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WTO report on US section 301 law: a good result for the EU and the multilateral system

The EU notes the WTO Panel's now published report on the section 301 case with satisfaction. The Panel concluded that the relevant part of the legislation as such was inconsistent with the WTO. It also came to the final conclusion that it could be considered in conformity with the WTO - but only because the US undertook before the Panel that in each and every case it would use its discretionary powers under Section 301 to act in compliance with WTO rules and procedures. "This is a fair result, a balanced outcome to a difficult case, but overall, it is a victory for the multilateral system", said Pascal Lamy, the EU Trade Commissioner. "Neither side can claim a triumph, because while the Section 301 legislation can stay on the books, the Panel has clarified that it can be used against other WTO members only as long as it strictly follows WTO rules. I am glad the US have given the necessary commitments to this effect".

Background

The EU challenged the US "Section 301" law in 1988, arguing that Section 304 in particular violated US obligations in the WTO, by requiring the United States Trade Representative to determine whether another WTO Member "denies US rights or benefits" under the WTO agreement before DSU procedures have been exhausted.

The panel was established in March 1999, and reported in October to the parties. The findings were released on 22 December.

The key question faced by the Panel was: does legislation that gives national authorities the possibility, to act either consistently or inconsistently with their WTO obligations, violate those obligations ? The US argued that only legislation which mandates WTO inconsistent action, or which precludes WTO consistent action, could violate WTO provisions.

The Panel did not follow this line of argument, and instead considered whether or not Section 301 violated the precise obligations of the WTO set out in Article 23 of the Dispute Settlement Understanding. It concluded that the Section 301 law, by reserving for the USTR the right to make a determination of inconsistency even in cases where the DSU proceedings have not been exhausted, constitutes a prima facie violation of Article 23 ("The very discretion under Section 304 is what, in our eyes, creates the presumptive violation" – 7.58 of the Panel Report.)

The Panel went on to say (paragraph 7.86) that “Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one’s way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members”.

Nonetheless, because the USTR had itself curtailed its discretion in the Statement of Administrative Action, and in statements before the Panel, the Panel concluded that in the final analysis, these commitments did enable the US to act in each and every case in conformity with WTO dispute settlement procedures.

However, the Panel also concluded that “should the undertakings articulated in the SAA and confirmed and amplified by the US to this Panel be repudiated or in any other way removed by the US Administration or another branch of the US Government, this finding of conformity would no longer be warranted”.