

## The WTO Panel decision in the case of United States Sections 301 – 310 of the Trade Act of 1974

By Bruce Macallum

The World Trade Organization (WTO) case of *United States Sections 301 – 310 of the Trade Act of 1974*<sup>1</sup> is of interest to international lawyers because it offers valuable insights into how the multi-lateral trading system and its dispute settlement process relates to domestic trade law enforcement regimes. The panel's reasoning suggests that the ability of members to retain discretionary trade remedies in domestic legislation, which could be exercised in a manner inconsistent with the obligation not to take unilateral trade action, would undermine the objects and purposes of the multi-lateral trading system. The Panel stated that the purpose of the multi-lateral trading system was to encourage market conditions to facilitate international trade based upon secure and predictable rules.<sup>2</sup> The reasoning in the panel's decision is interesting to international lawyers because it clearly articulates the Panel's deference to the international dispute resolution system in comparison to domestic trade enforcement regime where the two systems could conflict.

The background of the case involved a challenge made by the European Union that the United States trade enforcement powers given to the United States Trade Representative (USTR) under the *Trade Act of 1974* were inconsistent with the United State's obligation not to take unilateral domestic trade action. Such unilateral action is prohibited in the WTO Dispute Settlement Understanding,<sup>3</sup> (DSU) By way of further background Sections 301 – 310 of the *Trade Act of 1974* sets out a legal regime for the domestic legal enforcement of rights that the US has under the WTO agreement and other international trade agreements.<sup>4</sup> Under Section 302 the United States Trade Representative (USTR) may initiate an investigation of possible non-compliance with an obligation under an international trade agreement on his or her own motion or as a result of a petition.<sup>5</sup> The

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<sup>1</sup> The Panel Report is accessible on line at [http://www.wto.org/english/news\\_e/news09\\_e/294abr\\_w\\_e.htm](http://www.wto.org/english/news_e/news09_e/294abr_w_e.htm)

<sup>2</sup> Panel Report at par. 7.71.

<sup>3</sup> See Article 23(2)(a) of the DSU which requires members not to make any determination of non-compliance except in a manner consistent with the findings of either the Panel or the Appellate Body as the case may be. Furthermore Article 23(2)(b) requires members to follow the DSU in determining the reasonable period of time to allow the party complained against to implement the recommendations and rulings of any panel. Moreover Article 23(2)(c) requires complaining members to follow the DSU (Article 22 of the DSU) in determining the trade retaliatory measure proposed to be adopted and to obtain authorization from the Dispute Resolution Body prior "suspending concessions or other obligations under the covered agreements."

<sup>4</sup> Section 301(a) of the *Trade Act of 1974* requires the USTR to take action where the rights of the US under any trade agreement are denied.

<sup>5</sup> See United States *Trade Act of 1974* Section 302(a) which authorizes the commencement of an investigation by Petition and Section 302(b) which authorizes the commencement of an investigation by other means.

USTR is empowered under Section 304 to make a determination as to whether US rights under any trade agreement are denied. Furthermore Section 306 requires that the USTR consider whether another member has implemented the recommendations of a WTO Dispute Settlement Body report within 30 after the expiry of a reasonable period of time.

The fundamental ruling in the case is that domestic trade enforcement legislation cannot be administered in a manner which involves the exercise of a discretion that permits the implementation of a domestic trade remedy prior to the final determination by a WTO panel including the authorization of the specific trade remedy. The United States successfully argued that its Statement of Administrative Action and its unequivocal assertion before the Panel legally binds the USTR, under both domestic and international law, not to exercise his/her discretion in a manner which is inconsistent with the prohibition against taking unilateral trade action contained in the DSU. The DSU of the WTO expressly prohibits a member from taking unilateral trade action and any domestic determination of trade agreement inconsistency must be done in a manner which does not pre-empt the WTO DSU process.<sup>6</sup>

In the course of its reasoning the WTO panel in the Section 301 case made some interesting observations about the effect of international trade agreements on domestic legal regimes. These observations were integral to the final determination in the case since the previous GATT/WTO jurisprudence was equivocal about whether the risk or potential to exercise a discretionary power could be inconsistent with international trade obligations by itself, in the absence of a specific inconsistent action.<sup>7</sup> The Panel determined that whether such potential for the exercise of a discretionary power is inconsistent with an international trade obligation, without the exercise of a specific inconsistent discretionary action, depends upon the nature of the international trade obligation in question.<sup>8</sup> In the specific instance of the case, the potential for a domestic trade remedy to be made prior to the completion of WTO dispute resolution process, was inconsistent with the express obligation contained in the DSU of a member state not to take unilateral trade action.<sup>9</sup>

The observations made by the Panel on the relationship between the objectives of the multi-lateral trading system and domestic legal enforcement were based upon how economic actors in the domestic economy rely upon confidence in domestic compliance with trade agreements by implementing Governments. The Panel opined that international trade obligations do not generally have direct effect in domestic legal regimes.<sup>10</sup> That is, international trade obligations do not provide individuals in domestic regimes with a domestic trade remedy based upon direct application of international trade obligations in the domestic legal system. Despite not having direct effect, the Panel expressed the view that foreign investors or individuals or corporations who participate in

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<sup>6</sup> See Article 23 of the DSU.

<sup>7</sup> See Panel Report at par. 7.85.

<sup>8</sup> See Panel Report at par. 7.93.

<sup>9</sup> See Panel Report at par. 7.54.

<sup>10</sup> See Panel Report at par. 7.72.

the domestic economy of another WTO member rely upon domestic compliance in

making business decisions concerning their business interests.<sup>11</sup> In an interesting play on words the Panel opined that trade agreements have an ‘indirect effect’ rather than a legal direct effect to express the concept of individual reliance on compliance.<sup>12</sup> This observation, that individual economic actors rely on international trade law compliance, was central to the Panel’s conclusion that the US *Trade Act* could not be applied in a manner which would permit the USTR to exercise a discretionary power to make a domestic trade pre-determination based upon non-compliance with a WTO agreement before the WTO process had run its course.

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<sup>11</sup> See Panel Report at pars 7.73 and 7.76.

<sup>12</sup> See Panel Report at par. 7.78.