

TRADE-RELATED AGENDA, DEVELOPMENT AND EQUITY

(T.R.A.D.E.)

WORKING PAPERS

22

THE THREE BIG ROUNDS OF U.S. UNILATERALISM VERSUS WTO MULTILATERALISM DURING THE LAST DECADE

**A COMBINED ANALYSIS OF THE GREAT 1994 SOVEREIGNTY DEBATE
SECTION 301 DISPUTES (1998-2000) AND
SECTION 201 DISPUTES (2002-2003)**

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SOUTH CENTRE

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PREFACE

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South Centre, July 2004

FOREWORD

This Article was first published in the Temple International & Comparative Law Journal (TICLJ), 2003, Vol.17, No.2, pp.409~466, U.S.A. Both the author and the South Centre are grateful to the TICLJ, through its Editors-in-Chiefs, Mr. David B. McGinty and Mr. Mark Urbanski, for their kind permission to have the Article republished in the Centre's T.R.A.D.E. working papers series and posted on the Centre's website, and thus making it more widely known and accessible. The Article had been slightly updated before it was republished in July 2004.

Furthermore, please note that the phrase "*The Great 1994 Sovereignty Debate*," which is used throughout this paper to discuss a series of debates in the United States, derives from Professor John H. Jackson's article, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 162 (1997). These debates are often referred to as the Great Debate(s).

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ABBREVIATIONS

DSB	Dispute Settlement Body
GATT	Agreement on Tariffs and Trade
SAA	Statement of Administrative Action
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
UR	Uruguay Round
U.S.	United States of America
USTR	U.S. Trade Representative

Organizations

EC	European Commission
EU	European Union
WTO	World Trade Organization

I. INTRODUCTION

At the turn of the twenty-first century, the development of economic globalization is accelerating and the interdependent relationship between nations is deepening. The World Trade Organization (WTO), the so-called Economic United Nations, has been in operation for more than ten years. In this context, the world trading system of global multilateralism is further strengthening. However, strong unilateralism, the adversary of global multilateralism, originating from the contemporary sole superpower, the United States, has not been ready to concede voluntarily to the WTO multilateralism. During the latest decade, this superpower has been persistently, and by hook or by crook, imposing obstacles to impede the solidifying and strengthening of global multilateralism in the hope of maintaining its economic hegemonic status of unilateralism. Usually such unilateral behaviour is conducted under the camouflage of defending U.S. sovereignty, safeguarding U.S. interests, and enforcing U.S. law. New evidence of this is the mighty disturbance of the U.S. Trade Act's Section 201¹ and the chain of disputes ignited by the United States in March of 2002 within the WTO, specifically in the area of the international steel trade. These disputes were collectively decided by the WTO Panel in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*.²

Taking a macro view, the recent disputes concerning the U.S. Trade Act's Section 201 (Section 201 Disputes) are nothing but the third big round of confrontations between U.S. unilateralism and WTO multilateralism during the last decade. Its occurrence is never occasional or isolated. It has been closely connected with, and continues from, the first and second big rounds of the same confrontation: “*The Great 1994 Sovereignty Debate*” in the United States, and the disputes over the U.S. Trade Act's Section 301 (Section 301 Disputes) that occurred in the WTO during 1998-2000.

¹ See Section 201 of the Trade Act of 1974, 19 U.S.C. §2251.

² WTO Final Panel Report, WT/DS248/R-WT/DS259/R (July 11, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm [hereinafter U.S. – Certain Steel Products]. The Secretariat noted at the beginning of the Report that:

In the disputes, WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, and WT/DS259, as explained in paragraph 10.725 of the Panel's Findings, the Panel decided to issue its Reports in the form of a single document constituting eight Panel Reports, each of the Reports relating to each one of the eight complainants in this dispute. The document comprises of a common cover page, a common Descriptive Part, and a common set of Findings in relation to the complainants' claims that the Panel decided to address. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are particularized for each of the complainants. Specifically, in the Conclusions and Recommendations, separate document numbers/symbols have been used for each of the complainants (WT/DS248 for the European Communities, WT/DS249 for Japan, WT/DS251 for Korea, WT/DS252 for China, WT/DS253 for Switzerland, WT/DS254 for Norway, WT/DS258 for New Zealand and WT/DS259 for Brazil).

The background for such an approach is: Although all complaints made by the eight co-complainants were considered in a single panel process, the United States requested the issuance of eight separate panel reports, claiming that to do otherwise would prejudice its WTO rights, including its right to settle the matter with individual complainants. The complainants vigorously opposed to this request, stating that to grant it would only delay the panel process. The Panel decided to issue its decisions in the said form of “one document constituting eight Panel Reports”. Thus, for WTO purposes, this document is deemed to be eight separate reports, relating to each of the eight complainants in this dispute. In the Panel's view, this approach respected the rights of all parties while ensuring the prompt and effective settlement of the disputes. See *United States - Definitive Safeguard Measures on Imports of Certain Steel Products - Final Reports of the Panel* (circulated 11/07/2003), WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R.

The core of all the three rounds of confrontation focuses on the restriction and anti-restriction between the U.S. economic hegemony and the economic sovereignty of other states. These confrontations are deeply rooted in the policy that has been firmly established by the U.S. since 1994 when it just acceded to WTO: continuing to enforce its unilateralism, so as to maintain and extend its owned economic hegemony.

This article is written in the manner of a flashback. First, a brief introduction is given to the recent development of the Section 201 Disputes, that is., the third round of the aforementioned confrontation. Second, a general origin of the confrontation is traced back to the conflict between the national unilateralism of each sovereign state and the multilateralism of the WTO system during the formation stage of the WTO. Third, an objective and logical analysis is conducted to show that the third round confrontation has been closely connected with, and continues from, the first and second round confrontations, and that the common motive and trigger of all three rounds of confrontation have manifestly been the traditional U.S. unilateralism, which has deepened as a result of the long-standing economic hegemony of the United States, often under the camouflage of U.S. sovereignty. Fourth, more attention is paid to the WTO/DSB Panel Report in the case of the Section 301 Disputes, with the idea that the law-enforcing image of the Panel was not as good as reasonably expected, and that the Panel Report itself entails some legal flaws and suspicions, as well as some latent perils to WTO multilateralism.

Finally, this article probes into the significant implications and lessons from the sovereignty debate and the aforementioned disputes that might be worthy of notice by developing countries.

II. IGNITION OF THE SECTION 201 DISPUTES: U.S. UNILATERALISM AND SOVEREIGNTY

On June 22, 2001, on the grounds that the U.S. steel industry was seriously injured by imported steel products, the U.S. government authorized the U.S. International Trade Commission to invoke Sections 201-204 of the U.S. Trade Act of 1974, generally referred to as Section 201, to carry out investigations on more than twenty countries that exported steel to the United States.³ Based upon the Commission's preliminary conclusion, on March 5, 2002, U.S. President George W. Bush declared the employment of safeguard measures that implemented three-year long quota restrictions on major imported steel, or otherwise levied additional tariffs ranging from eight to thirty percent, which were to come into effect after March 20, 2002.⁴ The United States' behaviour met with violent condemnation from the injured states, and a large-scale trade war was triggered as a consequence.

Prior to March 22, 2002, the European Commission (EC) had drafted a list of those commodities that it might use to retaliate against the United States.⁵ The list included 325 categories of commodities -- such as steel, textiles, citrus fruits, paper, rice, motorcycles, and firearms.⁶ This list, aside from being submitted to the fifteen member nations of the European Union (EU) for approval, was also delivered to the WTO.⁷ The EC intended to levy additional tariffs ranging from ten to thirty per cent of the total value of 2.5 billion euros, which was equivalent to the damages incurred from the United States' unilaterally enhanced steel import tariff.⁸ If by June 18, 2002, the United States continued to adhere to its unilateral measures of arbitrarily increasing tariffs, and refused to compensate the EC for damages incurred from its additionally levied steel tariff, the EC retaliatory measures would enter into force on the same day.⁹

Other states, including Brazil, China, Japan, New Zealand, Norway, the Republic of Korea and Switzerland also incurred damages from the United States' unilateral measures. From March 14, 2002, to May 21, 2002, all of the states that had incurred damages jointly participated in the EU-U.S. consultations or engaged in separate consultations.¹⁰ However, none of the dispute settlement consulta-

³ Letter from Robert B. Zoellick, U.S. Trade Representative, Executive Office of the President, to the Honorable Stephen Koplun, Chairman, United States International Trade Commission (Jun. 22, 2001), *available at* <http://www.usitc.gov/steel/ER0622Y1.pdf>

⁴ Proclamation No. 7529, 67 Fed. Reg. 10553 (Mar. 5, 2002); Memorandum of March 5, 2002, 67 Fed. Reg. 10593.

⁵ *EU Draws up Steel Sanctions List*, CNN.COM (Mar. 23, 2002), *at* <http://edition.cnn.com/2002/WORLD/europe/03/23/steel/?related>

⁶ Patrick Lannin, *EU Draws up U.S. Sanctions List in Steel Row*, PNLTV (Mar. 22, 2002), *at* <http://www.pnlv.com/NewsStories/Mar%2022%20EU%20draws%20up%20U.S.%sanctions%20list%20in%20steel%20row.htm>

⁷ *EU Draws up Steel Sanctions List*, *supra* note 5.

⁸ Lannin, *supra* note 6; *see also* 2002 J.O. (L. 85) 1.

⁹ 2002 J.O. (L. 85) 1.

¹⁰ United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request to Join Consultations – Communications from Korea, WTO Doc. WT/DS258/4 (Jun. 4, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request to Join Consultations – Communications from Norway, WTO Doc. WT/DS258/5 (Jun. 4, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request to Join Consultations – Communications from China, WTO Doc. WT/DS258/6 (Jun. 4, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request to Join Consultations – Communication from the European Communities WTO Doc.

tions succeeded in resolving the dispute. The parties then proceeded separately to request the establishment of a panel to examine the issues arising from the consultations.¹¹ On July 25, 2002, in accordance with Articles 6 and 9.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the Dispute Settlement Body (DSB) eventually established a single panel to examine similar matters raised by all the complainants.¹²

On July 11, 2003, the final reports of the Panel on *United States-Definitive Safeguard Measures on Imports of Certain Steel Products* were issued and circulated to all WTO Members, pursuant to the DSU.¹³ The Panel concluded that the safeguard measures imposed by the United States on the imports of certain steel products were inconsistent with the *Agreement on Safeguards and the General Agreement on Tariffs and Trade* (GATT).¹⁴ Therefore, the Panel recommended that the DSB request that the United States bring the safeguard measures into conformity with its obligations under the GATT.¹⁵

On the same day that the Reports were issued for circulation, the eight co-complainants jointly declared that they “welcome[d] the Panel’s decision which upheld their main arguments and call[ed] upon the United States to terminate its WTO incompatible safeguard measures without delay.”¹⁶ The co-complainants further stated that “should the United States appeal this Panel’s decision, the

WT/DS258/2 (May 29, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request to Join Consultations – Communication from Japan, WTO Doc. WT/DS258/3 (May 29, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for Consultations by New Zealand, WTO Doc. WT/DS258/1 (May 21, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel products – Request for Consultations by Chinese Taipei, WTO Doc. WT/DS274/1 (Nov. 11, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for Consultations by Brazil, WTO Doc. WT/DS259/1 (May 23, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for Consultations by Switzerland, WTO Doc. WT/DS253/1 (Apr. 8, 2002). Canada, Chinese Taipei, Cuba, Mexico, Thailand, Turkey, and Venezuela participated in the Panel proceedings as third parties. U.S. – Certain Steel Products, *supra* note 2.

¹¹ United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by Brazil, WTO Doc. WT/DS259/10 (Jul. 22, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by New Zealand, WTO Doc. WT/DS258/9 (Jun. 28, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by Norway, WTO Doc. WT/DS254/5 (Jun. 4, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by Switzerland, WTO Doc. WT/DS253/5 (Jun. 4, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by China, WTO Doc. WT/DS252/5 (May 27, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by Korea, WTO Doc. WT/DS251/7 (May 24, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by Japan, WTO Doc. WT/DS249/5 (May 24, 2002); United States – Definitive Safeguard Measures on Imports of Certain Steel Products – Request for the Establishment of a Panel by European Communities, WTO Doc. WT/DS248/12 (May 8, 2002).

¹² U.S. – Certain Steel Products, *supra* note 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* These Panel Reports must be adopted by the DSB within sixty days after the date of their circulation unless a party to the dispute decides to appeal, or the DSB decides by consensus not to adopt the report. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 16(4), Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter DSU]. If the Panel Reports are appealed to the Appellate Body, they cannot be considered for adoption by the DSB until after the completion of the appeal. *Id.*

¹⁶ *USA-Steel: Full Victory for the Co-Complainants in the WTO Panel against the U.S. Steel Safeguards* (Jul. 11, 2003), http://europa.eu.int/comm/trade/issues/sectoral/industry/steel/legis/pr_110703_en.htm.

co-complainants [would] continue to work together to ensure that the WTO Appellate Body confirm[ed] that the United States' steel safeguard measures violate[d] WTO rules."¹⁷ The co-complainants requested that the Panel Report be adopted at the "earliest opportunity to allow a prompt termination of the United States' safeguard measures."¹⁸ However, the co-complainants stated that they would "keep working in close coordination if the United States decide[d] to appeal."¹⁹

Thereafter, it was reported that the United States, "instead of complying with the Panel's ruling, announced its intention to lodge an appeal with the WTO against the Panel's decision."²⁰ With regard to China, a spokesman for the People's Republic of China's Ministry of Commerce told reporters on July 15, 2003, that "[w]e have noted the United States is to take such action [appeal]."²¹ "We will continue to collaborate with the seven other plaintiffs to ensure that the WTO appellate body retains the Panel's present decision."²² It was further reported:

[T]he Ministry had also taken note of the E.U.'s announcement that it was ready to retaliate if the United States refuse[d] to accept the WTO decision within five days of the final judgment. An E.U. spokesman recently announced that the body had prepared a list of U.S. products against which it would implement sanction measures. If the United States failed to comply with the WTO decision. As one of the plaintiffs, China is closely watching the development of the issue, studying counteractive measures to protect the rightful interests of the domestic iron and steel sector.²³

On August 11, 2003, the United States officially notified the WTO of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports, as well as certain legal interpretations the Panel developed.²⁴ The United States sought review of the Panel's legal conclusion that the application of safeguard measures on imports of certain major steel products was separately and/or jointly inconsistent with Articles XIX:1 of the GATT and Articles 2.1, 3.1, 4.2, and 4.2 (b) of the Safeguards Agreement.²⁵ The United States argued that the Panel's findings were in error and based on erroneous findings on issues of law and related legal interpretations.²⁶ The United States further sought review on the grounds that the Panel had acted inconsistently with Article 11 of the DSU, in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with both the GATT and the Safeguards Agreement.²⁷ The United States also sought review of the Panel's findings on the grounds that the Panel

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Meng Yan, *U.S. Faces Stand Over Measures*, CHINA DAILY (Jul. 16, 2003), available at http://www1.chinadaily.com.cn/en/doc/2003-07/16/content_245580.htm

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ United States-Definitive Safeguard Measures on Imports of Certain Steel Products - Notification of an Appeal by the United States under Paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc., WT/DS248/17, WT/DS249/11, WT/DS251/12, WT/DS252/10, WT/DS253/10, WT/DS254/10, WT/DS258/14, WT/DS259/13 (Aug. 14, 2003) [hereinafter Safeguards Agreement], available at http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

acted inconsistently with Article 12.7 of the DSU, in that its report did not set out the basic rationale behind its findings and recommendations.²⁸

On November 10, 2003, the Appellate Body Report was circulated to Members.²⁹ The Appellate Body upheld the Panel's ultimate conclusions that each of the ten safeguard measures at issue in this dispute was inconsistent with the United States' obligations under Article XIX: 1(a) of the *GATT 1994* and the *Agreement on Safeguards*. The Appellate Body reversed the Panel's findings that the U.S. failed to provide a reasoned and adequate explanation on "increased imports" and on the existence of a "causal link" between increased imports and serious injury for two of the ten safeguard measures. Ultimately, however, even these measures were found to be inconsistent with the *WTO Agreement* on other grounds.

At its meeting on December 10, 2003, that is, just one month after the Appellate Body Report had been circulated to Members, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.³⁰ It was also at this meeting that the U.S. informed WTO Members that, on December 4, 2003, the President of the United States had issued a proclamation that terminated all of the safeguard measures subject to this dispute, pursuant to section 204 of the US Trade Act of 1974.³¹

However, it is necessary to remind and note that at the same time and in the same proclamation, the U.S. President, after obtaining a great deal of both economic and political benefits during the past period of 21 months, satisfactorily announced, "These [U.S.] safeguard measures have now achieved their purpose. He emphasized, "We will continue to pursue [our] economic policies", as well as "our commitment to enforcing our trade laws."³² As to the serious damages that had been incurred by abusing these U.S. safeguard measures to foreign steel-related trade partners during the same period of 21 months, the eloquent President pretending to be deaf and dumb, kept absolutely silent without saying even one word of regret, sorrow or apology.

The Section 201 Disputes, first ignited by the United States in March 2002, and eventually settled down under the WTO/DSU/DSB mechanism in December, 2003, became the focus of worldwide attention. The specific Disputes have now been over, and turned into history. As is known to all, however, Mr. History has always been the best teacher. Should people of the contemporary world learn something from the "new history" and its related precedents?

As mentioned above, with regard to the United States, the ignition of these disputes has never been isolated or occasional. It is deeply rooted in the United States' long-standing unilateralism and its new conception of sovereignty that evolved in 1994.

For a better understanding on the origin and essence of the current U.S. unilateralism and its related disputes, it would be necessary to trace back to the history upon "*The Great 1994 Sovereignty Debate*" and its history happened in the United States.³³ The debates of 1994 focused on whether or

²⁸ *Id.*

²⁹ United States - Definitive Safeguard Measures on Imports of Certain Steel Products - AB-2003-3 - Report of the Appellate Body (circulated 10/11/2003), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R.

³⁰ Minutes of Meeting, DSB, WTO, 10 December, WT/DSB/M/160, 27 January 2004, (04-0286)

³¹ *Id.*

³² [U.S.] President's Statement on Steel, at <http://www.whitehouse.gov/news/release/2003/12/20031204-5.html>

³³ This phrase was first coined by John H. Jackson in his article, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 Colum. J. Transnat'l L. 157, 160, 162, 174, 179, 182, 188 (1997), available at <http://www.worldtrade-law.net/articles/jacksonsovereignty.pdf>

not the United States should accept the WTO system and strictly observe its multilateralism.³⁴ Specifically, it centered upon whether the acceptance of the WTO system and the observance of its multilateral rules, *inter alia*, the WTO/DSU/DSB system and its rules, would impair, infringe, destroy, or deprive the United States of its sovereignty as it effected its economic policy decision-making.³⁵

³⁴ *Id.*

³⁵ *Id.*

III. CONFLICTS OF SOVEREIGNTIES IN THE FORMATION OF THE WTO SYSTEM

In light of the worldwide scope and the accelerated advancement of economic globalization, is the sovereignty hedge of nations being demolished too quickly? Should it be demolished at all? Are the principles and notions of economic sovereignty obsolete and in the process of being abated and diluted, and should it be weakened and diluted? This is not only a realistic problem arising out of the contemporary international community, but also a significant, controversial, and theoretical question often confronted in international fora.

Manifestly, the WTO is the product of the accelerated development of economic globalization. The necessary premise and procedure to establish the worldwide organization is the conclusion of a multilateral international treaty. To be a member of the WTO, each sovereign country or separate customs territory must, on the basis of equity, willingness, and reciprocity, conclude an international treaty establishing and/or acceding the multilateral organization, in which the international codes and rules of conduct, with legally binding effect, are stipulated for joint observance.³⁶

For every sovereign country, entering into such a treaty allows the country to acquire certain economic rights and interests. In accordance with the principle of reciprocity and equilibrium in rights and obligations, a nation, while acquiring economic rights and benefits, must also assume some corresponding economic obligations and restraints. This means that each sovereign country promises to self-restrict its inherent economic sovereign power to some extent as a concession. However, due to the differences or even contradictions among interests of each sovereign state, the core focus of the discussion and dispute in the consultation process is: what is the scope and degree of restrictions that should be imposed on another nation's economic sovereignty, and what scope and degree of self-restriction is acceptable to impose on its own economic sovereignty.

In the process of establishing the WTO, there existed numerous differences in national situations and requirements among the 125 prospective contracting parties. Furthermore, the international trade issues involved were of an unprecedented and vast range. Therefore, to accomplish harmony and consensus on so vast a scope of topics, obstacles and hardships had to be overcome in every state. During the eight-year-long Uruguay Round (UR) negotiations, the diplomats of every country bargained with each other. Though forms varied, in essence, the negotiations consistently focused on the same core, that is, the conflicts and compromises around the restriction and anti-restriction on national sovereignty, or around the conflicts and compromises between national unilateralism and international multilateralism. As known to all, the UR ultimately succeeded, concluding an agreement in 1994. However, during the last decade, the core of such conflicts has not only appeared in international negotiations, but has also been reflected in internal fora.

The domestic debate on national sovereignty that arose in the United States during the later negotiation stage of the WTO, and the period around its signing and ratification, was a typical reflection and refraction of the international restriction versus anti-restriction struggle on national economic sovereignty.

³⁶ *Id.* at 166; *see also* World Trade Organization, Accession: Technical Note, Completion of the Working Party Mandate, http://www.wto.org/english/thewto_e/acc_e/tn_4accprocess_e_e.htm

IV. THE REFRACTION OF SUCH CONFLICTS IN THE UNITED STATES: “THE GREAT 1994 SOVEREIGNTY DEBATE”

The reason that a ten-year old domestic debate is worthy of great attention is not only that it involved the major weighty issue of national sovereignty; but also due to the fact that such a debate of 1994 first broke out within the sole superpower, that is, the *First World*. Then, it had a broad effect on the combat between the *First World* and the *Second World*, and profoundly influenced the vast *Third World*. Therefore, it has a strikingly universal and global importance.

In the comparatively long period of time before the WTO Agreement and its multilateral system came into operation on January 1, 1995, some U.S. authoritative legal scholars repeatedly advocated the theories of “sovereignty *obsolete*,”³⁷ “sovereignty *dilution*,” and even “sovereignty *discarding*,”³⁸ all of which developed into original and fashionable theories and were continuously invoked and testified to in U.S. foreign political and economic affairs.

In 1989, a U.S. international law professor, Louis Henkin, delivered a series of lectures before The Hague Academy of International Law. In his lectures, Henkin re-examined the principal themes of traditional international law and elaborated on the latest developments in the current era.³⁹ In particular, Henkin addressed the fact that international law had experienced long-term conflicts between two superpowers armed with nuclear weapons, and had also experienced the emergence and proliferation of many Third World countries during the Cold War.⁴⁰ However, Henkin argued that the misconceived invocation of sovereignty had impeded the modernization and development of international law.⁴¹ In his opinion, the perversion of the term “sovereignty” was rooted in an unfortunate mistake.⁴² Henkin declared that “[s]overeignty is a bad word,” not only because it has served terrible national mythologies in international relations, and even in international law, but also because it is often a catchword, or a substitute for thinking and precision.⁴³ Henkin emphasized that “[f]or international relations, surely for international law, [sovereignty] is a term largely unnecessary and better avoided.”⁴⁴ Henkin even advocated that “we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.”⁴⁵

³⁷ Philip Jessup, *A modern law of nations*, 1-3, 12-13, 40-42 (Macmillan 1948). Jessup was a professor at Columbia University from 1949 to 1953. He was appointed as the Ambassador-at-Large, playing an active role in foreign affairs. In 1970, he was chosen as a Judge of the International Court of Justice.

³⁸ Louis Henkin, *The Mythology of Sovereignty*, ASIL Newsletter, March-May 1993, 1-2, available at <http://www.asil.org/pres.htm>; Louis Henkin, *International Law: Politics and Values*, xi, 1-2 (Martinus Nijhoff 1995). “This volume derives from a series of lectures delivered as the ‘general course’ at The Hague Academy of International Law in July 1989.” *Id.* Mr. Henkin served as President of the American Society of International Law and was a long-time professor at the Columbia Law School.

³⁹ See Henkin, *supra* note 38.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 2.

⁴² *Id.* at 8.

⁴³ *Id.* (emphasis added).

⁴⁴ See Henkin, *supra* note 38, at 10 (emphasis added).

⁴⁵ *Id.* (emphasis added).

In the early 1990s, the disintegration of the Soviet Union and the end of the cold war pushed the United States to the throne as the sole superpower. Professor Henkin stated that “international law will have to respond to the changed world order at the turn of the twenty-first century.”⁴⁶ Henkin further warned that “the world community ought to be alert to new opportunities to overcome old-order obstacles to a better international law.”⁴⁷

The implication of Henkin’s opinions, in its context, is that the sharp change in power contrast and balance greatly favours the United States. Thus the United States should take this opportunity to relegate the traditional sovereignty concepts in international law that reflected the “old-order,” so that the ideology of “the obsolete of sovereignty,” advocated by hegemonists, may pervade and prevail in the world without fetter.

IV.1 Away with the “S” word! -- [Sovereignty of other states]

In May of 1993, when the negotiations of the UR were in tense debate and the struggle for economic sovereignty among every category of nation was spreading like a wildfire, Professor Henkin issued a paper, *The Mythology of Sovereignty*.⁴⁸ Henkin’s main viewpoints are as follows:

Talk of “sovereignty” is heavy in the political air, often polluting it . . . “Sovereignty” is used to describe the autonomy of states and the need for state consent to make law and build institutions. “Sovereignty” is used to justify and define the “privacy” of states, their political independence, and territorial integrity; their right and the rights of their peoples to be let alone and to go their own way.

But sovereignty has also grown a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worthy in it, a mythology that is often *empty* and sometimes destructive of human values.

For example . . . [o]ften we still hear that a sovereign state cannot agree to be bound by particular international norms -- e.g., on human rights, or on economic integration (as in Europe). Even more often, sovereignty has been invoked to resist “intrusive” measures to monitor compliance with international obligations --human rights commitments or arms control agreements ...

It is time to bring sovereignty down to earth; to examine, analyse, reconceive the concept, cut it down to size, break out its normative content, repackage it, perhaps even rename it ...

...
Away with the “S” word!⁴⁹

The enlightening remarks of Professor Henkin assuredly are not “*empty* words” without target. The realistic purport of his reasoning is obviously to boost the “big stick” policy that the United States is

⁴⁶ *Id.* at 2.

⁴⁷ *Id.*

⁴⁸ Louis Henkin, *The Mythology of Sovereignty*, Am. Soc’y Int’l L. Newsl., Mar.- May 1993, 1-2, available at <http://www.asil.org/pres.htm>

⁴⁹ *Id.* (emphasis added). “S” is the first letter of the word sovereignty. This sentence means that sovereignty should be relegated *away* to *the shelf of history as a relic*. If “S” and “word” are read together, the sentence reads, “Away with the *sword*,” thus implying that sovereignty is an old but “terrible” *sword* that needs to be done away with.

practicing in the international community, and to facilitate the United States in pursuing its neo-interventionism, neo-gunboatism, and neo-colonialism disguised under the flag that human rights is superior to sovereignty, that preventing and controlling the proliferation of weapons of mass destruction is superior to sovereignty, or that economic integration is superior to sovereignty. The targeted countries definitely include all the small and weak nations who were not willing to succumb to the political and economic hegemony of the United States during the 1980s and 1990s. The theory was then met with applause within the United States. As a newsletter, the American Society of International Law diffused and propagated Professor Henkin's enlightening remarks to a large audience.

However, history is apt to mock people. Only one year later, in the United States, there broke out the Great Debate concerning *whether the United States could relinquish its own sovereignty*. Many American scholars and politicians, one after another, stressed that the United States should never accept wholesale the legal system embodying the UR negotiation results or the WTO Agreement, especially its dispute settlement mechanism.⁵⁰ Otherwise, the scholars argued, the United States' own economic decision-making sovereignty would be diminished, detracted, or taken away.⁵¹ Thus, the notion of sovereignty that Professor Henkin had vigorously advocated to *do "away with"*, was *re-adopted* and *re-expounded on* by many American scholars.

IV.2 Never away with the US' "S" word! -- ["Sovereignty" (hegemony) of US]

One such scholar, Professor John H. Jackson, subsequently wrote a commentary intended to explore the issue of sovereignty as it related to the Great Debate.⁵² As one of the major counsels on the foreign trade policy of the United States, Professor Jackson had the experience of participating in the nation-wide Great Debate. He twice testified and attended hearings held separately by the Senate Finance Committee and the Senate Committee on Foreign Relations.⁵³ In his paper, Jackson discusses the causes and major points of the Great Debate. Some of his discussion is outlined below.

The eight-year long UR negotiation was launched in 1986, and ultimately concluded on April 15, 1994, when the representatives of the Contracting Parties signed the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* and the *Marrakesh Agreement*, establishing the WTO.⁵⁴ As a continuation of, and supplement to, the 1947 GATT, one of the major innovations of the WTO was its establishment of a new set of dispute settlement mechanisms correcting some of the birth defects that existed in the original 1947 GATT.⁵⁵

One such birth defect that the UR attempted to correct "concerned the dispute settlement procedures of the 1947 GATT."⁵⁶ According to Article 22 of the GATT, international trade disputes arising

⁵⁰ Matthew Schaefer, *Sovereignty, Influence, Realpolitik and the World Trade Organization*, 25 *Hastings Int'l & Comp. L. Rev.* 341 (2002); Patrick J. Buchanan, *The Great Betrayal: How American Sovereignty and Social Justice are Being Sacrificed to the Gods of the Global Economy* (Little Brown 1998); Patrick J. Buchanan, *Showdown at the GATT Corral*, *Denver Post*, Oct. 9, 1994, at E4.

⁵¹ Schaefer, *supra* 46, at 341; Patrick J. Buchanan, *Fritz Hollings Derails the GATT Express*, *Denver Post*, Oct. 2, 1994, at F4 (arguing that "[i]n the World Trade Organization, established by GATT, America surrenders her national sovereignty, her freedom of action to defend her own economic vital interests from the job pillagers of Tokyo and Beijing. We give up our freedom – to foreign bureaucrats who will assume authority over America's commerce that the Founding Fathers gave exclusively to the Congress of the United States. And, if we are outraged by WTO's decisions, we have just one vote, out of 123, to challenge those decisions And in [the] WTO, the U.S. has no veto power.")

⁵² Jackson, *supra* note 33.

⁵³ *Id.* at 188 n.3.

⁵⁴ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, *Legal Instruments – Results of the Uruguay Round*, vol. 1 (1994), 33 *I.L.M.* 81 (1994) [hereinafter *Final Act*].

⁵⁵ Jackson, *supra* note 33, at 166.

⁵⁶ *Id.* at 165.

between contracting members' governments should be resolved through mutual consultations.⁵⁷ If no satisfactory settlement is reached between the disputing parties within a reasonable time, the dispute may be referred to all of the contracting parties for resolution.⁵⁸ "As practice developed, disputes were considered by a panel of experts (usually three but sometimes five individuals) not to be guided by any government."⁵⁹ The Panel would then submit a report to a council made up of contracting parties, that if adopted was considered binding on the parties.⁶⁰ However, "the decision to adopt the report had to be by 'consensus.'"⁶¹ According to this procedure, a Panel report can only be passed with the unanimous agreement of those present at the meeting, which allows the parties in the dispute to block the consensus of the council -- in fact resulting in a *de facto* phenomenon where "one objection means veto" and results in a low efficiency and weakness of the GATT dispute settlement mechanism.⁶²

In light of this, the DSU eliminated the ability of a party to block the adoption of the report.⁶³ The DSU provides that the Dispute Settlement Body (DSB), the name under which the General Council held its meetings, is fully competent to deal with the disputes.⁶⁴ "Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."⁶⁵ What is more important, the DSB completely transformed from the consensus procedure practiced during the 1947 GATT to the decision-making procedure of reverse consensus, whereby "[t]he report is deemed adopted unless there is a consensus against adoption."⁶⁶ In essence, if any complaining party so requests, a panel must be established unless the DSB decides by consensus not to establish a panel.⁶⁷ After the panel (similar to "the first instance adjudicating organization") or the Appellate Body (similar to "the second instance adjudicating organization") submits its report to the DSB, unless the DSB decides by consensus not to adopt the report, the DSB must adopt the report, requiring the concerned parties to unconditionally accept the recommendations or to implement related rulings.⁶⁸ Otherwise, a party who breaches the DSB's ruling (usually the losing party) will incur various sanctions and retaliations.⁶⁹ In short, the actual effect of the new decision-making principle that the DSB adopted in its dispute settlement proceedings is that if the injured claimant or the winning party insists on the legitimate demands determined by the panel or the Appellate Body in the DSB meeting, the final decision and recommendations will be implemented by a "pass with one vote."

⁵⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXII, 61 Stat. A- 11, T.I.A.S. 1700, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXII [hereinafter GATT].

⁵⁸ *Id.* art. XXIII.

⁵⁹ Jackson, *supra* note 33, at 165.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 189 n.16.

⁶³ *Id.* at 176.

⁶⁴ DSU, *supra* note 15, art. 2(1).

⁶⁵ *Id.*

⁶⁶ Jackson, *supra* note 33, at 176; DSU, *supra* note 15, art. 16(4).

⁶⁷ DSU, *supra* note 15, art. 16(4).

⁶⁸ *Id.* arts. 6(1), 16(4), 17(14).

⁶⁹ *Id.* arts. 3(7). The other party may suspend the application of the concessions or other obligations under the covered agreements on a discriminatory basis to those Members who neither abide by the WTO rule nor accept the rulings of the DSB. *Id.*

From this it can be perceived that the dispute settlement mechanism of the WTO is tougher and more efficient than that of the GATT. If this dispute settlement mechanism operates normally, it can have a binding effect on the economically powerful contracting members, especially on the superpower. In international trade, the powers are invariably in dominance because of their national wealth. Meanwhile, they act on a principle of national egoism and hegemonism, thus materially impairing the trade interests of the economically weak nations. If such dispute settlement mechanisms are effectively implemented, once the injured party complains, a superpower, like the United States, cannot block the decision or escape from sanctions at will by relying upon its economic dominance and recourse to the formerly applied principle of consensus.

The perfected new dispute settlement mechanism of the DSU is an indispensable element of the integral WTO Agreement system. After the U.S. negotiation representatives signed onto the single package treaty, the responsible governmental department sent it to the U.S. Congress for consideration and ratification.⁷⁰ Subsequently, the two houses of Congress held a series of congressional hearings and plenary sessions on the UR results, during which many congressmen sharply criticized the UR results, arguing that the ratification and acceptance of the WTO Agreement was unconstitutional because it would infringe on the United States' sovereignty.⁷¹ One of the arguments they posed was that the sovereignty of the United States would definitely be eroded should the United States accept the new WTO dispute settlement mechanism.⁷² The congressmen who held this opinion can be categorized as the "Sovereignty Anxiety Group;" while other congressmen, the "Sovereignty Confidence Group," refuted the above viewpoints, deeming that the acceptance of the WTO system, together with its indispensable dispute settlement mechanism, would not impair the sovereignty of the United States at all.⁷³

Those who "argued against the WTO did so partly because the dispute settlement procedure was tougher, and no longer permitted a single nation [trade superpower] to *block* acceptance of a panel report" *at will*.⁷⁴ Members of Congress who opposed the WTO were concerned with the issue of "whether the allocation of power regarding WTO decision-making was an inappropriate infringement on the United States' sovereign decisionmaking."⁷⁵ Politicians most often addressed the issue of whether "this nation [should] accept the obligation to allow certain decisions affecting it (or its view of international economic relations) to be made by an international institution rather than retaining that power in the national government?"⁷⁶ "Various opponents to the treaty argued that the WTO posed risks to U.S. sovereignty because decisions could be made in the WTO that would override U.S. law."⁷⁷

⁷⁰ Jackson, *supra* note 33, at 168-69.

⁷¹ *Id.* at 169; *The World Trade Organization and U.S. Sovereignty: Hearings before the Senate Committee on Foreign Relations*, 103rd Cong. (1994) (testimony of Ralph Nader, Center for Responsive Law), available at 1994 WL 4188790 [hereinafter Ralph Nader Testimony]. The heated argument between the two factions of Congress, "combined with a general public debate in all the various media, as well as many academic, business, and other public forums," created a great debate that swept across the nation. Jackson, *supra* note 33, at 169-70. Professor Jackson named it "The Great 1994 Sovereignty Debate," and proclaimed 1994 a year of "historic importance" in U.S. history. *Id.*

⁷² See Ralph Nader Testimony, *supra* note 71; Ross Perot, *Appeal to Trade Body Carries Risks for U.S.*, Houston Chronicle, 2, Jun. 14, 1996.

⁷³ See, e.g., 140 Cong. Rec. H11492 (Nov. 29, 1994) (statements of Rep. Archer, Rep. Coble, Rep. Richardson, and Rep. Bunning); 140 CONG. REC. S15,342 (Dec. 1, 1994) (statements of Sen. Domenici, Sen. Cochran, Sen. Hutchison, Sen. Roth, Sen. Gramm, and Sen. Grassley).

⁷⁴ Jackson, *supra* note 33, at 177 (emphasis added).

⁷⁵ *Id.* at 174.

⁷⁶ *Id.* at 179.

⁷⁷ *Id.* at 173.

In addressing these viewpoints, Professor Jackson acknowledged that “acceptance of any treaty, in some sense reduces the *freedom and scope* of national government actions.”⁷⁸ “At the very least, certain types of actions inconsistent with the treaty norms would give rise to an international law violation.”⁷⁹ However, Professor Jackson repeatedly argued that the majority of objections to joining an international treaty, which result in a loss of U.S. sovereignty, are arguments about the allocation of power.⁸⁰ “That is, when a party argues that the U.S. should not accept a treaty because it takes away U.S. sovereignty to do so, what that party most often really means is that he or she believes a certain set of decisions should, as a matter of good government policy, be made at the nation-state [U.S.] level and not at an international level.”⁸¹ Professor Jackson suggested that “nervousness about international dispute settlement procedures reflects a government’s desire to have some flexibility to resist future strict conformity to norms in certain special circumstances, particularly circumstances that could pose great danger to essential national objectives.”⁸² In response to those opposing the WTO on the basis that the WTO would damage U.S. sovereignty, Professor Jackson provided the following explanations and clarifications:

There is some confusion about the effect of a WTO and its actions on U.S. law. It is almost certain to be the case (as Congress has provided in recent trade agreements) that the WTO and the Uruguay Round treaties will not be self-executing in U.S. law. Thus, they do not automatically become part of U.S. law. Nor do the results of panel dispute settlement procedures automatically become part of U.S. law. Instead, the United States must implement the international obligations or the result of a panel report, often through legislation adopted by the Congress. In a case where the United States feels it is so important to deviate from the international norms that it is willing to do so knowing that it may be acting inconsistently with its international obligations, the U.S. government still has that power under its constitutional system. This can be an important constraint if matters go seriously wrong. It should not be lightly used of course. In addition, it should also be noted that governments as members of the WTO have the right to withdraw from the WTO with six month notice (Art. XV:1 of the WTO Agreement). Again, this is a drastic action which would not likely to be taken, but it does provide some checks and balances to the overall system.⁸³

Hereby Professor Jackson actually presented to the U.S. Congress and to other wide audiences with the following “U.S. creeds”:

- (1) When entering into or concluding any international treaty, the United States should consistently put into primary consideration the national interests, the U.S. sovereignty safeguarding its national interest and the U.S. law.
- (2) The international norms and code of conduct stipulated in the international treaties concluded by the United States, and the international obligations undertaken by the United States therein, must generally be reviewed, ratified and enacted by the U.S.

⁷⁸ *Id.* at 172 (emphasis added).

⁷⁹ Jackson, *supra* note 33, at 172.

⁸⁰ *Id.* at 160, 179, 182, 187-88.

⁸¹ *Id.* at 160.

⁸² *Id.* at 175.

⁸³ Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Finance Committee, 103d Cong. 114 (1994) (Mar. 23, 1994, testimony of John H. Jackson); John H. Jackson et al., *Legal Problems of International Economic Relations: Cases, Materials and Text* 305 (3d ed. 1995) [hereinafter *Legal Problems of International Economic Relations*].

Congress, the main branch embodying the U.S. sovereignty, before they became a part of the U.S. domestic law to be implemented.

- (3) Once the United States deemed it necessary to take certain measures or actions to safeguard its significant national interests, it is *empowered* to escape from the binding of international rules and norms, to breach its international obligation undertaken in the light of international treaties, and to go in its own way. When necessary, the United States does not even hesitate to withdraw from the international treaties that it deems would restrain it from free action. Such power is the U.S. sovereignty, the sovereignty that the United States persistently retains in hand in the process of the international “allocation of power.”⁸⁴

The above creeds on U.S. sovereignty expounded by Professor Jackson represent the typical opinion among WTO proponents at that time.⁸⁵ After months of nationwide debate, the sovereignty creeds of the proponents gradually prevailed throughout the whole nation, especially in Congress.⁸⁶ The majority of congressmen were thus relieved from the anxiety of sovereignty and further convinced that U.S. sovereignty was firmly in its own hands, even after it joined the WTO.⁸⁷ Ultimately, the WTO Agreement was successively approved by the House of Representatives on November 29, 1994, by a vote of 288 to 140, and by the Senate on December 1, 1994, by a vote of 76 to 24.⁸⁸

What is interesting is that, as a compromise between the WTO opponents and proponents and a deal between President Bill Clinton (Democratic Party) and the Senate Majority Leader, Robert Dole (Republican Party), a statutory ad hoc commission was to be established pursuant to special legislation proposed by Mr. Dole a few days before the congressional votes were cast.⁸⁹ The ad hoc commission was to be “composed of five U.S. federal judges who would review the adopted WTO Panel reports adverse to the United States.”⁹⁰ The Commission would evaluate and judge whether the reports violated four particular criteria. The specific criteria for evaluating WTO dispute reports were “whether the panel had: 1) exceeded its authority or terms of reference; 2) added to the obligations of or diminished the rights of the United States; 3) acted arbitrarily or capriciously or engaged in misconduct, etc.; or 4) deviated from the applicable standard of review including that in article 17.6 of the antidumping text.”⁹¹

After careful review and evaluation, the Commission would report the results of its review to Congress.⁹² If the Commission determined that the WTO/DSB Panel’s report was contrary to any of

⁸⁴ Legal Problems of International Economic Relations, *supra* note 79.

⁸⁵ 140 Cong. Rec. S15, 342 (Dec. 1, 1994) (statements of Sen. Domenici, Sen. Cochran, Sen. Hutchison, Sen. Roth, Sen. Gramm, and Sen. Grassley).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 140 Cong. Rec. H11493 (Nov. 29, 1994); S. Vote Rpt. 329 (Dec. 1, 1994).

⁸⁹ Jackson, *supra* note 33, at 186; A Bill to Establish a Commission to Review the Dispute Settlement Reports of the World Trade Organization and for Other Purposes, S. 16, 104th Cong. (1995) [hereinafter A Bill to Establish a Commission]. “This proposal has not become law, although a series of attempts were made to enact it in 1995 and 1996.” Jackson, *supra* note 33, at 186.

⁹⁰ Jackson, *supra* note 33, at 186; A Bill to Establish a Commission, *supra* note 89.

⁹¹ A Bill to Establish a Commission, *supra* note 89.

⁹² *Id.*

the above criteria, and if the number of such reports amounted to three within five years, Congress would then consider withdrawing from the WTO and act at its will.⁹³

While the proposal has never become law, it has been vigorously advocated by members of Congress at various times and remains a possibility that would provide the United States with the ability to attack and shoot at the proper time. Professor Jackson opined that the proposal *per se*, its obvious proposition and the review criteria set up by it, clearly shows the “anxious concerns” of the WTO opponents.⁹⁴

⁹³ *Id.*; Gary Horlick, *WTO Dispute Settlement and the Dole Commission*, 29(6) J. World Trade, 45-48 (1995).

⁹⁴ Jackson, *supra* note 33, at 187.

V. “THE GREAT 1994 SOVEREIGNTY DEBATE” AND SECTION 301

In fact and in essence, what WTO opponents and proponents argue about is *not* the economic sovereignty of the United States, but the economic hegemony of the United States. An obvious example of this aspect is the implementing practice of Section 301 of the U.S. Trade Act⁹⁵ and the decision made by the U.S. Congress after the Great Debate that Section 301 should continue to be implemented.

Section 301, familiar to everyone and appearing ubiquitously in Chinese and foreign newspapers, is the “big stick” that the Office of the U.S. Trade Representative (USTR) frequently waves to threaten and make submissive its trade adversaries, and fully reflects the United States’ economic hegemony in the area of international trade.^{96,97} Though wordy, the core content of Section 301 is never ambiguous. Section 301 provides, in part:

⁹⁵ 19 U.S.C. §§ 2411-2420 (2003). Section 301 refers to § 301 of the U.S. Trade Act of 1974, whose contents have been expanded through several amendments, and incorporated into the Omnibus Trade and Competitiveness Act of 1988, as Section 301–310. These ten sections, as a whole, are habitually referred to as Section 301.

⁹⁶ The USTR is appointed by the U.S. President and approved by the Senate, with the rank of Ambassador Plenipotentiary and Extraordinary. Formerly, the USTR conducted U.S. foreign trade negotiations. Since 1974, its office has been located in Washington, D.C., and has become a permanent institution of the U.S. Government. Its authority has been extended constantly, participating in the U.S. Government’s foreign trade decision-making, issuing policy guidance on foreign trade to other branches and departments of the U.S. Federal Government, representing the U.S. Government in presiding or presenting various foreign trade negotiations, accepting the “petition” of the U.S. commercial actors and defending their rights and interests in foreign trade, implementing Section 301 to initiate “tort and contract breach” investigations on its trading partners of foreign governments, and determining whether or not to take retaliatory actions or impose sanction measures.

⁹⁷ For example, take the three retaliatory measures and economic sanctions that China encountered. In November of 1991, the USTR, under the pretext that China had failed to provide “sufficient” and “effective” protection for the intellectual property rights of U.S. businesses, and failed to provide “equitable” market access opportunity to those American businessmen, listed China as a “Priority Foreign Country” to which Section 301 should apply. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 Am. Univ. L.R. 131, 141 (2001). Meanwhile, it unilaterally published a “retaliatory list” against China with a resulting cost of \$1.5 billion. *Id.* at 142. Through repeated consultations between the two sides, the dispute was ultimately resolved. *Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property*, Jun. 17, 1993, P.R.C.-U.S., T.I.A.S. No. 12036 (1995). However, on June 30, 1994, the United States played the old trick again, listing China once more as a Priority Foreign Country. USTR, 1995 Annual Rpt., available at http://www.ustr.gov/html/1996_tpa_monitor_3.html. Simultaneously, the USTR put forward many harsh requirements that directly contravened and interfered with China’s legislation, jurisdiction, and internal affairs. For example, the United States required the amendment of Chinese civil law, shortening the time limit for judicial hearings, revising the provisions on the charge for civil litigation with the purpose of lowering the charge, engaging in a large-scale attack on torts committed against U.S. intellectual property rights in China, reporting the results of such actions to the United States until it was satisfied, and quarterly reporting to the U.S. government the “situation of China’s investigation and disposal of the torts on U.S. intellectual property rights. As the U.S. requirements were too harsh, after seven rounds of consultations the dispute remained unsolved. David E. Sanger, *U.S. Threatens \$2.8 Billion on Tariffs on China Exports*, *New York Times*, Jan. 1, 1995, at A14. Then, on December 31, 1994, the United States unilaterally announced its retaliatory list against China would increase in cost, to approximately \$2.8 billion, in an attempt to compel China to succumb. *Id.* In response, China carried out direct, justified, favorable, and dignified counterattacks. Martha M. Hamilton, *U.S. to Hit China with Stiff Tariffs; Sanctions are Largest Ever Imposed*, *the Washington Post*, Feb. 5, 1995, at A1; Yu, *supra*, at 144. On the one hand, China pointed out that the United States’ use of unilateral retaliatory measures to cope with its trading partners was obviously in breach of the principle that disputes should be resolved through multilateral consultations, which is required by many international treaties and conventions, and thus should receive general condemnation in the international community. On the other hand, in accordance with Article 7 of the Foreign Trade Law of the People’s Republic of China -- which provides that if any country

“If the United States Trade Representative determines under section 304(a)(1) that: the rights of the United States under any trade agreement are being denied; or an act, policy, or practice of a foreign country -- violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or 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.”⁹⁸

Relying on both the authority and procedure provided by Section 301 and the economic dominance of the United States, subsection C authorizes the USTR to take various unilateral and compulsory retaliatory actions to compel its adversaries to eliminate the policy, act, or practice; to phase out their injury or restriction on U.S. commerce; or to provide the United States with compensation that is satisfactory to the U.S. government and its related economic sectors while disregarding other domestic law and international treaties.⁹⁹

or region takes discriminatory, restrictive, or other similar measures of trade against China -- China can take corresponding measures on the basis of factual circumstances. The Ministry of Foreign Trade and Economic Cooperation of the PRC (MOFTEC) published an “intended anti-retaliatory list on the U.S.,” which provided that double tariffs would be levied on some large quantity goods imported from the United States, suspension of the import of other large quantity goods from the United States, suspension of the negotiations of some large-scale joint venture projects with U.S. partners, and suspension of the applications of American businessmen to establish investment corporations in China. Yu, *supra*, at 144. Meanwhile, it was clearly announced that “the above measures would come into effect when the United States officially implemented its retaliation on Chinese exported goods.” *Id.* at 144. Considering that its “retaliation” and “sanctions” on China could not be fulfilled, along with the possibility of losing the big market in China, the United States had to restrain itself from its former attitude and abolish some of its formerly adhered to harsh requirements. See Julia Chang Bloch, *Commercial Diplomacy*, in Ezra F. Vogel ed., *Living With China: U.S.-China Relations in the Twenty-First Century* 185, 197-198 (1997). On February 26, 1995, China and the United States reached a “win-win” compromise in the form of “exchange of notes;” thus an on-the-trigger “trade war,” evoked by the United States, was avoided. See Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995). Between the spring and summer of 1996, a trade dispute between China and the United States rose again. Richard W. Stevenson, *U.S. Cites China for Failing to Curb Piracy in Trade*, *New York Times*, May 1, 1996, at D4; Yu, *supra*, at 148. The United States unilaterally listed China as the Priority Foreign Country under Section 301, and announced a retaliatory list on China to the value of \$2 billion. *Id.* at D4; Yu, *supra*, at 148. Correspondingly, the department of Chinese government solemnly declared again that “[t]o safeguard our *national sovereignty* and dignity, . . . we are forced to take corresponding anti-retaliation measures.” *The Announcement of the MOFTEC: The PRC’s Anti-retaliation List on the U.S.*, *People’s Daily*, May 16, 1996 (on file with author); Sanger, *supra*, at A1. The anti-retaliation list contained eight items and provided that “[t]he above measures would come into effect once the United States implemented its retaliatory measures on Chinese exported goods.” *Id.*; Sanger, *supra*, at A1. On June 17, 1996, through arduous negotiations, the two sides reached an acceptable agreement. China Implementation of the 1995 Intellectual Property Rights Agreement, Jun. 17, 1996, P.R.C.-U.S., available at <http://www.mac.doc.gov/China/Agreements.htm>. This new “contest” demonstrated once again that the trade disputes between states, especially between large, powerful ones, should and could only be resolved justifiably and reasonably through equitable consultations. An action such as unilateral retaliation, which is merely bullying the weak by relying on one’s power, is destined to end fruitlessly, and what is left is an arbitrary image.

⁹⁸ 19 U.S.C. § 2411(a).

⁹⁹ *Id.* § 2411; Yuqing Zhang & Yue Guan, *Section 301 of the U.S. Trade Act*, Intl. Trade 6-9 (1992); Guohua Yang, Study on the Section 301 of the U.S. Trade Act 36-57 (1998); see generally United States-Sections 301-310 of the Trade Act of 1974, WTO Panel Report WT/DS/152/R (Dec. 22, 1999).

The purpose and practical function of Section 301 lie in its unilaterally set-up U.S. criteria, justified or not, which compels other nations to open their domestic market by means of retaliatory threat and sanctions. Such hegemonic legislation and its implementation once gave rise to a wide range of reproaches and criticism in the international community, as this domestic act of the United States obviously deviated from the provisions of the GATT, a treaty both concluded and ratified by the United States. The United States adopted *unilaterally set-up criteria, unilateral judgment, and unilateral implementation* of retaliatory sanctions to replace the principle of multilateralism, where any dispute should be investigated and dealt with by a neutral panel and then reported to the GATT counsel for review which is reflected by the original GATT dispute settlement mechanism. Such an action is in breach of the international obligations that the United States committed itself to. However, the supremacy of U.S. interests and national egoism is the constant reflection of U.S. pragmatism in the area of international trade, which results in improper harassment of the normal international trade order in the international community. In view of this, during the UR, a majority of GATT contracting members, especially those who had experienced the attack of Section 301, were determined to strengthen the binding effect of the original dispute settlement mechanism of the GATT to stop the United States from its aggressive unilateralism and arbitrariness.¹⁰⁰

During the period that the U.S. representative signed the WTO Agreement and sent it to the U.S. Congress for review and ratification, many U.S. Congressmen made it clear that no changes in Section 301 would be tolerated.¹⁰¹ Consequently, “except for some minor procedural amendments, Section 301 remains intact.”¹⁰² It was pointed out by some U.S. experts that “[t]his statute . . . was perhaps *the most important political bellwether* of the sovereignty considerations in the Congress during the 1994 Debate.”¹⁰³

Conspicuously, even though a U.S. executive representative signed the WTO Agreement, the U.S. legislature continues to enforce Section 301, in contravention of the WTO Agreement. The actual effect of this device inevitably leaves the United States *sitting on the fence with an ability to gain advantages from both sides*. In international trade disputes between the United States and its trading partners, particularly in cases where the United States is the defendant, if the conclusion and award made through the WTO dispute settlement procedure is in favour of the United States, the United States, as the winning party, will agree and accept the conclusion or award in a high-sounding manner to show that it strictly abides by the international treaty. On the other hand, if the conclusion or award is against the United States, making it the losing party, the United States -- no longer able to play the old trick of blocking the enforcement of the Panel report or DSB decision -- but can still cast away the DSB decisions like worn-out shoes and boycott, even retaliate against the winning party under the rhetoric of *safeguarding the United States' economic sovereignty and defending the United States' constitutional institutions*. In addition, the United States can abandon the DSB procedures of the WTO, unilaterally invoke Section 301, and impose accusations of engaging in unjustified trade on the defendant and adjudicate the case in accordance with its statute, in the dual capacities of both plaintiff and judge, all pursuant to its self-established statutory criteria! Furthermore, it is demonstrated that in the circumstance of power politics and hegemonic action, “[t]he international public law is nothing but on defaulted basis, while the powerful are able to tie others in accordance with their own law!”¹⁰⁴

¹⁰⁰ Jackson, *supra* note 33, at 183.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 183-84 (emphasis added).

¹⁰⁴ Guanying Zhen, *Frightening Words in the Flourishing Age: Law of Justice* 42 (1898). It is amazing that since human society has stepped into the twenty-first century, the sigh of regret uttered by a thinker from a weak nation in the late nineteenth century is still of realistic importance, and is a sharp satire on the history and hegemony who do not change their mode of operation.

What the United States preciously cherished was the vigorously aggrandized sovereignty, the vested hegemony in the camouflage of “sovereignty “. The U.S. Congress, after its ratification of the WTO Agreement, still retains and enforces Section 301, and passionately continues to promote the adoption of the above-proposed legislation that “the United States can’t lose more than three times.”¹⁰⁵ Thus, the vested hegemony was doubly armoured to resist sword and spear, and to keep itself immortal.

¹⁰⁵ Referring to A Bill to Establish a Commission to Review the Dispute Settlement Reports of the World Trade Organization and for Other Purposes, S. 16, 104th Cong. (1995).

VI. THE EU-U.S. ECONOMIC SOVEREIGNTY DISPUTES CAUSED BY SECTION 301: ORIGIN AND PRELUDE

The U.S. practice since the WTO Agreement's entry into force in January of 1995 demonstrates that the United States in fact acts upon the conclusion it reached to during "*The Great 1994 Sovereignty Debate*:" that although it entered into the multilateral system of the WTO, it was able to retain and pursue unilateralism under Section 301. In some circumstances, the United States indeed achieved the anticipatory aim of "sitting on the fence in order to gain advantages from both sides," but in other situations new trade wars and disputes were triggered, making the United States a targeted country. The following are cases involving such typical disputes.

VI.1 U.S. - Japan automobile disputes

During the period before and after the WTO Agreement came into effect, the United States conducted a series of bilateral negotiations with Japan regarding Japan's opening of the Japanese market for automobiles and automobile parts. However, neither the United States nor Japan would budge from their respective viewpoints and the dispute remained unsolved.¹⁰⁶ The United States, as a member of the WTO, totally disregarded the multilateral dispute settlement mechanism of the DSU, instead relying directly on Section 301 and unilaterally declaring, on May 16, 1995, that it would levy 100 per cent ad valorem duties on thirteen different types of imported Japanese luxury model automobiles.¹⁰⁷ Additionally, the United States withheld the liquidation of customs entries with respect to such automobiles, causing a detention of goods.¹⁰⁸

Clearly, these were retaliatory measures and punitive sanctions. Faced with U.S. unilateral retaliation, the Japanese government filed a request for consultation with the WTO/DSB on May 22, 1995, claiming that the measures taken by the United States constituted serious discriminatory treatment of Japanese commodities and was in breach of Articles 1 and 2 of the GATT and Article 23 of the DSU.¹⁰⁹ Japan further charged that the unilateral decision of the U.S. Government had a signifi-

¹⁰⁶ Letter from Michael Kantor to Renato Ruggiero (May 9, 1995), in 141 CONG. REC. S6433; James Gerstenzang, *U.S., Japan Still on Collision Course over Trade Diplomacy: Clinton and Murayama Meet at Summit, but Neither Bidges on Sanction Threat*, *Los Angeles Times*, June 16, 1995, at 18.

¹⁰⁷ Statement by Ambassador Michael Kantor, Office of the USTR, Executive Office of the President (May 16, 1995), available at <http://www.ustr.gov/releases/1995/05/95-36.html> [hereinafter Kantor Statement]; William E. Scanlan, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, 45 Kan. L. Rev. 591, 605 (Mar. 1997). This rate of duty is much higher than the binding tariff of 2.5% that the United States committed to on the tariff concession schedule. Calculated on the basis of the total value of the same category of imported goods in 1994, the total amount of the newly imposed tariff duty is \$590 million.

¹⁰⁸ Kantor Statement, *supra* note 107.

¹⁰⁹ United State-Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974, WTO Doc. WT/DS6/1 (May 22, 1995) [hereinafter U.S. – Japan Auto Disputes]; GATT, *supra* note 57, art. 1 (providing that each contracting member must accord mutually with "general Most-Favoured-Nation Treatment, [w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation," and that no discriminatory measures may be taken at will); GATT,

cant adverse impact on the Japanese export industry in that goods with a value of over 108 million dollars that were scheduled to be exported to the United States were forced to stop being transported or had to be transported to other countries -- the scheduled production plan with a value of 93 million dollars would have to be reduced.¹¹⁰ Thereafter, through two rounds of negotiation, the United States and Japan reached an understanding on June 28, 1995.¹¹¹ The Japanese Government accepted the United States' specific proposal for Japan to open its market for automobiles and automobile parts, and promised to adopt specific measures to implement the proposal.¹¹² The U.S. Government, as a compromise, phased out its decision to levy a 100 per cent duty on automobiles imported from Japan and withholding the liquidation of customs.¹¹³

VI.2 U.S. – EC banana disputes

In February of 1996, and August of 1998, respectively, the United States and countries in the “Dollar Banana District,” including Ecuador, Guatemala, Honduras, and Mexico, jointly requested consultation with the EC pursuant to the WTO system, claiming that the various regulatory measures implemented by the EC in the importation and distribution of bananas from the above five countries made them enjoy less favourable treatment than that the EC conferred upon Contracting Members of the Lomé Convention, thus breaching the primary rule of the WTO, and constituting trade discrimination.¹¹⁴ While the concerned negotiations were still in progress, the United States -- on November 10, 1998, under the pretext that the proposed concession by the EC concerning the new banana importation regime was not consistent with the WTO, and on the basis of Section 301 -- unilaterally declared that it would issue a list of retaliation measures on the EC and a timetable to enforce the sanctions, threatening that unless the EC made further concessions the United States would impose trade sanctions at the beginning of 1999.¹¹⁵

The next day, November 11, 1998, EC President Jacques Santer responded by writing a letter to U.S. President Clinton, warning that the United States' proposals would breach its international obligations under the WTO Agreement.¹¹⁶ EU Trade Commissioner Sir Leon Brittan further pointed out

supra note 57, art. 2 (providing that each contracting member pledge to each other to levy tariffs subject to the listed preferential tariff in the annexed “tariff concession schedule” of each member, and not to increase tariffs arbitrarily); DSU, *supra* note 15, art. 23 (providing that the trade disputes arising between contracting members should be resolved in accordance with the DSU multilateral procedures and rules, and unilateral measures must not be taken willfully).

¹¹⁰ U.S. – Japan Auto Disputes, *supra* note 107.

¹¹¹ U.S. – Japan Automotive Agreement, Aug. 23, 1995, *reprinted in* 34 I.L.M. 1482 (1995) [hereinafter Auto Agreement]; USTR Fact Sheet on U.S. – Japan Auto and Auto Parts Agreement Released Jun. 28, 1995, 12 Int'l Trade Rep. (BNA) 1163, 1163-64 (Jul. 5, 1995).

¹¹² Auto Agreement, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ European Communities-Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador, WTO Panel Report, WT/DS27/RW/ECU (Apr. 12, 1999) [hereinafter Ecuador Panel Report].

¹¹⁵ James Cooper, Spirits in the Material World: A Post-Modern Approach to United States Trade Policy, 14 AM. U. Int'l L Rev. 957, 972 (1999); Stephen Fidler & Neil Bucklar, U.S. Threatens 100% Tax on European Union Exports in Banana Trade War, *Financial Times*, Nov. 11, 1998, at 1 (including cheese, clothing, cosmetics, electronic goods, paper and wine among the products threatened with tariffs).

¹¹⁶ *EU Attacks Clinton over Bananas*, BBC News, Nov. 11, 1998, available at http://news.bbc.co.uk/1/hi/business/the_economy/212262.stm; Stephen Bates & Larry Elliott, *Banana War Puts Global Economy at Risk*, *The Guardian*, Nov. 12, 1998, available at <http://www.guardian.co.uk/banana/Story/>

that although the United States was authorized to raise queries and disagreements on the new banana importation regime implemented by the EC on January 1, 1999, it was not empowered to threaten the EU with unilateral sanctions.¹¹⁷ The Director-General of the WTO, Renato Ruggiero, argued that both sides should resolve the dispute within the DSU multilateral system established by the WTO Agreement.¹¹⁸ After continual failed negotiations, the EC, in accordance with Article 22.6 of the DSU, submitted a request for arbitration.¹¹⁹ On January 29, 1999, the DSB decided to establish an arbitral tribunal.¹²⁰ After the establishment of this tribunal, the United States, under the pretext that the arbitral proceeding was not prompt enough, initiated lightning-like retaliation on March 3, 1999, and announced that it would unilaterally levy 100 per cent retaliatory ad valorem duties as punishment on twenty categories of popular goods exported to the United States from such EU members as Britain, Italy, Germany, and France, totaling \$520 million.¹²¹

The arbitrary action taken by the United States sharply escalated the “Banana War,” and the multilateral system established by the WTO was confronted with a serious threat.¹²² The United States’ action was condemned by many representatives who attended a WTO emergency conference.¹²³ On April 9, 1999, the DSB Panel Report was issued and the arbitral award was made.¹²⁴ The Panel Report concluded that the EC’s new banana importation regime was inconsistent with the Most-Favoured-Nation treatment and the National Treatment stipulated in the GATT and GATS, and recommended that the DSB require the EC to make further revisions of the new regime.¹²⁵ The arbi-

0,2763,208538,00.html [hereinafter *Banana Wars*]. In his letter to President Clinton, Jacques Santer stated that “[n]o WTO member had the right unilaterally to determine whether another member is in compliance with WTO rules.” *Id.*

¹¹⁷ Press Release No. 97/98, European Union, Statement by Sir Leon Brittan: EU/US Banana Dispute (Nov. 10, 1998), available at <http://www.eurunion.org/news/press/1998-4/pr97-98.htm>. Nigel Gardner, spokesman for European Trade Commissioner, Sir Leon Brittan, was also quoted as saying, “What we will not do is negotiate with the gun of unilateralism illegally at our heads.” *Fight Over Banana Trade Escalates*, Natl. L. J. (Nov. 30, 1998), at A14.

¹¹⁸ *Banana Wars*, *supra* note 116.

¹¹⁹ European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WTO Arbitrator Dec., WT/DS27/ARB (Apr. 9, 1999) [hereinafter *European Communities Arbitration*].

¹²⁰ *Id.* para. 1.1.

¹²¹ John R. Schmertz, Jr. & Mike Meier, *U.S.-EU Banana Dispute Continues Despite WTO Arbitration: EU Issues Regulation to Increase Support to its ACP Banana Suppliers*, INT’L L UPDATE, May 1999, at 5; Implementation of WTO Recommendations Concerning the European Communities’ Regime for the Importations, Sale, and Distribution of Bananas, 64 Fed. Reg. 19209 (Apr. 19, 1999); Eliza Patterson, *The U.S.-EU Banana Dispute*, ASIL Insights, Feb. 2001, <http://www.asil.org/insights/insigh63.htm> [hereinafter *The U.S.-E.U. Banana Dispute*].

¹²² John Lloyd, *Yanks Go Home . . . But Not Just Yet: U.S. Sanctions*, *New Statesman*, Mar. 12, 1999, at 14.

¹²³ *Banana Deal Frittered Away*, BBC News, Dec. 19, 1999, available at <http://news.bbc.co.uk/1/hi/business/238370.stm>; Charlotte Denny & Stephen Bates, *Bananas: It’s a Trade War*, *The Guardian*, Mar. 5, 1999, available at <http://www.guardian.co.uk/banana/Story/0,2763,208540,00.html>; *Crisis Talks Over Bananas*, BBC News, Mar. 8, 1999, available at http://news.bbc.co.uk/1/hi/business/the_economy/292041.stm; *US Declaring War Over Bananas*, BBC News, Mar. 8, 1999, available at <http://news.bbc.co.uk/1/hi/world/292654.stm>; Mark Milner, *WTO Talks up Banana Peace*, *The Guardian*, Mar. 8, 1999, available at <http://www.guardian.co.uk/banana/Story/0,2763,209337,00.html>.

¹²⁴ *The U.S.-EU Banana Dispute*, *supra* note 121.

¹²⁵ European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities, WTO Panel Report, WT/DS27/RW/EEC (Apr. 12, 1999), paras. 7.1-7.2 [hereinafter *European Communities Panel Report*].

tration panel decided that the EC's new regime had constituted injury to the U.S. interest, but that the actual loss was \$191.4 million instead of the \$520 million that was originally claimed by the United States.¹²⁶ In other words, the actual loss only accounted for 36.8 per cent of what the United States claimed, that is, the original us claim of \$520 million was with 63.2 per cent inflation and extortion! On April 9, 1999, the United States requested authorization from the DSB to retaliate on the basis of the amount determined by the arbitral award, and the authorization was given to the United States on April 19, 1999.¹²⁷

The international dispute ended with a partial financial win for the United States. The United States, however, has paid the great price of its international credit and image for its reckless waving of the "big stick," otherwise known as Section 301, to implement a unilateral threat after it has undertaken its international obligations under the multilateral system of WTO/DSB.

VI.3 EC – U.S. Section 301 dispute

Due to the United States' continuous use of Section 301 during the Banana Dispute, on November 25, 1998, the EC requested consultations with the United States in accordance with Article 22.1 of the GATT and Article 4 of the DSU, with the intent of addressing the U.S. use of Section 301 after the WTO and its multilateral dispute settlement mechanism, the DSU, came into effect.¹²⁸ Clearly, the intention of the EC was to open up a second battlefield so as to transform its position as the defendant in the Banana Dispute into the plaintiff in the Section 301 Dispute. Thus, the United States, truculent in the Banana Dispute, was forced to play defensive in the new proceeding.

From the date of the official operation of the WTO/DSU multilateral dispute settlement mechanism until July 13, 2001, the total number of disputes requiring consultations or determinations under the DSU amounted to 234. Compared with other disputes, the EC's claims in this dispute were peculiar. First, normally the objects of the dispute concern the treatment of a certain category of commodity or certain specific commodities; however, in the present case the complaint focused on the United States' hegemonic Section 301 legislation. Second, generally the disputes do not directly or clearly involve the struggle of economic sovereignty between the concerned states, although they may involve the concrete economic interests of the states. However, the present dispute between the E.U. and the United States reflected, rather directly and conspicuously, the restricting and anti-restricting practice of economic sovereignty between the two big powers. As for the United States, it consistently regarded the hegemonic Section 301 as its lifeblood to safeguard its economic sovereignty. Although the United States entered into the WTO multilateral system, the United States believed that the Act could not be crippled, let alone be abolished. Otherwise, the United States would not have hesitated to withdraw from the WTO, which was discussed earlier in this paper.¹²⁹ On the other hand, the EC persistently regarded the Lomé Convention, concluded with some 70 developing countries in Africa, the

¹²⁶ European Communities Arbitration, *supra* note 119, paras. 1.1, 8.1. On April 11, 2001, the United States and the EU reached an understanding in their long running dispute over bananas that called for the EU to adopt a new licensing system for bananas by July 1, 2001. In return, the United States lifted retaliatory duties on \$191 million worth of EU products. See *U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors*, Office of the United States Trade Representative, Executive Office of the President, Jul. 1, 2001, <http://www.useu.be/Categories/Bananas/BananaUSSanctionsEUJuly1.html>

¹²⁷ The Week in Review, Natl. L.J., Apr. 19, 1999, at A8.

¹²⁸ United States – Sections 301 – 310 of the Trade Act of 1974, WTO Panel Report, WT/DS152/R (Dec. 22, 1999), para. 1.2 [hereinafter Sections 301 - 310 Panel Report]; LANYU ZHE (ed.), *Analysis of WTO Dispute Settlement Cases 563-571* (2000).

¹²⁹ See *supra* Part V.

Caribbean, and the Pacific region -- and the “generalized non-reciprocal and non-discriminatory [tariff] preferences” conferred on them -- as its significant measure of exercising economic sovereignty and promoting the cooperation between the North and the South.¹³⁰ Once the WTO Agreement had officially come into effect, the original mechanisms implemented by the EC in accordance with the Lomé Convention were gradually transformed to be consistent with the new WTO system.

However, during the Banana Dispute, the United States, without waiting for a determination to be made by the WTO/DSU multilateral rules, frequently threatened sanctions in accordance with its unilateral, hegemonic Section 301 legislation. Confronted with such hegemonic actions, which impaired the EC’s economic sovereignty, the EC refused to submit willingly and targeted Section 301 in hopes of *catching the ring leader, cutting the weed, and digging out the roots*.

As is well known, a number of countries have suffered to varying degrees from the United States’ invocation of Section 301. When the EC first initiated the Section 301 Dispute, many WTO members -- including Columbia, the Dominican Republic, Ecuador, Guatemala, Honduras, Jamaica, Japan, Mexico and Panama -- quickly echoed a request to participate in the consultations as interested third parties in accordance with Article 4.11 of the DSU.¹³¹ All the requests were granted. On December 17, 1998, the disputing parties held consultations but were unable to settle the dispute.¹³² Upon the request of the EC, the DSB decided on March 2, 1999, to establish a panel to deal with this dispute.¹³³ David Hawes, Terje Johannesen, and Joseph Weiler were selected for the panel, with David Hawes acting as Chairman.¹³⁴ The terms of reference were:

To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS 152/11, the matters submitted to the DSB by the EC in that document and to make such findings as will assist the DSB in making its recommendations or in giving its rulings according to the above mentioned agreements.¹³⁵

In the meantime, other countries that suffered from Section 301 declared, one after another, that they reserved their rights to participate in the panel proceedings as third parties.¹³⁶ Those WTO members include Brazil, Cameroon, Canada, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, Hong Kong (China), India, Israel, Korea, St. Lucia, and Thailand.¹³⁷ An unprecedented situation developed in which thirty-six WTO members, including the fifteen EC member states and twenty-one state or regional members of the WTO, requested participation in the panel proceeding as third parties so that they could jointly condemn Section 301. The United States was more isolated than ever!

¹³⁰ Sections 301 – 310 Panel Report, *supra* note 128, para. 5.150.

¹³¹ See United States – Sections 301 – 310 of the Trade Act of 1974, Request to Join Consultations, WTO Doc. WT/DS152/9 (Dec. 14, 1998) (Communication from Columbia), WT/DS152/2 (Dec. 9, 1998) (Communication from Dominican Republic), WT/DS152/3 (Dec. 9, 1998) (Communication from Panama), WT/DS152/4 (Dec. 9, 1998) (Communication from Guatemala), WT/DS152/5 (Dec. 14, 1998) (Communication from Mexico), WT/DS152/6 (Dec. 14, 1998) (Communication from Jamaica), WT/DS152/7 (Dec. 14, 1998) (Communication from Honduras), WT/DS152/8 (Dec. 14, 1998) (Communication from Japan), WT/DS152/10 (Dec. 14, 1998) (Communication from Ecuador); DSU, *supra* note 15, art. 4.11.

¹³² Section 301-310 Panel Report, *supra* note 128, para. 1.2.

¹³³ *Id.* para. 1.5.

¹³⁴ *Id.* para. 1.7.

¹³⁵ *Id.* para. 1.5.

¹³⁶ United States – Sections 301-310 of the Trade Act of 1974, Constitution of the Panel Established at the Request of the European Communities, WTO Panel Report, WT/DS152/12 (Apr. 6, 1999).

¹³⁷ *Id.*

During the panel proceeding, the EC, the United States, and the third parties engaged in fierce “sword-like” verbal debates. In essence, the hostility and debate among many WTO members, ignited by Section 301 of the U.S. Trade Act, fully reflected a new battle on the restriction and antirestriction of economic sovereignty among nations under the new accelerated economic globalization. The process not only reflected the fight between the global economic hegemon and other economic powers on economic sovereignty, but also indicated new contests between many economically weak countries and the global economic hegemon on economic sovereignty. Accordingly, the dispute attracted worldwide attention.

Pursuant to Articles 12.8 and 12.9 of the DSU, the period in which the panel must conduct its examination, from the date that the composition and the terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, must not exceed six months.¹³⁸ If it is impossible to conclude the proceedings in time, upon approval of DSB, the time limit can properly be prolonged, but in no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.¹³⁹ The deadline for this case was December 31, 1999.¹⁴⁰ On December 22, 1999, the panel issued a lengthy, 351-page concluding report.¹⁴¹ Neither the EC nor the United States requested an appeal, and the DSB formally passed the Panel Report on January 27, 2000.¹⁴²

Although the Panel Report was issued in time and no appeal was submitted, a series of latent perils were left behind, which deserved further discussion. In the following text, the arguments of the EC and United States, the main contents of the Panel Report, and the latent perils left behind are introduced and analysed.

¹³⁸ DSU, *supra* note 15, art. 12.8.

¹³⁹ *Id.* art. 12.9.

¹⁴⁰ Sections 301 – 310 Panel Report, *supra* note 128.

¹⁴¹ *Id.*

¹⁴² United States – Sections 301 – 310 of the Trade Act of 1974, WTO Panel Report, WT/DS152/14 (Feb. 28, 2000).

VII. THE EU-U.S. ECONOMIC SOVEREIGNTY DISPUTES CAUSED BY SECTION 301: CLAIMS AND REBUTTALS

VII.1 The claims of the EC Representatives

The EC representatives claimed that the United States, after the WTO Agreement established the multilateral system, still retained and enforced the unilateral retaliation and sanctions laid down in Sections 301-310 of the U.S. Trade Act, which was in derogation of the international obligations the United States undertook when it signed the WTO Agreement.¹⁴³ The EC particularly emphasized that what the United States stipulated in its Trade Act was inconsistent with the provisions that concerned the “*strengthening of the multilateral system*” as laid down in Article 23 of the DSU.¹⁴⁴

Article 23.2(a) of the DSU provides that in case of a trade dispute, WTO members must settle the dispute in accordance with the rules and procedures established by the DSU.¹⁴⁵ No member may unilaterally make a determination to the effect that its “[trade] benefits have been nullified and impaired.”¹⁴⁶ In determining whether its benefits have been impaired, members “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.”¹⁴⁷ However, Section 304(a)(1)(A) of the U.S. Trade Act requires the USTR to determine whether another member denies the United States rights or benefits under the WTO Agreement, irrespective of whether the DSB adopted the findings on the matter contained in the panel or Appellate Body report.¹⁴⁸ Meanwhile, Section 306(b) requires the USTR to unilaterally determine whether a recommendation of the DSB has been implemented, irrespective of whether the multilateral proceedings on this issue under the DSU have been completed.¹⁴⁹ Therefore, the above provisions of the U.S. Trade Act have obviously breached what is set forth in the DSU.

Article 23.2(c) provides that if a WTO member fails “to implement the recommendations and rulings within [a] reasonable period of time” the winning party must follow the multilateral procedures of the DSU “to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements.”¹⁵⁰ However, Section 306(b) requires the USTR to determine and carry out sanctions under Section 301 and Section 305(a) in cases where the opposing party fails to implement the DSB recommendations, irrespective of the scope and level that the DSU multilateral system

¹⁴³ Sections 301- 310 Panel Report, *supra* note 124, paras. 3.1, 4.1-4.18, 4.26-4.48, 4.100- 4.199, 4.126, 4.146-4.153.

¹⁴⁴ *Id.* paras. 4.1, 4.3; DSU, *supra* note 15, art. 23 (emphasis added).

¹⁴⁵ DSU, *supra* note 15, art. 23.2(a).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 19 U.S.C. § 2414(a)(1)(A) (2003).

¹⁴⁹ 19 U.S.C. § 2416(b) (2003).

¹⁵⁰ DSU, *supra* note 15, art. 23.2(c).

determines, and without the DSB's authorization.¹⁵¹ It is obvious that the stipulations in the U.S. Trade Act directly breach what is in the DSU.

Articles I, II, III, VIII, and XI of the GATT stipulate that mutual favoured treatment and common obligations -- such as the Most-Favoured-Nation Treatment, Schedules of Concessions, the National Treatment, Reducing Fees and Simplifying Formalities connected with Importation and Exportation, and Elimination of Quantitative Restriction -- should be adhered to by all WTO members.¹⁵² In other words, all disputes must be solved in accordance with the multilateral system. Section 306(a), however, requires the USTR unilaterally to make determinations on whether to impose high duties, fees, or restrictions on imported goods from foreign countries involved in trade disputes.¹⁵³ It is obvious that the provisions of the U.S. Trade Act violate one or more of the above GATT provisions.

Additionally, even if Section 301-310 could be interpreted to permit the USTR to have options in implementing the law to avoid WTO-inconsistent unilateral determinations and retaliatory actions, it could also be interpreted to permit the USTR to have discretion unilaterally to make determinations inconsistent with the WTO multilateral system and to invoke retaliatory sanction measures. Therefore, it is obvious that the provisions of Sections 301-310 cannot be regarded as a sound legal basis for the implementation of the United States' obligations under the WTO. The lack of this sound legal basis is sure to produce a situation of threat and legal uncertainty against other WTO members and their economic operators.¹⁵⁴ This will fundamentally undermine the "security and predictability" of the multilateral trading system.¹⁵⁵

What is more, the apparent confusion in Sections 301-310 is nothing more than a deliberate policy, providing a particular mode for the United States to invoke administrative measures and deviate from the WTO multilateral system at any time. In fact, the United States -- by maintaining legislation such as Sections 301-310, which on its face and by its intent mandates unilateral determinations and actions in breach of the United States' obligations under the DSU and the WTO -- implements a deliberate policy pursuing double objectives: the USTR may make a unilateral determination or evoke unilateral sanctions so that the rival may be directly "killed" or may surrender at the threat of being "killed." Such a scheme could be called the "Damocles sword effect."¹⁵⁶

In its argument to the Panel, the EC maintained that in particular, United States' Section 301 was deployed to create a constant threat, "the Damocles sword effect," using it "as a 'bargaining' tool in order to extract extra trade concessions" and preferential interests.¹⁵⁷ Even after the entry into force of the WTO Agreement, the conduct of the United States remained unchanged, disregarding its international obligations under the WTO legal system. The United States acted unilaterally in the Banana Dispute, impairing the interests of the EC Other members of the WTO, such as Brazil, Canada, Hong Kong (China), India, Japan and Korea; however, had identical experiences and suffered greatly both before and after the conclusion of the WTO Agreement. Accordingly, they all condemned the unilateral practice of Section 301, and supported and concurred with the EC's charges against the United

¹⁵¹ 19 U.S.C. § 2416.

¹⁵² GATT, *supra* note 57, arts. I, II, III, VIII, XI.

¹⁵³ 19 U.S.C. § 2416.

¹⁵⁴ Sections 301 – 310 Panel Report, *supra* note 124.

¹⁵⁵ *Id.* para. 4.35.

¹⁵⁶ *Id.* paras. 4.43-4.44, 7.5-7.6. The term "Damocles sword effect" originates from Greek mythology in which the tyrant Dionysius ordered his official Damocles to be seated. A sword was hung by a horse's mane over Damocles' head, indicating that Damocles was in jeopardy.

¹⁵⁷ *Id.* para. 4.46.

States.¹⁵⁸ Ultimately, the EC argued that in consideration of all of the above factors, Sections 301-310 of the U.S. Trade Act, may *in no case*, be regarded as consistent with what is laid down in Article 16.4 of the WTO Agreement and with the WTO legal system.¹⁵⁹ Article 16.4 of the WTO Agreement expressly provides that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”¹⁶⁰ Sections 301-310 of the U.S. Trade Act, the EC argued, breached several of the above-cited provisions of the WTO legal system and its international obligations, and the EC requested the panel to clearly rule that:

the United States, by failing to bring the Trade Act of 1974 into conformity with the requirements of Article 23 of the DSU and of Articles I, II, III, VIII, and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI.4 of the WTO Agreement and thereby nullifies or impairs benefits accruing to European Communities under [those Agreements]; and to recommend that the DSB request the United States to bring its Trade Act of 1974 into conformity with its obligations under the DSU, the GATT 1994, and the WTO Agreement.¹⁶¹

VII.2 The rebuttals of the United States

In view of the claims and requests of the EC, the United States responded with the following arguments:

Sections 301-310 do not prevent the United States from following to the letter the requirements of the DSU. This legislation provides ample discretion to the United States Trade Representative to pursue and comply with multilateral dispute settlement procedures in every instance The European Communities may not assume that the USTR will exercise this discretion in a WTO-inconsistent manner¹⁶²

Nevertheless, the reason this case has been filed is because European Communities found itself in the position of having failed to comply with DSB rulings and recommendations in [the Banana Dispute].¹⁶³

Sections 301-310 provide more than adequate discretion to the USTR [to pursue] and comply with DSU Article 23 and other WTO obligations in every case. Section 304 permits the USTR to base her determinations [of whether or not the trade interests of the United States are impaired] on adopted panel and Appellate Body findings in every case. And Section 306 permits, in every case, the USTR to request and receive DSB authorization to suspend concessions in accordance with DSU Article 22 Sections 301-310 are thus consistent with DSU Article 23, Article XVI:4, and GATT Articles I, II, III, VIII, and XI.¹⁶⁴

¹⁵⁸ *Id.* paras. 4.45-4.48.

¹⁵⁹ Sections 301-310 Panel Report, *supra* note 128, para. 4.59

¹⁶⁰ *Id.* (quoting WTO Agreement Article XVI:4).

¹⁶¹ *Id.* para. 3.1.

¹⁶² *Id.* para. 4.51.

¹⁶³ *Id.* para. 4.52.

¹⁶⁴ Sections 301-310 Panel Report, *supra* note 128, para. 4.58.

The law is the protector of both the weak and the strong, equally. It protects the small and the large, equally. It protects the popular and the unpopular, equally... The United States knows that Sections 301-310 are not popular. But the WTO and the DSU are not clubs to be used in a popularity contest against any one Member. If they are to protect the weak credibly, they must also protect the strong against attacks not on what they have done, but on who they are.¹⁶⁵

Sections 301-310 allow the USTR to comply fully with United States' obligations under the WTO Agreement and its annexes. This law by its mere existence violates none of [the United States' obligations under the WTO system]. The EC's transparent efforts to turn this proceeding into a forum for making political attacks on United States' trade policy only highlight the absolute void at the centre of its legal case.¹⁶⁶

The United States indicate[d] that its Administration has, in the Statement of Administrative Action approved by Congress, provided its "authoritative expression . . . concerning its views regarding the interpretation and application of the Uruguay Round agreements . . . for the purposes of domestic law" . . . the USTR will:

- invoke DSU dispute settlement procedures, as required under current law;
- base any Section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB;
- following adoption of a favourable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and
- if the matter can not be resolved during that period, seek authority from the DSB to retaliate.¹⁶⁷

The Statement of Administrative Action (SAA) provides:

This statement describes significant administrative actions proposed to implement the Uruguay Round agreements . . . this statement represents an authoritative expression by the Administration concerning its view regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that the future Administrations *will observe and apply* the interpretations and commitments set out in this Statement. Moreover, since this statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.¹⁶⁸

The U.S. explicitly, officially, repeatedly, and unconditionally confirmed the commitments expressed in the SAA namely that the USTR would . . . "base any Section 301 de-

¹⁶⁵ *Id.* para. 4.62.

¹⁶⁶ *Id.* para. 4.65.

¹⁶⁷ *Id.* para. 4.121.

¹⁶⁸ Sections 301-310 Panel Report, *supra* note 128, para. 7.110 (emphasis added).

termination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB.”¹⁶⁹

That is to say, U.S. law precludes [the USTR’s] affirmative determination not based on adopted panel or Appellate Body findings.¹⁷⁰

Based on the above reasons, the United States requested that the panel rule explicitly:

“That [the] European Communities has [sic] failed to meet its burden of establishing that Sections 301-310 of the Trade Act of 1974 are inconsistent with DSU Article 23, WTO Agreement Article XVI:4, and GATT 1994 Articles I, II, III, VIII, and XI, and that Sections 301-310 are therefore not inconsistent with these obligations,¹⁷¹ . . . [that] Sections 301-310 . . . do not mandate action in violation of any provision of the DSU or GATT 1994, nor do they preclude any action consistent with those [WTO] obligations,¹⁷² . . . [and must] reject the EC’s speculative arguments in their entirety.”¹⁷³

¹⁶⁹ *Id.* para. 7.115.

¹⁷⁰ *Id.* n.683; The Uruguay Round Agreements Act: Statement of Administrative Action at 366, *reprinted in* H.R. Doc. No. 103-316 [hereinafter SAA].

¹⁷¹ Sections 301-310 Panel Report, *supra* note 128, para. 4.65.

¹⁷² *Id.* para. 3.2.

¹⁷³ *Id.* para. 4.145.

VIII. THE WTO/DSB PANEL REPORT ON THE SECTION 301 CASE

The Panel for the dispute was initiated on March 31, 1999. The whole proceedings lasted about nine months, during which the EC's charges and claims, and the responses of the United States, together with the condemnations against Section 301 by the twelve countries and regions participating in the proceedings as third parties, were fully heard by the Panel. On December 22, 1999, the Panel issued its final report to the concerned parties and submitted it for DSB approval.¹⁷⁴ As the report was not appealed, the DSB formally passed the final Panel Report on January 27, 2000.¹⁷⁵

In the lengthy 351-page report, the Panel initially concluded that:

Our function in this case is *judicial*. In accordance with Article 11 of the DSU, it is our duty to “make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements.”¹⁷⁶

The mandate we have been given in this dispute is limited to the specific EC claims We are *not* asked to make an *overall assessment* of the compatibility of Sections 301-310 with the WTO Agreements We are, in particular, not called upon to examine the WTO compatibility of *U.S. actions taken in individual cases* in which Sections 301-310 have been applied.¹⁷⁷

In determining whether Section 304 constituted a violation of DSU 23.2(a), the Panel found that:

Section 304(a) requires the USTR to determine *whether* U.S. rights are being denied within 18 months. It does not require the USTR to determine *that* U.S. rights are being denied at the 18 months deadline.¹⁷⁸

[W]e find that even though the USTR is not *obligated*, under any circumstance, to make a Section 304 determination . . . it is not *precluded* by the statutory language of Section 304 itself from making such a determination.¹⁷⁹

Therefore, pursuant to examination of text, context and object-and-purpose of [DSU] Article 23.2(a) we find, at least *prima facie*, that the statutory language of Section 304 precludes compliance with Article 23.2(a). . . . Under Article 23 the US promised to have recourse to and abide by the DSU rules and procedures, specifically not to take unilateral measures referred to in Article 23.2(a). In Section 304, in contrast, the U.S. statutorily

¹⁷⁴ United States – Sections 301-310 of the Trade Act of 1974, WTO Panel Report, WT/DS152/14 (Feb. 28, 2000).

¹⁷⁵ *Id.*

¹⁷⁶ Sections 301-310 Panel Report, *supra* note 128, para. 7.12 (emphasis added).

¹⁷⁷ *Id.* para. 7.13 (emphasis added).

¹⁷⁸ *Id.* para. 7.31(c) (emphasis added).

¹⁷⁹ *Id.* para. 7.31(d) (emphasis added).

reserves the right to do so. In our view, because of that, the statutory language of Section 304 constitutes a *prima facie* violation of Article 23.2(a).¹⁸⁰

We [do] not conclude that a violation has been confirmed. This is so because of the special nature of the Measure in question. The Measure in question includes statutory language as well as other institutional and administrative elements. To evaluate its overall WTO conformity we have to access all of these elements together.¹⁸¹

One of the institutional and administrative elements the Panel refers to concerns the SAA, which was submitted by the U.S. President for congressional approval. With regards to the SAA, the Panel determined that:

[T]he U.S. Administration has carved out WTO covered situations from the general application of the Trade Act. It did this in a most authoritative way, *inter alia*, through a Statement of Administrative Action (SAA) submitted by the President to, and approved by, Congress. Under the SAA so approved “. . . it is the expectation of the Congress that future administrations would observe and apply the [undertakings given in the SAA].” This limitation of discretion would effectively preclude a determination of inconsistency prior to exhaustion of DSU proceedings.¹⁸²

The SAA thus contains the view of the Administration . . . concerning both interpretation and application and containing commitments, to be followed also by future Administrations, *on which domestic as well as international actors can rely*.¹⁸³

On this point, the Panel totally supports and accepts the arguments of the United States on Section 301, and repudiates and rejects the claims of the EC. However, during the proceedings, the EC called the Panel’s attention to another paragraph, which contained ambivalent statements in the SAA, and which is cited repeatedly by the United States as the authoritative administrative statement.

There is *no basis for concern* that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations *more reluctant* to apply section 301 sanctions that may be *inconsistent* with U.S. trade obligations because such sanctions could engender DSU-authorized counter-retaliation . . . Just as the United States may now choose to take section 301 actions that *are not GATT authorized*, governments that are the subject of such actions may choose to respond in kind. That situation *will not change* under the Uruguay Round agreements. The risk of counter-retaliation under the GATT *has not prevented* the United States from taking action in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone treated beef.¹⁸⁴

The EC contends that this portion of the SAA, providing for an authoritative interpretation of the URAA, the implementing statute, announces in very clear and unambiguous terms that the United

¹⁸⁰ Sections 301-310 Panel Report, *supra* note 128, para. 7.97 (emphasis added).

¹⁸¹ *Id.* para. 7.98.

¹⁸² *Id.* para. 7.109 (emphasis added).

¹⁸³ *Id.* para. 7.111 (emphasis added).

¹⁸⁴ *Id.* para. 4.108 (emphasis added) (quoting SAA, *supra* note 164). The word “now,” as used in this paragraph refers to September of 1994, when the SAA was sent to Congress for approval. The WTO Agreement had not entered into effect at that time, so international trade was conducted in accordance with the 1947 GATT.

States will not feel impeded by its international obligations to continue having recourse to retaliatory action of unilateralism.

The Panel, although not persuaded to accept the EC's analysis, admitted, however, that "some of the language in the SAA appears ambivalent."¹⁸⁵ They noted "however that, following U.S. constitutional law, cases of ambiguity in the construction of legal instruments should, where possible, always be resolved in a manner consistent with U.S. international obligations."¹⁸⁶ The Panel concluded "that it [was] possible to do so in this case."¹⁸⁷

In consideration of the above reasons, the Panel to this dispute comes to the following conclusions:

(a) Section 304(a)(2)(A) of the U.S. Trade Act of 1974, is not inconsistent with Article 23.2(a) of the DSU; (b) Section 306(b) of the U.S. Trade Act of 1974, . . . is not inconsistent with either Article 23.2(a) of the DSU; or 23.2(c) of the DSU; (c) Section 305 (a) of the U.S. Trade Act of 1974, is not inconsistent with Article 23.2(c) of the DSU; (d) Section 306 (b) of the U.S. Trade Act of 1974, is not inconsistent with Articles I, II, III, VIII, and XI of GATT 1994 . . . [A]ll these conclusions are based in full or in part on the U.S. Administration's undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the U.S. Administration or another branch of the U.S. Government, the findings of conformity contained in these conclusions would no longer be warranted.¹⁸⁸

¹⁸⁵ Sections 301 - 310 Panel Report, *supra* note 128, para. 7.113.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* para. 8.1.

IX. THE EQUIVOCAL LAW-ENFORCING IMAGE CONCLUDED FROM THE PANEL REPORT

The Section 301 Dispute Panel findings are rather impressive when we take a comprehensive look at the above Panel findings and conclusions. The Panel's decision can be characterized with four observations. *First*, the Panel creates a limit for its own duty, being overly cautious, dares not to transgress the "mine bounds", and is irresponsible for its duties. *Second*, the Panel is *shilly-shallying* towards the two powers, and is smooth and slick in ingratiating itself with both sides. *Third*, the Panel leaves the offender at large, criticizing the offender pettily while doing it great favour. *Fourth*, the Panel is partial to and pleads for hegemony, and thus, leaves a lot of suspicions and hidden risks. Therefore, it is not surprising that international scholars make a general valuation on the final report of the Panel, commenting that "[w]hile the United States-Section 301 Panel Report is politically *astute*, its legal underpinnings are *flawed* in some respects and its policy implications for the future of the WTO Dispute Settlement Body generate serious concerns."¹⁸⁹ The above observations concluded from the Panel's report are further analysed below:

IX.1 The Panel creates a limit for its own duty, is overly cautious, dares not transgress the "mine bounds", and is irresponsible for its duties

Since the enactment of Section 301 of the U.S. Trade Act of 1974, the USTR has frequently waved this "big stick" to threaten and force its trading partners into submission, and to extract extra hegemonic economic interests. The record of the United States' practice in the last twenty years sufficiently shows that it met ample condemnation in the world public opinion. The U.S. Government is aware of this opinion, admitting that "[t]he United States knows that Sections 301-310 are not popular."¹⁹⁰

During the proceeding, "[i]n addition to the EC, twelve of the sixteen third parties expressed highly critical views of this legislation."¹⁹¹ This situation clearly indicates that Section 301 and the U.S. related practices have aroused public indignation among many WTO members. Faced with this reality, the Panel felt compelled to note this U.S. confession in its final report, stating that "[i]n its submissions, the US itself volunteered that Sections 301-310 are an unpopular piece of legislation."¹⁹²

Subsequently, however, the Panel limits its terms of reference with a "*three- not*" mandate. The Panel determines that its purpose is: 1) not "to make an overall assessment of the compatibility of Sections 301-310 with the WTO Agreements;" 2) not to examine other aspects beyond the specific EC claims; and 3) not "to examine the WTO compatibility of U.S. actions taken in individual cases in which Sections 301-310 have been applied."¹⁹³ The Panel claims that its function is *judicial*, yet when encountered with the offending indignation aroused by the hegemonic legislation and the related prac-

¹⁸⁹ Seung Wha Chang, *Taming Unilateralism Under the Trading System: Unfinished Job in the WTO Panel Ruling on United States Sections 301-310 of the Trade Act of 1974*, 31 Law & Pol'y Int'l Bus. 1151, 1156 (2000) (emphasis added).

¹⁹⁰ Sections 301 - 310 Panel Report, *supra* note 128, para. 4.62.

¹⁹¹ *Id.* para. 7.11.

¹⁹² *Id.*

¹⁹³ *Id.* para. 7.13.

tices of the United States in the international community, the Panel chooses to impose on itself the “three-not” limit, fails to strictly enforce the law, and fails to investigate and examine the hegemonic legislation in order to determine the cardinal question of right or wrong. This review style strikingly reflects the Panel’s image that they act too cautiously so as to avoid transgressing the bounds of mines, as if they were faced with the abyss or treading on thin ice. In other words, they lack the courage and boldness to act upright, without flattery, and to enforce the law strictly.

In fact, the function, authority, and terms of reference of the Panel are generally provided for in DSU Article 11, that is, in addition to making an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, the Panel should “*make such other findings* as will assist the DSB in making the recommendations or the rulings provided for in the covered agreements.”¹⁹⁴ This can be taken as the legitimate power and terms of reference rendered by the WTO/DSU system to the DSB panel. When necessary, the Panel *should* enlarge its scope and depth of review according to the related issues to make such other findings.

As far as this case is concerned, the concrete claims of the EC involve some critical articles of Sections 304-306 of the U.S. Trade Act. These articles are closely related with other articles of Section 301 and constitute an indispensable part of Section 301 as an organic whole. If the Panel is the one that strictly abides by its function and terms of reference provided for in DSU Article 11, how could it consciously neglect and evade such an integral part of Section 301? How could it avoid making an overall assessment on the illegitimacy of the hegemonic legislation and its consistency with the WTO system in its entirety? How could it turn a deaf ear to and ignore the *specific practices* of legislation that have aroused the indignation of the world? How could it fail to thoroughly investigate, but indeed pardon the specific hegemonic practices of Section 301 complained of by over thirty WTO members? Indeed, the Panel failed to judge right from wrong, and failed to assist the DSB in making a correct determination in accordance with the related provisions. Is not such a short-sighted judicial examination of the Panel a violation of the law? Is it not an irresponsible conduct of the Panel’s duties?

Such adjudication, however, brings to mind a popular fable. *A* was hurt by an arrow and went for treatment from doctor *B*. *B* took out a small saw, sawed off the arrow shaft outside *A*’s body, then announced the completion of the operation and requested compensation. *A* was perplexed, pointing out that the metal arrowhead remained in his body. *B* responded, “I’m a physician who is only responsible for the portion outside your body; as for the metal arrowhead within your body, you should go to a surgeon!”

IX.2 The Panel hovers between the “Two Powers” in its attempt to ingratiate itself with both sides

Among the concerned parties in the dispute, the claimants consist of the fifteen countries of the EC, including France, Germany, Italy and the United Kingdom, which are four economically powerful countries; and the respondent is the superpower of global economic hegemony -- the United States. Also concerned parties in the dispute are the participating third parties, sixteen of which are WTO members, including Canada and Japan. The latter two countries are also economically powerful nations. The third parties concurred completely with the EC in its arguments before the Panel. Therefore, this can be characterized as a dispute between two powers, one that is opposing Section 301, and the other defending it. The leading actors in the dispute are the most economically developed “Seven,”¹⁹⁵ which are divided into two sides. Between the two sides, a great war broke out that centred on the re-

¹⁹⁴ *Id.* para. 7.119 (emphasis in original); DSU, *supra* note 15, art. 11.

¹⁹⁵ The G7, they are Canada, France, Germany, Italy, Japan, United Kingdom and the United States.

striction and anti-restriction of its own economic sovereignty. This circumstance in the history of world trade development is rare, if not unprecedented. Although the superpower is very formidable, it stands alone; and particularly when opposed by six powerful nations, who have substantial WTO members' support, it faces considerable power and opposition. The Panel judging the dispute is thereby caught between the two big "powers".

After the final Panel Report was circulated among the members of the WTO on December 22, 1999, both parties to the case announced they would not seek an appeal. However, in their related statements, they both report a positive outcome, illustrating each side's mental victory. The USTR issued a press release on December 22, 1999, announcing that the dispute settlement Panel of the WTO "has rejected a complaint by the European Union, upholding the WTO consistency of Section 301 of the Trade Act of 1974."¹⁹⁶

The U.S. Trade Representative Charlene Barshefsky triumphantly and arrogantly stated that "[s]ection 301 has served, and will continue to serve, as a cornerstone of our efforts to enforce our international trade rights."¹⁹⁷

To be sure, the U.S. statement of *victory* is not totally without basis, as the final Panel Report determined that Section 301 is not inconsistent with the WTO/DSU system.¹⁹⁸ However, the United States avoids mentioning the precondition and reservation on which the determination is based -- that is, it was alleged and asserted that the U.S. Administration, in the SAA, has promised to preclude the USTR's discretion to make unilateral determinations or retaliatory sanctions prior to the exhaustion of DSU proceedings or without the DSB's authorization. Should the U.S. Administration repudiate the preconditions, the above findings would not be justified and the United States would incur state responsibility because the existence of Section 301 would then be rendered inconsistent with its obligations under the WTO system. Thus, the United States' statement of *victory*, which avoids mentioning the preconditions and reservations, should be considered "*emasculated*", and could be rendered meaningless at any time.

On December 23, 1999, just after the issuance of the United States' press release, the E.U. Trade Commissioner, Pascal Lamy, also issued a press release, in which he stated that:

[t]he EU notes *with satisfaction* the WTO Panel's now published report on the Section 301 case. This is a fair result, a balanced outcome to a difficult case, but overall, it is a *victory for the multilateral system*. 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 United States has given the necessary commitments to these effects.¹⁹⁹

The EC's statement of *victory* is also not totally without basis. Through this *new-case*-igniting, the EC effectively curbed the \$520 million claim of the United States in the banana case, compelling the WTO/DSU to reduce the U.S. compensation to \$191.4 million, thereby eliminating the 63.2 per cent inflation and extortion claimed by the United States in the banana *old-case*.²⁰⁰ Furthermore, it

¹⁹⁶ Press Release No. 99-102, Office of the U.S. Trade Representative, WTO Panel Upholds Section 301 (Dec. 22, 1999), available at <http://www.ustr.gov/releases/1999/12/99-102.html>.

¹⁹⁷ *Id.*

¹⁹⁸ Sections 301 - 310 Panel Report, *supra* note 128, para. 7.115.

¹⁹⁹ Press Release No. 86/89, Delegation of the European Commission to the United States, WTO Report on U.S. Section 301 Law: A Good Result for the European Union and the Multilateral System (Dec. 23, 1999), available at <http://www.eurunion.org/news/press/1999/1999086.htm>.

²⁰⁰ See *supra* Section VI.B.

prompted the United States, during the proceedings, to state repeatedly that in the future it would implement Section 301 strictly under the WTO multilateral system. However, the main goals of the EC, namely, to deny and abolish the unilateral and hegemonic legislation of Section 301 through the recommendation or determination of the DSB, were far from satisfied. Therefore, the so-called “victory of the multilateral system” is rather very limited and very unstable, for the *bane* remains and the chronic disease of Section 301 may recur at any time in the future.

The final Panel Report, having not been appealed by either party, was formally adopted by the DSB on January 27, 2000. The international public has levied both praise and criticism for the Panel Report. One international author commented that “[t]he Panel decision seem[ed] to be a fair ‘political’ decision that pleased both parties, or at least enabled them to save face. However, this panel decision is *legally weak*, even though it is not entirely wrong.”²⁰¹ This overall assessment seems not to be without basis. In light of the fact that both sides claimed *victory* and the Panel’s way of ingratiating itself with both parties, the Panel displays an undeniable “*astute*” skill at avoiding the core issues.

IX.3 The Panel leaves the offender at large, criticizing pettily while doing it great favour

In the final Panel Report, quoting copiously from various sources, the panelists expounded in great length on the general rules and principles guiding the interpretation of international treaties provided for in Article 31 of the Vienna Convention on the Law of Treaties, and proved that the statutory language of Section 301 is inconsistent with the WTO/DSU multilateral system and that the United States actually did breach its international obligations.²⁰² However, the Panel’s opinion swerved suddenly and concluded, in even greater length and energy, that the plain words and the definite meaning in the statutory provisions only constituted *prima facie* evidence,²⁰³ and thus could not be relied upon to determine that the hegemonic legislation was inconsistent with the WTO and the United States’ international obligations.²⁰⁴ Subsequently, the Panel again invoked Article 11 of the DSU as the basis of its competence, casting away the self-imposed “three-not” limits that had confined it to analysis of the claims themselves.²⁰⁵ The Panel exceeded Section 301 *per se* by distracting peoples’ attention *beyond* Section 301 to the United States’ institutional and administrative elements.²⁰⁶ Quoting laboriously and rationalizing the SAA and the solemn pledge and obtuse statements of the U.S. representative,²⁰⁷ the Panel concluded that the SAA can revise and abolish the formal legislation of the U.S. Congress, that the SAA had curtailed the USTR’s *discretion* to make unilateral determinations according to Section 301, and consequently confirmed that the unilateral hegemonic legislation of the United States was not inconsistent with the WTO multilateral system. However, as for the ambivalent sections of the SAA, the Panel, under the pretext of U.S. constitutional principles, endeavoured to persuade the world to rely on the United States’, the economic hegemon’s assurances that it would make interpretations of its own hegemonic law strictly in conformity with its international obligations.²⁰⁸

²⁰¹ Chang, *supra* note 189, at 1185.

²⁰² Sections 301 - 310 Panel Report, *supra* note 124, paras. 7.58-7.79.

²⁰³ *Id.* para. 7.98.

²⁰⁴ *Id.* paras. 7.104 – 7.113.

²⁰⁵ *Id.* paras. 7.119, 7.13.

²⁰⁶ *Id.* para. 7.98.

²⁰⁷ Sections 301 - 310 Panel Report, *supra* note 124, para. 7.109.

²⁰⁸ *Id.* n.681.

A general survey of the integral reasoning process and the method employed by the Panel manifests that its trick was appallingly identical to the behaviour of some politicians in the political arena -- for example, saying East for the purpose of saying West; just producing clouds with the hand upper-turned, while promptly producing rain with the same hand overturned; negating in the abstract but confirming in the specific; and criticizing a bit while conferring great favour!

IX.4 The Panel is partial to and pleading for hegemony and thus leaves a lot of suspicions and hidden perils

In brief, the Panel's attitudes and approaches toward the Section 301 Disputes aforesaid could be objectively summarized as *partial to* and *pleading for* the contemporary *hegemony*. A lot of Remaining Suspicions and Hidden Perils, which have been left, are the inevitable destination of the three adjudicating ways and dispute-settling styles as mentioned above in *A, B and C points*. In essence, the Remaining Suspicions and Hidden Perils are the inevitable results of the Panel's lacking the courage and boldness to act upright without flattery, and to enforce the related international laws and WTO rules righteously. The following Part X of this paper will conduct a concise analysis of these inevitable destinations and results.

X. THE REMAINING SUSPICIONS AND LATENT PERILS ENTAILED BY THE PANEL REPORT

Scrutinizing the content and the final conclusions of the Panel Report, one can perceive the legal suspicions and latent perils embodied therein.

X.1 The first suspicion and latent peril

Is the SAA that was submitted by the U.S. President and approved by the U.S. Congress indeed a mandatory binding statute?

As stated above, the Panel approved and affirmed the arguments of the United States, confirming that the SAA had lawfully and effectively curtailed the discretion vested with the USTR by Section 301, so that the latter could not make unilateral determinations or resort to unilateral retaliatory measures prior to the exhaustion of the DSU proceedings.²⁰⁹

Manifestly, the affirmation and determination of the Panel is premised on the fact that the related statements in the SAA have a mandatory binding effect on the USTR. However, after a careful check of the key words in the key paragraphs in the SAA, it can be concluded that the premise of a mandatory binding effect does not exist at all.

The original text of the SAA reads as follows:

Although it will enhance the effectiveness of Section 301, the DSU does not require any significant change in Section 301 for investigations that involve an alleged violation of a Uruguay Round agreement or the impairment of U.S. benefits under such an agreement. In such cases, the Trade Representative *will*:

- invoke DSU dispute settlement procedures, as required under current law;
- base any Section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement *on* the panel or Appellate Body findings adopted by the DSB;
- allow the defending party a reasonable period of time to implement the report's recommendations; and
- if the matter cannot be resolved during that period, *seek* authority from the DSB to retaliate.²¹⁰

In the above paragraph, the word "*will*" is the key word. As far as the original meaning of "will" is concerned, it is a *soft, discretionary, optional, and ambiguous* auxiliary verb. In the legal vocabulary,

²⁰⁹ *Id.* para. 7.112.

²¹⁰ SAA, *supra* note 164, at 365-66 (emphasis added); *see also* Sections 301-310 Panel Report, *supra* note 124, para. 7.112 (quoting the SAA at 365-66.).

it differs totally from “shall,” a rigid, compulsory, resolute, non-negotiable, and execution-force auxiliary verb. In the above listed actions, the SAA doesn’t direct that the USTR “shall invoke,” “shall base,” “shall allow,” or “shall seek” when carrying out the investigations. In short, the four actions listed in the SAA are not compulsory executive directions; thus the SAA is not a compulsory statute with a binding legal effect.

The preamble of the SAA provides that “[f]uture Administrations *will* observe and apply the interpretations and commitments set out in this Statement.”²¹¹ These words reveal again that the U.S. Administration *has no intention at all* of treating the SAA statements, interpretations, and commitments on the relationship between Section 301 and the WTO system as an administrative order so as to *direct* future U.S. Administrations to strictly *abide* by them.

Furthermore, as the EC brought to light during the proceeding, the SAA contains clearly ambivalent statements that state publicly that there is no basis for concern that the WTO/DSU will make future Administrations more reluctant to apply Section 301 unilateral sanctions.²¹² Until the SAA was submitted to the U.S. Congress for approval in September of 1994, the USTR could willingly and dauntlessly apply Section 301 unilateral sanctions without the DSB’s authorization. The situation remains unchanged. The United States can *continue* dauntlessly to persist in its *old way*.²¹³ In this context, recalling the historic “Great Sovereignty Debate” that took place in the U.S. Congress between the “Sovereignty Confidence Group” and the “Sovereignty Anxiety Group,” it seems obvious that this paragraph of the SAA is the proclamation, statement, and appeasement made by the “Sovereignty Confidence Group” with the aim of eliminating the “Sovereignty Anxiety Group’s” apprehension and anxiety toward the new WTO/DSU multilateral system.

This would explain why the U.S. Administration repeatedly adopted the word “*will*” in the SAA and made ambivalent statements and declarations in the same document. It further indicates that the U.S. Administration is never willing to be absolute, but rather leaves an adequate margin for itself to persist in the implementation of Section 301. It also accurately reflects the United States’ mentality and reluctance to part with hegemonic actions. The U.S. Congress approved both the SAA and the Uruguay Round Agreement Act, indicating that the “egoism, unilateralism, pragmatism, and fence-sitting” philosophy and codes of conduct of the United States’ ruling class were once again “effectively applied” and vividly manifested.

Those sitting on the Panel are inevitably those learned scholars who are well-versed in legal science and English. However, they consciously evaded the twice-used key word “*will*” and its legal meaning. In response to the ambivalent statements in the SAA, the Panel pleads for the United States to “follow the interpretation principle” of the U.S. Constitution. However, by making controversial conclusions based on the interpretation principle of the U.S. Constitution, they negated the irrefutable conclusions of the worldwide-accepted interpretative principles provided for in Article 31 of Vienna Convention on the Law of Treaties. Furthermore, the Panel arbitrarily transformed the weak, ambiguous, and ambivalent statement in the SAA into an U.S. “*guarantee*” that would preclude it from making unilateral determinations in the international community, thereafter asking the international communities to *rely* on it. How can this way of pleading and examination not be suspected of being partial to hegemony?

²¹¹ SAA, *supra* note 210, at 1; *see also* Sections 301 - 310 Panel Report, *supra* note 128, para. 7.110.

²¹² SAA, *supra* note 210, at 366.

²¹³ The Panel “recognize[d] of course that an undertaking given by one Administration can be repealed by that Administration or by another Administration.” Sections 301 - 310 Panel Report, *supra* note 124, para. 7.109.

X.2 The second suspicion and latent peril

Does the USTR, after the entry into force of the WTO Agreement, truly *abide* by the commitments and “*guarantees*” made in the SAA?

During the proceedings, the United States flatly denied that the USTR had ever taken any unilateral retaliatory action. The relevant statement reads as follows:

“The record shows that the [US] Trade Representative has never once made a Section 304(a)(1) determination that U.S. GATT or WTO agreement rights have been denied which was not based on the results of GATT and WTO dispute settlement proceedings. Not once.”²¹⁴

In responding to this overall denial by the United States, the EC pointed out that the USTR had published the retaliatory list in the banana case before the exhaustion of DSU proceedings.²¹⁵ Japan, as an interested third party to the dispute, further pointed to the USTR’s publishing of the retaliatory list in the Automobile Parts Dispute.²¹⁶ Jointly, they refuted and exposed the United States’ unjustified denial.

Both of these unilateral acts took place after the SAA and WTO/DSU had come into effect. The lists were not only conspicuously registered in the U.S. Federal Register, but also appeared in the Section 301 Tables of Cases compiled by the USTR Bureau othemselves.²¹⁷ These irrefutable facts strongly demonstrate that the statement in the SAA made by the U.S. Administration to the USTR is *devoid* of legally binding effect. The actions of the USTR to date show that it does not abide by the commitments and “*guarantees*” made in the SAA, but rather casts them away like worn-out shoes. It is also a sufficient indication that the SAA statements are, in essence, nothing more than crafty manoeuvrings and double-faced tactics to deceive the public.

However, even in the face of such irrefutable facts, the Panel unexpectedly pardoned the United States, stating that “[w]e are, in particular, not called upon to examine the WTO compatibility of U.S. actions taken in individual cases.”²¹⁸ “We do not consider the evidence before us sufficient to overturn our conclusions regarding Section 304 itself.”²¹⁹

²¹⁴ Sections 301 - 310 Panel Report, *supra* note 128, para. 7.128.

²¹⁵ On April 19, 1999, the WTO/DSU proceedings were exhausted and the United States was given permission to publish the retaliatory list by the DSB. However, on December 21, 1998, the United States unilaterally published its retaliatory list of sanctions on the EC, *four months* prior to the exhaustion of the DSU proceedings.

²¹⁶ In the Automobile Parts Dispute, the United States unilaterally published its retaliatory list on May 16, 1995, without recourse to the DSB in accordance with the DSU.

²¹⁷ Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: Barriers to Access to the Auto Parts Replacement Market in Japan, 60 Fed. Reg. 26745 (May 18, 1995); Press Release No. 98-113, Office of the U.S. Trade Representative, Executive Office of the President, USTR Announcing List of European Products Subject to Increased Tariffs, (Dec. 21, 1998) (on file with author); Implementation of WTO Recommendations Concerning the European Communities’ Regime for the Importation, Sale and Distribution of Bananas, 63 Fed. Reg. 71,665-666 (Dec. 29, 1998); Press Release No. 99-17, *United States Takes Customs Action on European Imports* (Mar. 3, 1999) (on file with author); Section 301 Table of Cases, Japan Auto Parts No. 301-93, The EC and the Importation, Sale, and Distribution of Bananas No. 301-100 (Aug. 9, 1999), *available at* <http://www.ustr.gov/reports/301report/act301.htm>.

²¹⁸ Sections 301 - 310 Panel Report, *supra* note 128, para. 7.13.

²¹⁹ *Id.* para. 7.130.

In conducting a comprehensive survey of the proceedings in the above two cases, one can perceive that the United States, after its anticipated goals were accomplished by waving the “big stick” to threaten its opposition, ceased at the proper time and did not formally carry out its original unilateral retaliatory sanctions. According to the United States’ self-defending logic -- that because the USTR did not actually execute its original unilateral retaliatory sanctions in the above two cases -- the United States does not breach its international obligations under the WTO system. According to this logic, the Charter of the United Nations should not ban the using of military threats in international relations, and the criminal law of every nation should not stipulate that blackmail is a criminal offence; in other words, under this logic, threatening other nations “does not breach international law,” and blackmail “is not a violation of criminal law.” Is this not ridiculous?

Nevertheless, it is this kind of ridiculous logic that the Panel adopted in its final report. What is worse, it is no different from encouraging the United States to wreak havoc in international trade by relying on its unilateral hegemonic “big stick” in subsequent practice. Consequently, its influence would definitely bring about additional weakening and devastation to the WTO/DSU multilateral system. The critical issue then becomes whether the action of carrying out threats and relying on Section 301 is *per se* inconsistent with the WTO, whether it repudiates the United States’ international obligations, and whether the United States should incur state responsibility.

X.3 The third suspicion and latent peril

Is the “Damocles sword effect” of Section 301 really *consistent* with the WTO/DSU multilateral system? Does it not repudiate the United States’ international obligations?

As stated above, the formal implementation of Section 301 of the U.S. Trade Act of 1974 is a frequently waved “big stick,” utilized by the USTR to threaten its trading partners. Relying on the formidable “Damocles sword effect” created by the “big stick,” the United States repeatedly fulfilled its anticipated goals and enjoyed incredible benefits. According to the Section 301 Table of Cases compiled by the USTR Bureau, from July 1, 1975 to August 5, 1999, 119 cases were investigated over the course of twenty-four years. In only fifteen of these cases were trade sanctions actually imposed. In the remaining 104 cases, almost 87.4 per cent of all the trading partners were compelled to succumb to the enormous pressure of the “big stick.” This shows that the mere publishing of possible retaliatory measures is sufficient to create a formidable and threatening influence, forcing the United States’ trading partners, especially those economically small and weak countries, to accede to open their markets or to reach agreements that favour the United States. Experience has shown that the might of Section 301 lies in the threat of a trade sanction, rather than in the sanction itself.²²⁰

Whenever the USTR invokes Section 301, it follows a certain procedure.²²¹ First, upon receiving the petition and allegations from the interested person, the USTR determines to initiate an investigation after review and then publishes the summary of the case in the Federal Register; meanwhile, it requests consultations with the concerned foreign country regarding the issue involved in the investigation.²²² Second, the interested persons of the United States are invited to bring forth verbal com-

²²⁰ Chang, *supra* note 189, at 1157; Jay L. Eizenstat, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 Emory Int’l L. Rev. 137, 153-54 (arguing that the Congressional intent underlying Section 301 is to open foreign markets by creating “credible threats of retaliation.”).

²²¹ See 19 U.S.C. § 2411.

²²² *Id.*

ments, including new petitions and allegations.²²³ Third, public hearings are held to seek advice from the petitioners.²²⁴ Fourth, a preliminary retaliatory list is announced, the list is presented to the foreign countries concerned, and necessary revisions and supplements are made to the retaliatory list with the development of the case.²²⁵ Finally, the retaliatory sanctions are actually implemented.²²⁶

In this law enforcing process, the powerful U.S. media actively helps disseminate the news and create a great sensation. The media sensation not only constitutes a great mental threat to the United States' trading partners in the negotiation process, but actually compels the concerned enterprises confronted with the occasional retaliatory risks such as high tariff rates, high regulatory fees, customs suspension and other deliberate difficulties, to carry out risk avoiding measures in advance to eliminate their inner apprehensions. Such measures include: reducing or stopping goods being transported to the United States; shifting the goods originally transported to the United States to other countries; or increasing the insurance premiums, etc. -- which all result in a sharp increase in price of the concerned goods, greatly weakening or even utterly depriving the concerned commercial undertaking, and thus denying the chance of fair competition in the international market.

In light of this, it is the United States' reliance upon its economic dominance that led it to implement its hegemonic, Section 301. Ever since the formal publishing of the case in the Federal Register and the initiation of investigation, the increasingly consolidated "Damocles sword effect" has *substantively* caused continuously significant discriminatory treatment of relevant trading partners, economic actors and goods, and, consequently, has *substantively* violated the most fundamental principles in the WTO/GATT international trade system: the principles of the Most Favoured Nation Treatment and the National Treatment.²²⁷ Concerning *procedure*, the "Damocles sword effect" violates and tramples the fundamental principles of the WTO/DSU system: multilateral adjudication and examination to solve disputes. In other words, this "Damocles sword effect" has breached and infringed upon relevant trading partners' both *substantive* and *procedural* privileges and interests under the WTO multilateral system, long before retaliatory sanctions are formally implemented. As to this action, the United States continues acting at will and refuses to deviate from its pre-WTO old track. In doing so, the United States totally repudiates the international obligations it has under the WTO system.

Countering with the startlingly conspicuous "Damocles sword effect" and its destructive consequence on the WTO system, the Panel, in its lengthy final report, only casually mentioned it and never penetrated it deeper. However, on the same pretexts of the statements in the SAA and interpretation of U.S. constitutional principles, it determined not to investigate further.²²⁸ The objective effect of this method of examination actually confuses the significant falsehood and truth, mixes up black and white, wrong and right, and thus consequently connives and encourages the economic hegemony.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ 19 U.S.C. § 2411.

²²⁷ DSU, *supra* note 15, art. 2.

²²⁸ See Sections 301 - 310 Panel Report, *supra* note 128, paras. 7.89-7.92.

X.4 The fourth suspicion and latent peril

Does the exemplary effect and its consequent influence of partiality and connivance in the Panel Report on U.S. Section 301 not affect the general situation? Should we therefore see no harm in letting it go, or is this a matter of significance which should not be ignored?

As stated earlier, the struggles and debates launched on the hegemonic act of Section 301 reflected the new conflicts between WTO members on the restriction and anti-restriction of economic sovereignty during the new acceleration of global economic integration. In the contesting process, the United States, on one side, under the big flag of safeguarding its economic sovereignty by asserting execution of Section 301 as its offending weapons and defending magic weapons, has striven to maintain and enlarge its in-hand economic hegemony and to retain its global economic hegemony. This purport, as early as 1994, had floated onto the surface during “*The Great 1994 Sovereignty Debate*.” It was widely spread and advocated and thus became the “most political bellwether” in the Congress’ review.²²⁹ The EC countries and numerous other WTO members, on the other hand, in having recourse to the WTO multilateral system, requested that the United States revise and relegate Section 301 in the hope of restricting and weakening U.S. economic hegemony and defending their constantly impaired economic sovereignty. Facing such a globally important dispute, the Panelists, to be responsible and impartial, should take the basic provisions in the WTO/DSU system as their codes and rules of conduct.

The WTO Agreement, in its preamble and Article 16.4, explicitly provides that its objectives are to establish “an integrated, more viable, and durable multilateral trading system” through the joint efforts of the contracting members.²³⁰ It additionally provides that each Member must ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed agreements.²³¹

The DSU, an accessory to the WTO Agreement and a forcible guarantee of its objectives, explicitly provides in its General Provisions: “The dispute settlement system of *the WTO is a central element in providing security and predictability to the multilateral trading system.*”²³² Its first objective is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.²³³ Correspondingly, the function of panels established under the DSU is to make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in giving rulings provided for in the covered agreements.²³⁴ These provisions expressly stipulate specific functions and codes of conduct for the Panel in adjudicating each dispute.

Reviewing Section 301, which aroused the indignation of the international community and is sternly condemned by thirty-plus WTO members, the Panel did not investigate or make such findings in assisting the DSB to make recommendations and rulings for the United States to revise and relegate the notorious hegemonic statute, even though it was fully aware that the specific provisions and practices of Section 301 actually breached many agreements in the WTO multilateral system. The Panel, by the above means of “criticizing pettily while doing great favour,” deceived the public and affirmed

²²⁹ See *supra* Part V of this paper.

²³⁰ DSU, *supra* note 15, at pmb1.

²³¹ *Id.* art. 16.4.

²³² *Id.* art. 3.2 (emphasis added).

²³³ *Id.* art. 3.7.

²³⁴ *Id.* art. 11.

Section 301 flatly, allowing Section 301 to be preserved and remain intact. The final Panel Report is obviously partial to hegemony, which has aroused controversy and criticism from the learned persons in the international academic field and in the public opinion arena.²³⁵

If the report were left alone and not further criticized or boycotted with the passing of time, it may gradually result in the four types of chain reactions:

First, using the conclusions of the Panel's report to fashion a protective umbrella and bullet proof clothes, the United States will proceed unbridled in implementing its hegemonic Section 301 while safeguarding, consolidating, and extending its state global economic hegemony. It will continue to open up the markets of its trading partners through recourse of unilateral threat and blackmail, with the purpose of extracting more presumptuous and inequitable rights without being bound by the WTO/DSU multilateral system and totally evading the risks of incurring claims and anti-retaliations in the WTO/DSU system. Its rationale is that the only reservation that the Panel made in its final report is that once the United States repudiates its commitments and "guarantees" as established by the SAA, the United States would incur state responsibility. This is only an utterance of void and forged "Trammel Incantation" that *cannot tame* the contemporary intractable *Monkey King*!²³⁶

Second, other economic powers may follow U.S. practice in shielding their various unilateral legislations and measures by adopting an ambiguous and publicly deceiving "Statement of Administrative Act." They can then bully weak trading partners and prevent the interest-impaired, economically weak countries from invoking the WTO multilateral system to charge and sanction them.

Third, for those economically weak nations, they, in self-defence, will be compelled to each craft an ambiguous domestic "Statement of Administrative Act" to escape from the binding provisions of the WTO multilateral trade system and consequent international obligations.

Finally, the various unilateral domestic legislations are sure to gradually collide with each other, thoroughly shaking and destroying the foundation of the WTO integral multilateral system, which was established through the joint efforts of all of its members. In the end, the WTO system will exist no more and a big historic retrogression will occur. Even a thousand-mile dike can collapse due to the existence of one ant-hole. The danger posed by the false conclusions of the Section 301 case, acting as the one ant-hole, may make the WTO system similarly vulnerable to collapse. In consideration of all these chain reactions, the adverse influence of the Panel Report cannot be neglected.

²³⁵ Chang, *supra* note 189, at 1224-26. The Seoul scholar, Seung Wha Chang, pointed out in the article that the Panel's ruling stands on shaky legal ground, because the Panel did not sufficiently focus on the ambivalent position of the United States, which is expressed in the SAA as well as in other congressional records for the passage of the URAA in 1994. *Id.* The Panel did not make a formal ruling on the WTO consistency of specific U.S. actions. *Id.* Instead, it directly supports the U.S. denials. *Id.* It heavily relies on the assurances made by the United States before it during the proceeding. *Id.* All these pose a risk for the WTO/DSU dispute settlement mechanism. *Id.* These comments are of deep insight. However, at the end of the Chang's paper, the author declared in particular that the goal of his article was not to unilaterally blame Section 301 on behalf of U.S. trading partners, but to persuade the United States not to abuse Section 301 in the future. *See id.* The author claimed that Section 301 can co-exist with the WTO multilateral system, that the WTO needs the United States to be a leader in maintaining its multilateral trading system, and so forth. *Id.* Those "good wills," to a certain degree, demonstrate the bewilderment and naivety of the author: the hope to advise the tiger; that a tiger could change its diet from meat to vegetables; the hope to cure the chronic disease of hegemony by simply applying some light, herbal medicine.

²³⁶ Monkey King, a mythical hero of the Chinese classic novel, *The Pilgrim to the West*, is the apprentice to Saint Xuanzhang, an elite monk who contributed to the spread of Buddhism in China. St. Xuanzhang resolved to acquire the original Buddhist Classics from India, a country far from China, then in Tang Dynasty. Monkey King was an escort to St. Xuanzhang, but because he was intractable and sometimes disobedient, St. Xuanzhang had to utter the "splitting-headache incantation" to control him when he did not behave rightly.

XI. THE IMPLICATIONS FOR DEVELOPING COUNTRIES OF “THE GREAT 1994 SOVEREIGNTY DEBATE” AND THE EC-U.S. ECONOMIC SOVEREIGNTY DISPUTES

Conspicuously, “*The Great 1994 Sovereignty Debate*” in the United States took place in an accelerated economic globalization on the eve of the birth of the WTO system. Against this background, the causes of the debate, which broke out regarding the abolition or preservation of Section 301, were not confined to the United States itself and its follow-up influence was far-reaching and exceeding the U.S. territory.

As expected, soon after the WTO came into existence, the Japan-U.S. Automobile Parts Dispute, the U.S.-EC Banana Dispute, the EC-U.S. Section 301 Disputes, and the EC-U.S. Section 201 Disputes occurred one after the other. Although the proceedings and results of these cases may differ, they shared significant commonalities. First, the United States was targeted as the formidable adversary in the contests. Additionally, each was closely related to the hegemonic legislation of Sections 301 and 201, or directly aimed at the theme of the abolition or preservation of Section 301. Moreover, the essence of the cases was based upon restriction and antirestriction conflicts between the United States’ economic hegemony and the economic sovereignty of other nations. The fierce rise, fall, and re-emergence of the debates, which revolved around the restriction and anti-restriction on economic sovereignty from 1994 to 2003, provide significant information worthy of serious research by the international community, especially small and weak nations. Such nations should analyze and inquire about these debates so as to draw some enlightenment.

The implications of the debates for developing countries, which have occurred over the span of ten years are several, as follows:

First, as economic globalization accelerates, the offensive and defensive war of economic sovereignty has not calmed down; rather, it continues and sometimes becomes rather fierce. Therefore, the developing countries must strengthen their sense of crises/risks to avoid unconscious acceptance of the theories of *obsolescence*, *relegation*, *weakening*, or *dilution of economic sovereignty*.

The main characteristic of this offensive and defensive war is that the most powerful nation is striving to defend its vested economic hegemony, to weaken further the economic sovereignty of those less powerful nations, and to damage the hard-earned economic sovereignty of weak nations. The international hegemonist has been consistently applying a double standard to the issue of economic sovereignty, that is, regarding its own economic sovereignty and actually economic hegemony as a *holy god* while it treats that of weak and small nations as a *small straw*.

When Professor Jackson concluded his article concerning “*The Great 1994 Sovereignty Debate*,” he mildly expressed his dissent to the above quoted arguments of Professor Henkin, the senior authority.²³⁷ He acclaimed that “in nominal sense, my view appears to be somewhat contrary to parts of Professor Henkin’s views, especially in those instances when he speaks of relegating “the term sovereignty to the shelf of history as a relic from an earlier era . . . the observable fact is that the word sovereignty is still being used widely, often in different settings which imply different sub-meanings.”²³⁸ Therefore, Professor Jackson contends that the word sovereignty should be decomposed to use appropriately in different situations. These remarks seem obscure when read the first time.

²³⁷ See Jackson, *supra* note 33, at 158-59.

²³⁸ *Id.*

After due consideration, however, one can comprehend without difficulty that the words of the two professors refer to sovereignty *in different circumstances*. The sovereignty that Professor Henkin advocated to be relegated specifically refers to the *sovereignty of those small and weak nations* (1) that are unwilling to succumb to the superpower, (2) that constantly raise the justice flag of sovereignty, and (3) that boycott the interventionism and hegemonism of the superpower. While, the sovereignty that Professor Jackson seeks to preserve refers specifically to the *sovereignty of the United States itself*. Behind the camouflage of “sovereignty”, the United States can cover its vested hegemony, and thus resist being bound by its international treaty obligations and the international rule and code of conduct. Therefore, the viewpoints of the two professors even seem to contradict each other at first sight, but actually constitute a pair of well-coordinating weapons: Professor Henkin’s relegation theory is the *spear* to attack the small and weak nation’s sovereignty, while Professor Jackson’s preservation theory provides the *shield* to defend the United States’ “sovereignty”, the vested hegemony. The two theories differ in function, while serving their same purpose (U.S. interests) perfectly. This is another perfect example for the philosophy of pragmatism and double criteria acted upon by the United States in the international community. Now, faced with the hegemonist’s attacking spear and the hegemonist’s defending shield, shouldn’t the developing countries, especially the weak and small nations, intensify their sense of crises/risks so as to avoid unconsciously accepting the theory of the abolishment, relegation, weakening, or dilution of economic sovereignty?

Second, the international allocation of decision-making power in global economic affairs is an important part of the offensive and defensive wars on economic sovereignty. Therefore, the developing countries should strive to acquire an equitable portion of decision-making power in the international arena.

The equity and rationality of the international allocation of decision-making power in world economic affairs is decisive as to whether a weak nation’s economic sovereignty can obtain the protection it deserves. Further, it determines whether the international allocation of world wealth is reasonable. To change the severe inequity in the international allocation of global wealth, the protection of the weak nations’ sovereignty should be strengthened. For this purpose, reformations should be conducted on the source of the severe inequity malpractice in the international allocation of decision-making power in world economic affairs.

As noted above, Professor Jackson, when reviewing and concluding “*The Great 1994 Sovereignty Debate*,” emphasized repeatedly that the core and essence of the debate was about the allocation of power, the appropriate allocation of the decision-making power in international affairs between the U.S. Government, and international institutions.²³⁹ This insight touched the essence of the issue and was so pointed. Perhaps confined by his social status and position, however, Professor Jackson was unable or did not dare to further expose the gigantic inequity of the current allocation of the decision-making power in international affairs between the superpower and the majority of developing countries.

The facts attest that, in the allocation system of decision-making power in international economic affairs, the United States has acquired a portion far in excess of what it deserves. During “*The Great 1994 Sovereignty Debate*,” the arguments of the “Sovereignty Confidence Group” and the “Sovereignty Anxiety Group” seem contradictory, even though, in essence, they share a common fundamental starting point -- that is, grasping tightly a *super-portion* of decision-making power in international affairs without making any concessions, while endeavouring to seize the *small portion* of the decision-making power that rests on other’s plates to satisfy its own voracious appetite.

As is well known, the two worldwide economic organizations, the World Bank and the International Monetary Fund, established in accordance with the Bretton Wood System approximately fifty years ago, implemented a weighted voting mechanism based upon the amount of capital subscription

²³⁹ See Jackson, *supra* note 33.

as advocated by the United States. It enables the United States to enjoy a super portion of decision-making power in relevant international economic affairs.²⁴⁰ During the Uruguay Round negotiations, the United States intended to play the old trick again to implant the weighted voting mechanism into the WTO; however, its efforts failed due to constant resistance from the majority of developing countries.²⁴¹

The practice of the various decision-making mechanisms in some international economic organizations, for many years, has repeatedly proven that the weighted voting mechanism on the basis of economic power and upon the “size of the purse” will inevitably lead the wealthy to bully the poor, the bigger to oppress the smaller, and the strong to overshadow the weak. Conversely, to implement the “one nation, one vote” equitable voting mechanism will contribute to the realization of equality between nations, distributing the wealth to the poor, and provide mutual complementation and benefits. It will particularly help to support the weak and restrain the strong.

During the United States’ “*Great 1994 Sovereignty Debate*,” what most worried the “Sovereignty Anxiety Group” was the organic combination of the voting system of “one nation, one vote” in the WTO with the voting system of reverse consensus in the DSB, which made the United States impossible to dash around due to its economic dominance. However, what the strong and hegemonic always dread is what the weak yearn for. To safeguard their deserved interests and rights in the contemporary offensive and defensive wars of economic sovereignty, obviously developing countries, weak nations, and small nations must strengthen their cohesive force to strive for deserved equitable portions in the international allocation of decision-making power in global economic affairs.

Third, the economic sovereignty of a country lies in its autonomy, power in all its domestic and foreign economic affairs. In the new circumstance of economic globalization, the developing countries should particularly dare to insist on and be good at manoeuvring their economic sovereignty.

In the tide of accelerated economic globalization, what the developing countries face is a situation in which chances and crises coexist. To make use of the chances, the developing countries must grasp tightly their economic sovereignty. Only by using it as major leverage can developing countries conduct the necessary guidance, organization, and management on various internal and foreign economic affairs. To prevent and defend crises, the developing countries should rely on their tightly grasped economic sovereignty, apply it as the main defence, and take all necessary and effective measures to disintegrate and eliminate any possible crisis.

There is no such thing as a free lunch in the world. Sacrifice must be paid to take advantage of the chances and to make use of foreign economic resources to serve a nation’s own economic construction. But the sacrifice is limited to an appropriate degree of self-restraint on certain economic power and economic interests, and on the basis of complete independence and autonomy. The appropriate degree of self-restraint may be found by: 1) persisting in securing on the balance between obligation and right, and resisting harsh foreign requirements. We should flatly reject those extra requirements that would generate a severe negative impact or deteriorate a nation’s security and social stability, without making any concession;²⁴² 2) making an overall assessment of the advantages and disad-

²⁴⁰ For example, in the International Monetary Fund, the voting rights of the United States accounted for twenty per cent of the overall voting rights for a long time, while the voting rights of many weak and poor countries only accounted for 0.1 per cent or 0.01 per cent. The differences of voting rights between them reach several hundred, even several thousand, times. Later, the percentage of the voting rights was “slightly tuned,” while the great differences have not been fundamentally changed.

²⁴¹ See Jackson, *supra* note 33, at 161, 174-75.

²⁴² For example, in the “single package” negotiation on China’s accession to the WTO at the beginning of 2001, some developed country members put forward harsh requirements on China’s adjustment on its agricultural policy, which were denied by the Chinese delegation. The head of the Chinese delegation and its chief negotiation representative, Yongtu Long, emphasized: “with regard to the agriculture, China has a population of 900 million

vantages, gains and losses, on the autonomy basis, then striving for more advantages than disadvantages, more gains than losses; 3) being vigilant in peacetime and strengthening our sense of anxiety in assessing, anticipating, and taking precautions earlier due to the possible risks accompanying such chances, such as the *re-manipulation* of the national economy vein by foreign countries, the loss of control and confusion of the finance and monetary order, the drain of national property, and the taxation source of national treasury; 4) being prudent enough and taking deep consideration without making promises too rashly as to those concessions and prices with too high a risk with less benefits; and, finally, 5) making arrangements before and after making promises to enhance the ability to defend and eliminate crisis. Only then can nations, as steadfast as a mid-stream rock, retain their autonomy in their economy under the lash of the economic globalization tide.

Fourth, any mistake in **theory** is sure to lead to blindness in **practice** and the paying of a great price. After an overall survey of the current contradiction between the South and the North, it is obviously *inadvisable* for the weak and small nations of developing countries to recognize or to adopt the theories of *sovereignty weakening* or *sovereignty dilution*.

With accelerated economic globalization, various theories of diluting or weakening the concept of sovereignty will appear quietly on some occasions, which seem to be novel and fashionable ideas. Some less-worldly people with a kind heart, who have not tasted the bitterness of a small or weak nation, may be perplexed by certain specious arguments, evidence, or false impressions, and thus become unconsciously the echoers of the fashionable theories. However, considering the reality that contemporary economic hegemony is performing arbitrariness from time to time, and combining with the fact that those theories of the obsolete and relegation of sovereignty were created *right from* the hegemonic country and have been advocated as a strong theoretical support of economic hegemony, it should be a sudden wake-up for many people: the development direction of the sovereignty dilution and weakening theories is destined to the sovereignty obsolete and relegation theories. This destination is never the welfare of the small and weak nations, rather it is a *theoretical trap* and people with good intention can not foresee its results.

If people can keep calm and strengthen their observation and comparison of the current international reality they will naturally accept the right judgement in conformity with reality : In the situation of accelerated economic globalization, hegemonism and power politics still exist, thus the tasks of the developing countries to safeguard their national sovereignty, security, and interests are still arduous.²⁴³

Consider for a moment China's place in this discussion. In the offensive and defensive wars in the field of political and economic sovereignty during the period of the twentieth century, China, being the biggest developing country, had suffered severe historic tortures of national oppression, exploitation and humiliation, been trampled by powers; and then, it experienced great historic exultation when eventually achieving autonomy on politics and economy after 100 some years of striving to restore its national dignity. Now, at the beginning of the twenty-first century, in the new situation of accelerated economic globalization, China is, as well as many other developing countries, once again confronted with the offensive and defensive wars of economic sovereignty in the new century.

engaging in agriculture industry, so keeping the stability of agriculture is of great importance to the social stability and economic development of China After its accession to the WTO, the Chinese Government needs to reserve those measures in support of agriculture which are consistent with the WTO. The interest of the 900 million agricultural population will forever be the first consideration of us." Fifteenth Session of WTO Chinese Working Group Finished, People's Daily (Jan. 19, 2001).

²⁴³ See Zemin Jiang, China-Africa Cooperated Hand in Hand, Creating a New Century, People's Daily (Oct. 11, 2000).

It is necessary at this moment to revive the eager exhortation left by Mr. Deng Xiao Ping that Chinese people cherish their friendship and cooperation with other countries and their people, but they cherish more their rights of autonomy acquired through long periods of striving. No country should count on China to be their dependency, or expect China to swallow the bitter fruits that may impair their own country's interests.²⁴⁴

²⁴⁴ See Xiaoping Deng, *The Opening Ceremony Remarks on the Twelfth Plenary Session of the CCP*, *The Selected Works of Xiaoping Deng*, 372 ((People's Pub. House 1983).

XII. CONCLUSION

Taking a macro view, the conflicts and confrontations between U.S. unilateralism and WTO multilateralism during the last decade have produced at least three big rounds attracting worldwide attention. The first round was embodied in “*The Great 1994 Sovereignty Debate*.” The second was reflected in the Section 301 Dispute. The third round was incarnated in the Section 201 Disputes. Notwithstanding the fact that the expression of each round has varied, each have the same core: the restriction and anti-restriction on U.S. economic hegemony, coming under the high-flown flag and camouflage of defending the United States’ “sovereignty”, safeguarding U.S. interests, and implementing U.S. laws.

In the first round, the United States reluctantly accepted WTO multilateralism with the precondition that U.S. unilateralism should coexist with it. Moreover, the Dole Commission is set to be activated at anytime necessary, to guarantee that U.S. unilateralism may always defeat WTO multilateralism.

In the second round, WTO multilateralism was only on the surface respected and observed by using the twist-explained SAA of the United States, while U.S. unilateralism was insisted upon by USTR’s declaration that “Section 301” has served, and *will continue to serve*, as a cornerstone of U.S. efforts to enforce U.S. international trade “rights”.²⁴⁵ Additionally, owing to the fact that U.S. unilateralism was, to some extent, *actually* protected and encouraged by the Panel Report, the U.S. unilateralism, also to the same extent, *actually* won in the “suit”. Thus, the “Damocles sword” is still hanging over the heads of the weak! And, therefore, the Judgment on this round has been criticized for its being politically astute but legally flawed, and *particularly* for its serious policy implications on the WTO/DSB system and on multilateralism.

The third round resulted in a small win for WTO multilateralism after the multilateralism had *actually* lost twice during the previous two big rounds. It had been so hard to achieve by so many WTO members with collective and cooperative struggles for such a long period of 21 months. Undoubtedly, this win, even if small, has been worth congratulating the wide supporters of WTO multilateralism. However, the real meanings of the small win should better not be unduly and excessively appraised. People seem to need to keep in their mind that the longstanding and traditional U.S. unilateralism has far from willingly retreated since this third round.

In this respect, one of the strongest forms of evidence is that, as cited and mentioned in Part II of this paper, the U.S. President emphasized and vowed, “We will *continue to pursue* [our] economic policies”, as well as “our commitment to enforcing our trade laws”,²⁴⁶ right after the U.S. had lost in the “Section 201” Disputes and was forced to temporarily terminate the abused U.S. “safeguard measures” of unilateralism. Similar to the USTR’s declaration right after the end of “Section 301” Disputes in December 1999, the U.S. President’s proclamation right after the end of “Section 201” Disputes in December 2003 *actually* announced to the world: We, the U.S.A., *will continue to pursue* our policies of *economic hegemony*, and *continue to conduct* such activities *still under the camouflage of defending U.S. “sovereignty”, safeguarding U.S. interests, and enforcing U.S. laws*. Therefore, even though the U.S. lost in the recent “Section 201” Disputes, its hegemonic chronic malady of unilateralism may *continue to recur* at any time.

²⁴⁵ USTR Press Release, WTO Panel Upholds 301 (Dec. 22, 1999), available at <http://www.ustr.gov/releases/1999/12/99-102.pdf>

²⁴⁶ See *supra note*, 32.

Of course, nobody can nowadays precisely predict what, when, where and how it will happen in the future. However, in light of the conflicts over the last decade and their related lessons, it is certain that traditional U.S. unilateralism will not exit from the international trade arena voluntarily, or get out of its old rut automatically. Consequently, WTO multilateralism cannot proceed forward smoothly in the foreseeable future. There will inevitably occur more rounds, big or small, of new conflicts and confrontations between U.S. unilateralism and WTO multilateralism, and/or between U.S. economic hegemony and economic sovereignties of other states, if the United States, the unique super-power in the contemporary world, continues to persist in its established unilateralist and arbitrary behaviour.

Under such circumstances, should the weak in the contemporary world, *inter alia* the majority of developing countries, sum up their experiences resulting from the small win secured in the aforesaid third round? How now to enhance their united and cooperative struggles against contemporary economic hegemony and its unilateralism, so as to protect their own economic sovereignties and related equitable rights? Could they achieve some new and bigger success?

Let us wait and see!