United States trading partners to negotiate even where they have not violated specific international rules, often generating discriminatory bilateral agreements which erode the most favored nation (MFN) principle.

Furthermore, the United States has described Section 301 as a means of securing broad trade liberalization, which is justified by the weakness of the dispute settlement procedure and by the inadequate scope of the General Agreement on Tariffs and Trade (GATT).⁵ During the Uruguay Round (UR) of Multilateral Trade Negotiations many countries argued for the elimination of Section 301; in fact, some expected Section 301 to be repealed, or at least, substantially modified after the UR.⁶

Despite these criticisms, the Clinton administration has stated that Section 301 remains unaffected by the UR agreements.⁷ According to this position, the United States implementing legislation of the UR Agreements, submitted to the United States Congress⁸ on September 27, 1994, states that United States law is to prevail in case of conflict:

No provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any United States law shall have effect. . . . [F]urther, nothing in the Uruguay Round Agreements Act shall be construed . . . to limit any authority conferred under any United States law,

3. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988). For a discussion on the amendments of the 1988 Trade Act, see Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, AGGRESSIVE UNILATERALISM, 113-59 (Jagdish Bagwhati & Hugh Patrick eds., 1990).

4. *Statement by the European Communities*, GATT Doc. C/M/233; *infra* note 96, at 105.

5. *See infra* note 96, at 106.

6. *Id.*

7. The United States Trade Representative, Mickey Kantor, expressly said that Section 301 "remains exactly today as it always has been." *USTR Says Accord Preserves Section 301: Gephardt Pledges Support For GATT Deal*, 11 INT'L TRADE REP. (BNA) 1 (Jan. 5, 1994) [hereinafter USTR].

8. In the United States further legislative implementation of the agreements achieved in the UR is necessary. Consequently, United States law needs to be amended in many respects to enable the United States to conform with the obligations established in such agreements.

including Section 301 of the Trade Act of 1974 unless specifically provided for in this act.⁹

Ultimately, the Act does not contain very substantial modifications to Section 301 as it stands to date.

Although it is clear now that Section 301 will not be eliminated, there is still debate on whether and how GATT's applicability and the establishment of a more legal-based multilateral dispute settlement mechanism, addressing former weaknesses, will preclude the United States from further unilateral use of Section 301. Without attempting to be exhaustive or comprehensive, this article aims to review whether and how, presumably, the new GATT/WTO agreements resulting from the UR and, in particular, the new Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁰ will affect the use of Section 301 the principal unilateral United States tool to open foreign markets. We will start with a review of some of the major reforms and new features introduced into GATT dispute settlement by the DSU, focusing our analysis on the relationship between Section 301 and the GATT 1994 agreements, and then explore the likely effects that the DSU will have on the future of this key United States trade statute.

II. THE NEW DISPUTE SETTLEMENT UNDERSTANDING.

A. In General: The New Integrated Nature of The WTO Dispute Settlement System.

Article 1.1 of the Uruguay Round DSU states that its rules and procedures shall apply to: all consultation procedures, the settlement of disputes arising under any of the GATT 1994 agreements, and the Agreement Establishing the World Trade Organization.¹¹ In other words, the DSU adopted in the UR provides a unified system for dispute resolution. All prior rules and practices are subsumed under this first fully integrated system of GATT dispute settlement.¹²

9. Uruguay Round Agreements Act, H.R. 5110, 103d Cong., 2d Sess. § 102 (1994).

10. Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, Apr. 15, 1994, URU. ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Annex 2 General Agreement on Tariffs and Trade (Uruguay Round) Dec. 15, 1993, KAV 3778, *reprinted in* 33 I.L.M. 1125,1128 [hereinafter DSU].

11. *Id.* art. 1.1. For a comprehensive list of the Agreements Covered by the DSU see Appendix 1 to the DSU.

12. *Id.* art. 1.2. Specific provisions in other agreements which conflict with the Understanding, however, shall prevail.

For the first time, these procedures constitute treaty obligations and their use is mandatory.¹³ Thus, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."¹⁴ The Dispute Settlement Body (DSB) is established as the administrator of the DSU and has the sole authority, acting by consensus, to: establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation, and authorize suspension of concessions in cases of nonimplementation of recommendations.¹⁵

B. Other Improvements and New Features of the DSU

The new DSU introduces major procedural improvements to the GATT dispute settlement system. However, we will look particularly at those changes that could be considered most relevant. The DSU allows for the automatic establishment of a panel upon request, and the automatic adoption of a panel report, unless the DSB decides by consensus against the establishment or the adoption.¹⁶ With the new DSU rule of "reverse consensus," the possibility existing under the previous GATT-1947 dispute resolution system for a single contracting party to block the establishment of a panel or, more importantly, the adoption of a GATT panel report (adverse to that party) by formally objecting to it, no longer exists.

Another improvement is the ability of either party to a panel proceeding, to appeal panel decisions to a standing Appellate Body¹⁷ that will conduct a review of the panel report that is limited to issues of law. In accordance with the new "reverse consensus" rule, the DSU provides for the automatic adoption of the appellate report by the DSB within thirty days after its issuance, unless there is a consensus against its adoption. If either the panel or the Appellate Body finds a measure to be inconsistent with the covered agreements, they shall recommend steps to bring the measure into conformity.¹⁸

As a general principle, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually

13. JOHN JACKSON ET AL, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 327 (3d ed. 1994).

14. DSU, *supra* note 10, art. 3.2.

15. *Id.* art. 2.1, 2.4.

16. Technically, panel reports have no legal effect unless and until they are adopted by the GATT Council (all the Contracting Parties), named DSB under the DSU. Bello, *infra* note 41 at 795.

17. This Appellate Body is to be established by the DSB and composed by seven members who will serve for four-year terms.

18. DSU, *supra* note 10, art. 19.1.

acceptable to the parties and consistent with the covered agreements is clearly to be preferred.”¹⁹ In the absence of such a solution, though, the objectives of dispute resolution are prioritized in the following manner.²⁰ The first priority is to secure the withdrawal of a measure if it is found to be inconsistent with any provision of any covered agreement.²¹ Second, compensation will be a temporary measure, if immediate withdrawal is impracticable.²² The final objective is the suspension of concessions on a discriminatory basis vis-à-vis the offending member state, and subject to the authorization of the DSB.²³

Also, as a general principle, “all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair the benefits accruing to any Member under those agreements.”²⁴ If any of the measures taken for implementation are considered inconsistent with a covered agreement, the issue can be resubmitted to the dispute settlement process (preferably to the original panel if possible).²⁵ In the case of a nonviolation nullification, or impairment of benefits under the covered agreements, there is no obligation to withdraw the measure.²⁶ However, in such cases, the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment.²⁷

In regard to implementation, Article 21 of the DSU provides for strict surveillance of the implementation of adopted rulings and recommendations and stresses the importance of prompt compliance for the effectiveness of dispute resolution.²⁸ Within thirty days of the adoption of the report, the member concerned shall inform the DSB of its intentions with respect to implementation.²⁹ If it is impracticable to comply immediately, the party concerned shall be given a “reasonable period of time” to do so by following the procedures set forth in Article 21.3 which includes binding

19. *Id.*

20. *Id.* art. 3.7.

21. *Id.*

22. *Id.*

23. DSU, *supra* note 10, art. 3.7.

24. *Id.* art. 3.5.

25. *Id.* art. 21.5.

26. *Id.*

27. *Id.* art. 26.1(b).

28. DSU, *supra* note 10, art. 21.

29. *Id.* art. 21.2.

arbitration.³⁰ The DSU actually establishes mandatory surveillance by the DSB, instructing it to monitor the implementation of recommendations and rulings to make sure it is consistent with the adopted reports.³¹

Article 22 is a central provision dealing with compensation and suspension of concessions.³² Both are considered as temporary measures to be taken when rulings are not implemented within the "reasonable period of time," but neither is preferred to full implementation to bring a measure into conformity with the covered agreements.³³ Compensation is voluntary and, in order to proceed, the member concerned must enter into negotiations with the complaining party to develop a mutually acceptable compensation. If the parties involved can not agree on compensation, the complaining party may request authorization to suspend the application, to the member concerned, of concessions or other obligations under the covered agreements. In other words, to retaliate.³⁴

Consequently, in the absence of conformity with the panel rulings and recommendations within the "reasonable period of time" and failing agreement on compensation; Article 22.6 provides for the automatic approval by the Council of a request for authorization to suspend concessions, unless the Council decides by consensus to reject the request for retaliation.³⁵ The DSB, however, cannot authorize suspension of concessions if the covered agreement prohibits such suspension.³⁶ Furthermore, the DSU provides that complainants, as a last resort, may take retaliatory action and suspend concessions under a different agreement, from the one covering the dispute, against a member that has not implemented an adopted panel recommendation.³⁷ Concessions which are to be suspended should be prioritized in the following order; first, in the same sector in which the violation by the other party occurred; second, in different sectors covered by the same agreement; or thirdly in areas covered by other agreements.³⁸

The level of retaliation or cross-retaliation shall be equivalent to the level of the nullification or impairment; and the DSU provides for

30. *Id.* art. 21.3.

31. *Id.* art. 21.6.

32. *Id.* art. 22.

33. DSU, *supra* note 10, art. 22.

34. *Id.* arts 22.1, 22.2.

35. *Id.* art. 22.6.

36. *Id.* art. 22.5.

37. *Id.*

38. DSU, *supra* note 10, art. 22.3(a)-(d). This possibility to cross-retaliate could be of importance to developing countries.

expeditious arbitration on any disagreement about the level of retaliation.³⁹ The suspension of concessions is only temporary and must be discontinued when the measures originally objected to have been brought into conformity with the agreement or a mutually satisfactory solution is reached.⁴⁰

Under the previous dispute resolution system, developed under GATT-1947, even if a report was adopted by the GATT Council, the affected party had no assurance that the offending party would implement it (by either withdrawing the offending measures or providing compensation). Therefore, actions found to violate GATT, or to nullify and impair benefits reasonably anticipated from GATT, could continue indefinitely without providing any recourse for a party that “won” its case but continued to lose trade benefits.⁴¹ Such a party would continue to lose trade benefits.⁴² Although GATT-1947 authorized the suspension of concessions to restore the level of concessions, contracting parties very rarely requested such authorization to retaliate.⁴³ In part, this was due to the consensus rule,⁴⁴ and the lack of an effective and credible procedure to quantify the adverse trade effects in establishing the level of retaliation. Today, the DSU not only provides for automatic retaliation but, absent implementation or compensation and no consensus to the contrary, it also allows for cross-retaliation and establishes very specific rules on how, and to what extent, countries can suspend concessions.⁴⁵

Finally, various provisions of the DSU establish strict time limits which are to be followed at the different stages of dispute settlement. For instance, the period in which the panel conducts its examination of the case; from the time the terms of reference and composition of the panel are agreed to, up until the time the panel’s final report is given to the parties in dispute; should not exceed six months.⁴⁶ In no case, should the time period; from the establishment of the panel, to the circulation of the report to the members;

39. *Id.* arts. 22.6, 22.7.

40. *Id.* art. 22.8.

41. Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT’L LAW 795, 796-797 (1992).

42. *Id.*

43. *Id.*

44. JACKSON, *supra* note 13, at 330-31, 355-57. Authorization to retaliate has only been granted once (and it was not utilized), in 1955, to allow the Netherlands to suspend concessions made to the United States. Other requests failed in the 1980’s because of the consensus rule. *Id.*

45. DSU, *supra* note 10, arts. 21-22.

46. *The WTO Dispute Settlement Mechanisms* Focus GATT Newsletter, No. 107 (special issue), May 1994, at 12-14 [hereinafter GATT].

exceed nine months.⁴⁷ The final panel report should be adopted by the DSB within sixty days of issuance, unless one party notifies of its decision to appeal or a consensus emerges against the adoption of the report. Appeal proceedings are not to exceed sixty days, but in no case shall they exceed ninety days.⁴⁸ Also, the panel report shall be adopted by the DSB after thirty days, from the issuance of the appellate report, unless there is a consensus against its adoption.⁴⁹

Accordingly, Article 20 of the DSU provides that,

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. . . .⁵⁰

Taking together all of the provisions mandating time limits, we can say that the DSU establishes a general deadline of fifteen months from the establishment of a panel to the adoption of a report. This deadline constitutes a critical procedural improvement to the GATT system since one of the main criticisms against it were the delays and the non-existence of strict time limits in dispute resolution.⁵¹

These are very significant reforms which make the GATT dispute resolution process more legalized and formal, and thus, they are expected to transform the multilateral dispute settlement system by making it a more credible, expeditious, and effective system than it has been in the past.

Some authors coincide that these reforms were in large part adopted in the hopes that they would satisfy United States complaints about the weaknesses of the GATT system, and thereby the increased formality may help in precluding the resort to unilateral processes such as Section 301.⁵² In other words, it could result in the United States' use of the GATT system in

47. *Id.*

48. *Id.*

49. *Id.*

50. DSU, *supra* note 10, art. 20.

51. See *General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round*, GATT Focus, May 1989, reprinted in 28 I.L.M. 1023, 1031-34. Actually, in the 1988 Midterm Review of the Uruguay Round, the Contracting Parties adopted (*ad referendum*) new procedures designed principally to expedite the stages of dispute settlement. *Id.*

52. See JACKSON, *supra* note 13, at 330; see also John Greenwald, *The World Trade Organization and United States Sovereignty: The Issue Merits Serious Debate*, 1994 A.B.A., URU. ROUND TRADE AGREEMENT.

the future instead of unilateral action.⁵³ However, some questions still need to be answered; do the UR agreements, and in particular the provisions for settlement of disputes, preclude or limit the United States from taking Section 301 bilateral or unilateral actions in every case? If not, when do the WTO agreements limit the ability to use the United States statute? Or in Judith Bello's terms, "Where the UR agreements fall short of United States objectives, will the United States remain free to seek better results through bilateral negotiations fueled by the possibility, if not threat, of unilateral action under Section 301?"⁵⁴

C. *The Strengthening of the Multilateral System.*

Of particular importance in answering these questions is the analysis of Article 23 of the DSU concerning the Strengthening of the Multilateral System.⁵⁵ Article 23.1 establishes a positive obligation requiring contracting parties; seeking redress of a practice they consider a GATT violation of obligations or other nullification, or impairment of benefits under the covered agreements; to have recourse to, and abide by, the DSU procedures and rules.⁵⁶ This provision implies that the United States *must* use the DSU when dealing with an action charged as a violation, nullification, or impairment of its rights or benefits as derived from the GATT 1994 covered agreements.⁵⁷

As a reinforcing provision, article 23.2(a) establishes a negative requirement by which members are prohibited from making:

[A] determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the *covered agreements* has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.⁵⁸

53. Greenwald, *supra* note 52.

54. Bello, *supra* note 1, at 5.

55. DSU, *supra* note 10, art. 23.1.

56. *Id.*

57. *Id.*

58. *Id.* art. 23.2(a).

Similarly, Articles 23.2(b) and (c) of the DSU impose the obligation on members to follow the procedures set forth in Articles 21 and 22 for determining the "reasonable period of time" and the "level of retaliation" (or cross-retaliation) respectively.⁵⁹ A recent GATT publication states that "WTO members have committed themselves not to take unilateral action against perceived violations of the trade rules"⁶⁰ and that "instead they have pledged to seek recourse in the new dispute-settlement system, and abide by its rule and procedures."⁶¹ John Jackson explains to us that, "indeed one of the major items of discussion in GATT Council meetings in recent years has been complaints about United States unilateral actions"⁶² and he adds that "Article 23.1 of the DSU addresses these complaints by requiring WTO members to use the dispute settlement system exclusively if they seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements."⁶³

At a first reading, Article 23 seems to suggest that when a member invokes any of the provisions of the covered agreements the DSU procedures and rules are exclusive, and a member cannot determine that the measures complained of are inconsistent with such agreements under any other dispute resolution mechanism.⁶⁴ However, some authors have suggested the possibility that Section 301 may be used in combination with WTO dispute settlement procedures in the future, as it often has been used in the past.⁶⁵ If we accept this, then it may follow that the correct interpretation of Article 23 is that where matters that are the object of a United States complaint are subject to WTO disciplines, the DSU rules and procedures have to be followed exhaustively rather than exclusively. Where the matter does not fall under existing WTO disciplines an analysis of Section 301 is necessary and will be addressed below. Yet, a general conclusion can be drawn, from the previous analysis, that all of these provisions, taken as a whole, clearly call GATT 1994 members to follow strict adherence to the DSU procedures and rules in resolving disputes under the covered agreements. Failure to do so might place member states, and the United States if unilaterally using

59. *Id.* arts. 21, 22, 23(b), 23(c).

60. GATT, *supra* note 46, at 12.

61. *Id.* at 12-14.

62. Jackson, *supra* note 13 at 330.

63. *Id.*

64. DSU, *supra* note 10, art. 23.

65. For instance, in the *Oilseeds* case, the United States used Section 301 to increase the pressure on the European Community to comply with a GATT panel report. *Oilseeds Case*, 53 Fed. Reg 984 (USTR 1988). Bello, *supra* note 1, at 8.

Section 301 in any manner that is inconsistent with the DSU rules, in violation of their international obligations derived from the DSU itself.

III. EFFECTS OF THE WTO AGREEMENTS AND THE DSU ON SECTION 301⁶⁶

Section 301 provides the domestic counterpart to the GATT consultation and dispute settlement procedures and is the United States domestic authority to impose retaliatory action, if necessary, to enforce United States rights against: unjustifiable, unreasonable, or discriminatory foreign trade practices which burden or restrict United States commerce.⁶⁷ The broad inclusive nature of Section 301 authority has been applied to practices and policies of countries whether or not they are covered by, or are members of, GATT or other trade agreements.⁶⁸

Since its existence, Section 301 has served a twofold purpose. First, Section 301 enables United States citizens to petition the USTR to investigate foreign government policies or practices actionable under the “umbrella” of the statute, although, the USTR (United States Trade Representative)⁶⁹ may also initiate an investigation on its own initiative. If necessary, the USTR may take action, including taking the case to a formal dispute settlement mechanism under a trade agreement.⁷⁰ Secondly, Section 301 provides, on the other hand, a “catch-all” for trade problems not specifically covered by trade agreements or formal dispute resolution mechanisms. “Section 301 can encompass virtually any foreign government practices unilaterally deemed objectionable by the United States, whether relating to United States imports, United States exports, United States investments, or any other commercial matter of significance.”⁷¹ In general, Section 301 gives the USTR authority to take particular actions (*i.e.* consultation, investigation, retaliation, monitoring, etc.) against unfair trade practices under certain circumstances.⁷² In some cases the USTR must take such action, and in

66. Trade Act of 1974, Pub. L. 93-618, Title III § 301-310, 88 Stat. 2041 (1975).

67. United States Trade Representative, *United States Trade Law*, 1994 TRADE POLICY AGENDA AND 1993 ANNUAL REPORT, 95 (1994) [hereinafter USTR].

68. COMMITTEE ON WAYS AND MEANS, ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN PRACTICES, H.R. Conf. Rep. No. 1644, 93d Cong., 2d Sess. (1974).

69. Trade Act of 1974, Pub. L. 93-618, Title III § 302, 88 Stat. 2041 (1975).

70. Trade Act of 1974 § 302.

71. Sykes, *supra* note 2, at 313.

72. Trade Act of 1974, Pub. L. 93-618, Title III § 301, 88 Stat. 2041 (1975).

other cases the USTR is left with discretion on deciding whether or not to take such action or what action is appropriate.⁷³

Section 301 (a) of the Trade Act of 1974 requires the USTR to act, subject to any specific direction by the President.⁷⁴ If the USTR determines that an act, policy or practice of a foreign country “violates or is inconsistent with any trade agreement,⁷⁵ denying the rights or benefits derived thereof to the United States, or is, unjustifiable⁷⁶ and burdens or restricts United States commerce.”⁷⁷

On the other hand, Section 301(b) provides the USTR with discretionary authority to take “all appropriate and feasible action”⁷⁸ to obtain the elimination of an act, policy, or practice of a foreign country if the USTR determines that the foreign measure is “unreasonable”⁷⁹ or “discriminatory” and burdens or restricts United States commerce and that action by the United States is appropriate.⁸⁰ Making an analogy, we could say that the different circumstances that determine the distinction between mandatory and discretionary action in Section 301, parallel somewhat the distinction in Article XXIII of GATT between cases involving the so-called prima facie violation/nullification or impairment, on the one hand, and a non-violation/nullification or impairment on the other. Furthermore, Section 303 provides that if a “301 investigation” involves a trade agreement and a mutually acceptable solution is not reached through consultations⁸¹ then, “the

73. Trade Act of 1974 § 302.

74. Trade Act of 1974, Pub. L. 93-618, Title III § 301(a), 88 Stat. 2041 (1975).

75. The amendments to Section 301 in 1988 made action under Section 301 mandatory in cases involving violations of international agreements.

76. Trade Act of 1974, Pub. L. 93-618, Title III § 301(d)(4)(A), 88 Stat. 2041 (1975). An “unjustifiable practice” is defined as one which is in violation of or inconsistent with the international legal rights of the United States (denying MFN or national treatment or the right of establishment or protection of intellectual property rights).

77. Trade Act of 1974 § 301.

78. Trade Act of 1974, Pub. L. 93-618, Title III § 301(b), 88 Stat. 2041 (1975).

79. The amendments to Section 301 in 1988 clarified what constitutes “unreasonable” practices actionable under Section 301 if they burden or restrict United States commerce. They are defined as unfair and inequitable (not necessarily inconsistent with the legal rights of the United States) acts, policies or practices including (but no limited) those that deny establishment or market opportunities (including the toleration of anti-competitive practices), adequate and effective intellectual property protection, constituting export targeting or denying workers rights.

80. Trade Act of 1974 § 301(b).

81. Trade Act of 1974, Pub. L. 93-618, Title III § 303(a)(1), 88 Stat. 2041 (1975). In each investigation the USTR must consult with the foreign government whose practices are under investigation.

Trade Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement.”⁸²

At the conclusion of a trade practice investigation, if the matter is not resolved, Section 304 of the Trade Act requires the USTR to determine whether the practices in question deny United States rights under a trade agreement or whether they are unjustifiable, unreasonable, or discriminatory and burden or restrict United States commerce.⁸³ However, the time period for making these determinations vary according to the type of practices alleged. Generally, investigations of alleged violations of trade agreements must be concluded within eighteen months,⁸⁴ while an investigation of alleged unreasonable, discriminatory, or unjustifiable practices must be decided within twelve months.⁸⁵

This means that the USTR is required on the one hand, to take the case to the GATT where the investigation involves a GATT issue. On the other hand, the statute requires the USTR to make a determination on its own if the dispute is not solved by the GATT dispute settlement procedure within eighteen months. In the past, countries have objected to the imposition of trade sanctions pursuant to Section 301 and not authorized by the GATT. Part of the problem has been that Section 301 imposes very strict time limits, thus making it practically inconsistent with the GATT dispute settlement that usually takes longer under the 1947 system. Assuming that this practical inconsistency may be solved by the new DSU, since it imposes general deadlines of fifteen months for dispute resolution, then current United States law requires the USTR to request proceedings under the GATT dispute settlement procedures where the subject of a Section 301 petition involves United States rights or benefits derived thereof.

Yet another 301 provision in this connection ought to be analyzed. Under this Section two exceptions to mandatory action exist. The USTR is to act in any case in which:⁸⁶

- 1) [T]he USTR finds that the foreign country is taking satisfactory measures, or has agreed to eliminate the

82. Trade Act of 1974 § 303(a)(1).

83. Trade Act of 1974, Pub. L. 93-618, Title III § 304, 88 Stat. 2041 (1975). Section 304 provides that the USTR shall make the determination in the case involving a trade agreement, the earlier of: (i) the date that is 30 days after the date on which the dispute settlement is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated. Trade Act of 1974 § 304.

84. Trade Act of 1974 § 304.

85. Trade Act of 1974, Pub. L. 93-618, Title III § 304(2), 88 Stat. 2041 (1975). 19 U.S.C. § 2414 (1975).

86. Trade Act of 1974, Pub. L. 93-618, Title III § 301(a)(1-2), 88 Stat. 2041 (1975).

objectionable practice or to another imminent solution. If any of the later results is impossible, where the country has agreed to provide compensation, or when the action would have an adverse impact on the United States economy of national security; or

2) The GATT Contracting Parties have determined, a GATT panel has reported, or a dispute settlement ruling under any other trade agreement finds that the rights of the United States under a trade agreement are not being denied, or that the foreign act, policy, or practice does not violate United States rights neither nullifies, or impairs United States benefits under the relevant agreement.⁸⁷

If we carefully analyze the current statutory language of the latter exception to mandatory authority, the USTR "is not required" to take action under 301(a)(2)(A).⁸⁸ It should be noted, however, that this does not mean that the USTR could or will not take action where a GATT ruling or recommendations finds (probably contrary to the United States interests) that United States rights or benefits have neither being denied or violated.⁸⁹

In other words, while the statute requires the USTR to follow GATT dispute settlement procedures where a GATT issue is involved, the statute does not require the USTR to conform its determination with that of a GATT panel. Although, the Office of the USTR has never found a practice to be unfair after a GATT determination that it was fair, or vice-versa,⁹⁰ at least from a strictly literal or legal point of view, and apart from other possible policy constraints, this statutory language leaves open the possibility for the United States to use its domestic procedures under Section 301 for the unilateral determination of a violation, nullification, or impairment of United States rights or benefits (i.e. those resulting from the UR agreements) even after a GATT determination has been made.

Article 23.2 of the DSU constitutes a negative provision prohibiting members from making such determinations except through dispute settlement in accordance with the rules and procedures of the DSU, and consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitral award rendered under the DSU.⁹¹ Therefore, assuming

87. Trade Act of 1974 § 301(a)(1-2).

88. Trade Act of 1974, Pub. L. 93-618, Title III § 301(a)(2)(A), 88 Stat. 2041 (1975).

89. Trade Act of 1974 § 301(a)(2)(A).

90. Bello, *supra* note 41, at 799.

91. DSU, *supra* note 10, art. 23.2.

that there is a case involving an issue covered by the GATT 1994 agreements where the USTR decides to act, (i.e. impose retaliation) under the domestic authority conferred by Section 301 (although the USTR is not required to), following a report adopted by the DSB finding no violation, nullification, or impairment of United States rights or benefits, this Section 301 action would place the United States, itself, in violation of Article 23.2 of the DSU. Of course, this is a hypothetical situation, and might not happen in the future given that the USTR is not legally required to act and, in all probability, would not act due to other policy considerations. However, the specific purpose of this analysis, is to point out what might be considered as a legal inconsistency between Section 301(a)'s statutory language and Article 22.3 of the DSU.

Notwithstanding, the irrelevance that the practical and the legal inconsistencies, may have in the actual use of Section 301. These inconsistencies, if not clarified, could potentially limit and undermine the role of the new WTO/DSU, especially in terms of its expected greater effectiveness, credibility, and predictability. Whereas maybe slight modifications to Section 301 procedures to adjust the time requirements and to change the "not required" language for a "shall not" type provision in connection with the exception to mandatory action we analyzed could probably save the United States from some of the charges against its unilateralism and would confirm its good faith and interest in furthering the WTO/DSU objectives.

With the analysis conducted up to this point, and after contrasting the content of some of the provisions contained in Section 301 and the new DSU, some other conclusions may be drawn in terms of the relationship between these two legal instruments. First, many of the DSU new features, especially those concerning compensation, suspension of concession, the possibility of cross-retaliation and time frames, seem to follow to a great extent, the rationale of Section 301. This is probably what some authors may be talking about when they refer to the so-called "internationalization"⁹² of Section 301.⁹³ They argue that "the Understanding internationalizes Section 301 by providing dramatically more effective international enforcement against unfair traders. . . . [B]y increasing the prospect of effective and expeditious enforcement against GATT offenders, the Understanding, like Section 301, may deter GATT offenses. However, at least it restores a reasonable balance of rights and obligations".⁹⁴

92. Bello, *supra* note 41, at 799.

93. *Id.*

94. *Id.*

Second, corresponding with the first conclusion, while the DSU internationalizes Section 301, the new GATT 1994 agreements and, in particular the DSU, do have major implications in the future use of Section 301 by imposing certain limits on its unilateral use by the United States. The broad inclusive nature/use of Section 301 would be limited by the broad scope of the GATT 1994 agreements. Section 301 can no longer be used as the "catch-all" trade tool for some areas not previously, but now, covered by GATT. The WTO will have a considerably broader scope than the GATT-1947, limited to trade in goods. The UR agreements, besides reinforcing existing GATT disciplines, extended the GATT coverage to trade in services, intellectual property protection, and trade-related investment measures. This extended coverage implicitly restrains the unilateral use of Section 301 and will reshape its subsequent use by the United States as long as Section 301 requires the USTR to use the GATT dispute settlement when a GATT 1994 issue is involved.

Thus, it seems unlikely that the United States will take unilateral action under Section 301 against a GATT 1994 contracting party measure that falls within the areas covered by WTO agreements without due recourse to the DSU rules and procedures. In doing so, the United States would be taking an action inconsistent with the DSU rules and procedures and therefore, putting itself in open violation of GATT obligations. This violation may be further challenged by the affected country which could, in the end, be authorized by the DSB to retaliate against the United States. This latter retaliation could amount to an authorized counter-retaliation. This actual possibility for authorized counter-retaliation diminishes the credibility of the threat of unilateral retaliation by the United States under Section 301.

The question of the implicit restraints imposed on 301 by the larger scope of the GATT disciplines takes even greater significance in the context of Section 301 cases not involving alleged violation of international obligations. Notwithstanding the absence of any alleged infringement of United States legal rights, the United States has been fairly successful in using Section 301 to induce foreign governments to eliminate or modify their practices, usually related to trade in services, restrictions on foreign investment, and intellectual property protection.⁹⁵ However, because of the nature of the challenged practices, few of these cases involved matters that might have been the issue of prior GATT dispute resolution as cases of non-violation nullification or impairment in Article XXIII terms. This

95. Thirty-five cases not involving a violation of a trade agreement have been the subject of investigations under Section 301. See Sykes, *supra* note 2, at 313-16.

ability, though, will encounter some limits imposed by the substantive rules embodied in the Uruguay Round agreements now regulating these areas.⁹⁶

Having accepted that the broader the scope of the GATT 1994 agreements, then the broader the scope of the statutory requirements imposed on the USTR to invoke the DSU rules and procedures applicable to all such GATT 1994 agreements will be also. In addition, Section 301 will continue to be the source of the United States domestic authority to get to the GATT/WTO dispute settlement mechanism. Section 301 is, after all, the source of domestic authority in pursuance of which a formal dispute settlement procedure available under a trade agreement shall be requested.⁹⁷ Thus, Section 301 constitutes the domestic procedure by which United States nationals can have access to GATT dispute settlement procedures.⁹⁸

Indeed, the Clinton Administration has said that the United States expects to use the Section 301 provisions of the 1974 Trade Act aggressively to bring disputes to the new World Trade Organization.⁹⁹ The United States Trade Representative, Mickie Kantor, has conceded that the United States will have to take cases under Section 301 to the WTO for dispute resolution more often than it did in the past because the WTO will cover more areas.¹⁰⁰ However, it was also clarified that Section 301 is still available for areas not covered in the Round's agreements.¹⁰¹ Thus, Section 301 will also continue to be the source of the United States domestic authority against foreign

96. It should be noted, though, that the case for Intellectual Property might be different and would require a separate analysis. The United States Omnibus Trade and Competitiveness Act of 1988 introduced the Special 301 authority, under which the USTR is required to initiate Section 301 investigations against "priority countries" that deny "adequate and effective" protection of intellectual property rights or "fair and equitable" market access to United States persons that rely on such protection. 102 Stat. 1107. The priority countries may then be the object of an investigation under Special 301 authority conducted on an accelerated time frame. The USTR has created a "priority watch list" and a "watch list" under Special 301. Placement of a trading partner on either of these lists indicates that particular problems exists with respect to the protection or enforcement of intellectual property rights or market access for persons relying on intellectual property. Countries listed on the "priority watch list" are the focus of increased bilateral attention concerning the problem areas. GATT, *Report by the GATT Secretariat, Trade Policy Review Mechanism - United States 1994*, (Geneva, 1994), Vol. I, at 102.

Special 301 covers an area of trade not covered by the GATT-1947 but now within the scope of the GATT 1994. However, a five-years Moratorium was established by article 64.2 of the TRIP's agreement so that the general WTO dispute settlement provisions relating to non-violation, nullification, and impairment cases of intellectual property shall not apply to the settlement of disputes under the TRIP's agreement. Bello, *supra* note 1, at 7.

97. Trade Act of 1974 § 301.

98. Trade Act of 1974 § 301.

99. USTR, *supra* note 7, at 1.

100. *Id.*

101. *United States to Use GATT Dispute Settlement Aggressively*, 11 INT'L TRADE REP. (BNA) No. 1, 30 (Jan. 5, 1994); USTR, *supra* note 7, at 1.

practices and policies in areas not yet covered or not comprehensively covered by the GATT 1994 agreements. In this case, Section 301 applies regardless of GATT 1994 membership. Therefore, there may still be determined as unjustifiable, unreasonable, or discriminatory, foreign trade practices that burden or restrict United States commerce actionable under 301.

Despite this extended coverage of the new GATT 1994 agreements, there are various areas that are not yet multilaterally regulated but that some major trading countries, and in particular the United States, have an increasing tendency to connect with trade (i.e. human rights, labor standards). There are also other areas that are not yet comprehensively regulated by the GATT disciplines or it is not totally clear whether or to what extent the GATT rules would cover them or not (i.e. competition rules, and intellectual property protection).

A general look through Sections 301-310 of the 1974 Trade Act tells us that its scope of application goes well beyond the notion of trade in goods and even beyond the GATT 1994 extended scope. Section 301 encompasses services, intellectual property, investment, market opportunities, competition policies, labor standards, and human rights issues.¹⁰² In this connection, the House Majority Leader, Richard Gephardt, said that the United States will have to work through GATT where rules exist.¹⁰³ In addition, he added that where there are no rules, such as in the areas of workers' rights, environmental protection, and competition policy, "we need to aggressively and creatively pursue our interests multilaterally, bilaterally and unilaterally."¹⁰⁴

Thus, if Section 301 actions are taken in the future against a GATT 1994 contracting party in regard to areas not covered or not comprehensively regulated by the UR agreements, such as labor standards, weak competition laws or intellectual property protection, beyond the obligations agreed upon by the TRIP's agreement¹⁰⁵ would not amount to a GATT violation of the DSU rules. This is true regardless of other legal or policy considerations that may be made with respect to such unilateral approach to achieving trade objectives.

102. Trade Act of 1974 § 301.

103. USTR, *supra* note 7.

104. *Id.*

105. The United States Uruguay Round Agreements Act introduces several provisions and modifications to Section 301(D)(3) for granting the USTR authority to act against countries that do not provide adequate and effective intellectual property protection notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the TRIP's agreement. Uruguay Round Agreements Act H. R. 5110, 103d Cong., 2d Sess. § 314 (1994).

The major substantive changes introduced by the new UR agreements and the broadening of the GATT scope to other disciplines (services, intellectual property, investment) make the analysis over the subsequent application of procedural rules, such as the DSU and Section 301, a very complex one. Some cases may appear to be obvious, but there might be others where it will be not so easy to draw the line in deciding whether a GATT adjudication or unilateral action under 301 authority should proceed.

The broader coverage of the GATT/WTO agreements also suggests that the USTR must act with extreme caution in deciding whether a case falls under the GATT 1994 coverage and therefore, should take it to the WTO dispute settlement, or under his authority to exercise unilateral Section 301 actions, aside from the GATT system. It would be risky, on the other hand, to engage in broad generalizations with regard to the GATT-legality or illegality on the future use of statutory authority under Section 301 by the United States. Careful analysis on a case-by-case basis must therefore, be advised before deciding whether or not to take Section 301 mere unilateral actions by the United States and in charging any Section 301 action as GATT-illegal by other countries as well.

Section 301 will also be used as the source of the United States domestic legal authority for DSB authorized retaliation. In other words, to enforce United States rights and impose retaliatory action against GATT 1994 members where a trading partner against which the United States wins a GATT dispute settlement case fails, nonetheless, to come into compliance with the adopted rulings and recommendations or to provide compensation and the DSB authorizes the United States to retaliate.

In this regard, Ambassador Mickey Kantor has expressly said in regard to Super 301 procedures:

Where the foreign practices at issue constitute violations of trade agreements such as the GATT, or the new WTO, we will take those practices to the dispute resolution process created in those agreements, as Section 301 requires United States to do. At the end of the investigation, the Trade Representative will have to determine if the practices are actionable under Section 301 and, if so, what action he should taken in response to them.¹⁰⁶

106. The so-called "Super 301" (Section 310 or the Trade Act of 1974, 19 U.S.C. § 2420 (1975)) process was introduced for two years in 1988, and has been reinstated by Executive Order for the Identification of Trade Expansion Priorities, signed by President Clinton. Under this Executive Order, the USTR is required to identify in 1994 and 1995 "trade liberalization priorities" including "priority foreign countries" and "priority practices," the elimination of

Under Section 301 the USTR is authorized to take actions including: the suspension or withdrawal of trade agreements concessions, the imposition of duties or other import restrictions, the imposition of fees or restrictions concerning services, the entry into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States, and the restriction of service sectors authorizations.¹⁰⁷ The United States implementing legislation of the Uruguay Agreements adds to Section 301 that "actions may be taken that are within the power of the President with respect to trade in any goods, or with respect to any other area of pertinent relations with the foreign country."¹⁰⁸

However, as we have seen, Article 22 of the new DSU, together with the objectives of the DSU set forth in Article 3, establishes the limits and rules to be followed when exercising retaliation or cross-retaliation authorized by the DSB.¹⁰⁹ This means that the USTR discretion when determining which sanction pursuant to Section 301 is appropriate will be limited, as long as he will have to follow such rules and abide to such limits, for the retaliation to be consistent with the GATT 1994 agreements and the DSU.

Finally, Section 301 will continue to be the source of the United States domestic authority against practices and policies of non-member countries to the WTO whether not they are covered by the GATT 1994 agreements. Not all the countries that engage in international trade with the United States are GATT members (*i.e.* China, North Korea). Most importantly, the new UR agreements, including the DSU, will only be binding for those that are going to be parties to the new GATT 1994. Although the UR has been acclaimed as a great success, it still remains to be seen how many countries will take part in this new multilateral enterprise. Therefore, non-members to GATT 1994 will be subjected to domestic Section 301 procedures rather than to the DSU. In addition, any further retaliatory action taken pursuant to Section 301 against a non-contracting party to GATT 1994 would not account to a GATT violation of the DSU

which is likely to have the most significant potential for expansion of United States exports. Within twenty-one days after the submission of the report of priorities to the Congress, the USTR is required to initiate a Section 301 investigation on every priority practice of each of the priority countries. According to the United States administration the rationale for this authority was to provide a "credible threat of retaliation to back the market-opening efforts abroad of the United States." Ambassador Mickey Kantor, Statement on the Executive Order Reinstating Super 301 (March 3, 1994) (available from office of United States Trade Representative).

107. USTR, *supra* note 67, at 95.

108. Uruguay Round Agreements Act § 314, *supra* note 105.

109. DSU, *supra* note 10, arts. 3, 22.

rules, regardless of the value or policy judgments we may have in respect with such an aggressive unilateralism.

A last remark to be made has to do with a question suggested before: whether Section 301 consultations, investigations, and monitoring of implementations could be parallel conducted with GATT dispute resolution, in combination with GATT dispute settlement procedures, as it often has been done in the past to increase the pressure to comply with the panel reports. For some, the answer may seem obvious since nothing seems to prevent the United States from doing so and indeed, this possibility may color GATT dispute resolution mechanisms, since the threat of 301 sanctions lurks in the background. Still, it is not totally clear, specially taking into consideration the inconsistencies that we have pointed out, whether such actions under 301 would be legitimate. Especially, if we accept the interpretation of Article 23.1 of the DSU in the sense that such provision makes the DSU procedures exclusive when dealing with disputes arising under the covered agreements and those procedures include consultations and monitoring proceedings. Although article 23.2 of the DSU prohibits the contracting parties from making their own determinations, it is silent in precluding or authorizing the contracting parties to conduct consultations, investigations, or monitoring of implementation on their own. Ultimately, the conclusion might be that, in any case falling under the covered agreements, Section 301 procedures must conform with the DSU rules and procedures and any determination must be consistent with the reports adopted by the DSB for the United States not to be in violation of the DSU.

IV. CONCLUSIONS

The new WTO/DSU rules neither require the United States to eliminate Section 301 nor does it preclude the United States from further use of Section 301. Indeed, Section 301 will continue to be the source of domestic legal authority for United States action in several situations. However, from a legal point of view, the new WTO/DSU rules do, in effect, impose certain limitations or constraints on the future unilateral use of Section 301.

Generally, by introducing a rule-based system, the DSU is likely to reduce the credibility of the threat of unilateral action, which accounted for the success of Section 301 to date. In addition, the broad coverage of the WTO agreements effectively limits the ability to unilaterally use Section 301. The broader the scope of the UR agreements the broader the limitations that the DSU imposes on United States unilateral action under 301. Also, by reason of the consequences that inappropriateness or inconsistency with the WTO/DSU that unilateral action under 301 could imply, such as retaliation

not authorized by the DSB, the United States faces the possibility or threat of GATT authorized (counter) retaliation by trading partners that also limits in effect the use of Section 301.

From a policy point of view, the changes introduced largely respond to the United States criticisms to GATT dispute settlement and the DSU meets the United States demands for a more effective and strengthened multilateral dispute settlement mechanism by essentially internationalizing Section 301. It would be a grave mistake by the United States to underestimate the benefits that the new dispute settlement system may represent in furthering United States interests and achieving access to foreign markets through the new WTO rules. All these factors will *hopefully* lead to a more extensive use of WTO dispute settlement mechanism by the United States and a corresponding reduction in the unilateral use of Section 301, at least in the areas that are covered by GATT 1994.