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# Dispute Settlement in the World Trade Organization: An Overview

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## Summary

Dispute resolution in the World Trade Organization (WTO) is carried out under the rules and procedures of the WTO Dispute Settlement Understanding (DSU). The DSU provides for consultations between disputing parties, panels and appeals, and possible compensation or retaliation if a defending party does not comply with an adverse WTO decision by an established deadline. Automatic establishment of panels, adoption of reports, and authorization of requests to retaliate, along with deadlines and improved multilateral surveillance of Member compliance, are aimed at producing a more expeditious and effective system than had existed under the GATT. To date, 366 complaints have been filed under the DSU; slightly more than half involve the United States as a complainant or defendant. Expressing dissatisfaction with WTO dispute settlement results in the trade remedy area, Congress, in the Trade Act of 2002 (P.L. 107-210), directed the executive branch to address dispute settlement in WTO negotiations. Although WTO Members have been negotiating DSU revisions in the WTO Doha Round, a draft agreement has not yet resulted. S. 364 (Rockefeller) and H.R. 708 (English) would establish a congressional advisory committee to review WTO decisions and provide for private party participation in WTO disputes. S. 364 would also require congressional approval of administrative actions taken to comply with WTO decisions and rescind certain administrative actions that have gone into effect. H.R 1278 (Camp) and S. 445 (Stabenow) would create a Trade Enforcement Officer intended in part to assist the United States Trade Representative (USTR) in undertaking WTO disputes. S. 460 (Snowe) would allow judicial review of certain USTR determinations under Section 301 of the Trade Act of 1974, which may in some cases involve the initiation and conduct of WTO disputes. S. 1919 (Baucus) would, inter alia, create a Chief Trade Enforcement Officer, establish a WTO Dispute Settlement Review Commission, and require a report from the Commission before an administrative change to comply with a WTO decision could take effect. This report will be updated.

**Background.** From its inception, the General Agreement on Tariffs and Trade (GATT) has provided for consultations and dispute resolution among GATT Contracting Parties, allowing a party to invoke GATT dispute articles if it believes that another's measure, whether violative of the GATT or not, has caused it trade injury. Because the

GATT does not set out a dispute procedure with great specificity, GATT Parties over time developed a more detailed process including ad hoc panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, the use of consensus decision-making (thus allowing a Party to block the establishment of panels and adoption of panel reports), and laxity in surveillance and implementation of dispute settlement results. Congress made reform of the GATT dispute process a principal U.S. goal in the Uruguay Round of Multilateral Trade Negotiations.

**WTO Dispute Settlement Understanding.** The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), negotiated during the Uruguay Round and effective as of January 1, 1995, continues past GATT dispute practice, but also contains features aimed at strengthening the prior system.[1] A Dispute Settlement Body (DSB), consisting of representatives of all WTO Members, administers dispute proceedings. While the DSB ordinarily operates by consensus (i.e., without objection), the DSU reverses past consensus practice at fundamental stages of the process. Thus, unless it decides by consensus *not* to do so, the DSB is to establish panels; adopt panel and appellate reports; and, where WTO rulings have not been implemented and if requested by a prevailing party, authorize the party to impose a retaliatory measure. The DSU also sets forth deadlines for various stages of the proceedings and improves multilateral monitoring of the implementation of adopted rulings. Given that panel reports are to be adopted automatically, WTO Members have a right to appeal a panel report on issues of law. The DSU created a standing Appellate Body to carry out this new appellate function; the Body has seven members, three of whom serve on any one case. The DSU provides for integrated dispute settlement under which the same rules apply to disputes under virtually all WTO agreements unless an agreement provides otherwise. If a dispute reaches the retaliatory stage, this approach allows a Member, under certain circumstances, to impose a countermeasure in a sector or under an agreement other than the one at issue. The preferred outcome of the dispute mechanism is "a solution mutually acceptable to the parties and consistent with the covered agreements"; absent this, the primary objective of the process is withdrawal of a violative measure, with compensation and retaliation being avenues of last resort. To date, 366 complaints have been filed under the DSU; slightly more than half involve the United States as complaining party or defendant. The United States Trade Representative (USTR) represents the United States in WTO disputes.

The DSU was scrutinized by Members under a Uruguay Round Declaration, which called for completion of a review within four years after the WTO Agreement entered into force (i.e., by January 1999). Members did not agree on any revisions in the initial review and continued to negotiate on dispute settlement issues during the Doha Round, doing so

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[1] The text of the DSU, panel and Appellate Body reports, and information on the WTO dispute process are available at [http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm]. WTO disputes are listed and summarized by the WTO Secretariat in its "Update of WTO Dispute Settlement Cases," available at the WTO website, above. Information on WTO disputes involving the United States, including the text of U.S. written submissions to WTO panels, may be found at the USTR website, at [http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Section_Index.html]. For statistical information on cases involving the United States, see CRS Report RS21763, *WTO Dispute Settlement: Stages and Pending U.S. Activity Before the Dispute Settlement Body*, by Todd B. Tatelman. For the status of current cases in which the United States has been successfully challenged, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

on a separate track permitting an agreement to be adopted apart from any overall Doha Round accord. The talks were suspended with the overall suspension of the Round in July 2006 but have since resumed.[2] The United States has proposed greater Member control over the dispute settlement process, guidelines for WTO adjudicative bodies, and increased transparency (e.g., through open meetings and timely access to submissions and final reports).[3] WTO Members have also submitted proposals for, inter alia, a permanent roster of panelists, Appellate Body remand to panels, sequencing (see below), the termination of retaliatory measures (see below), tightened time frames, enhanced third-party rights, and special treatment for developing country disputants.[4]

**Steps in a WTO Dispute.** Following are the stages in a DSU proceeding:

***Consultations (Art. 4).*** If a WTO Member requests consultations with another Member under a WTO agreement, the latter must generally respond within 10 days and enter into consultations within 30 days. If the dispute is not resolved within 60 days after receipt of the request to consult, the complaining party may request a panel. The complainant may request a panel earlier if the defending Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

***Establishing a Dispute Panel (Arts. 6, 8).*** If a panel is requested, the DSB must establish it at the second DSB meeting at which the request appears as an agenda item, unless it decides by consensus not to do so. The panel is generally composed of three persons. The Secretariat proposes the names of panelists to the disputants, who may not oppose them except for "compelling reasons." If there is no agreement on panelists within 20 days from the date the panel is established, either disputing party may request the WTO Director-General to appoint the panelists.

***Panel Proceedings (Arts. 12, 15).*** After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Absent further comments, the interim report is considered to be the final report and is circulated promptly to WTO Members. A panel must generally circulate its report to the disputants within six months after the panel is composed, but may take longer if needed. The period from panel establishment to public circulation of the report should not exceed nine months. In practice, panels have increasingly failed to meet the six-month deadline (see, e.g., European Commission, "DSB Special Session: Non-paper on Panel Composition," Dec. 9, 2003, Ref. 575/03, at 5, at [http://trade-info.cec.eu.int/doclib/html/115445.htm]).

***Adoption of Panel Reports/Appellate Review (Arts. 16, 17, 20).*** Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals it or the DSB decides by consensus not

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[2] For a recent status review, see WTO document TN/DS/20 (July 26, 2007).

[3] See, e.g., WTO documents TN//DS/W/79 (July 13, 2005), TN/DS/W/82 (Oct. 24, 2005), TN/DS/W/82/Add.1 (Oct. 25, 2005), as corrected, and TN/DSW/86 (Apr. 21, 2006).

[4] For further information on proposals, see Institute of International Economic Law, *DSU Review*, at [http://www.law.georgetown.edu/iiel/research/projects/dsureview/synopsis.html].

to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report. The AB report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members. The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to exceed nine months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

***Implementation of Panel and Appellate Body Reports (Art. 21).*** In the event of an adverse decision, the defending Member must inform the DSB of its implementation plans within 30 days after the panel and any AB reports are adopted. If it is "impracticable" to comply immediately, the Member will have a "reasonable period of time" to do so. The period will be (1) that proposed by the Member and approved by the DSB; (2) absent approval, the period mutually agreed by the disputants within 45 days after the report or reports are adopted; or (3) failing agreement, the period determined by binding arbitration. Arbitration is to be completed within 90 days after adoption of the reports. To aid the arbitrator, the DSU provides a non-binding guideline of 15 months from the date of adoption; awards have ranged from 6 months to 15 months and one week. The DSU envisions a maximum of 18 months from the date a panel is established until the reasonable period of time is determined. Where there is disagreement as to whether a Member has complied, a compliance panel may be convened (Art. 21.5).

***Compensation and Suspension of Concessions (Art. 22).*** If the defending party fails to comply with the WTO decision within the established period, the prevailing party may request that the defending party negotiate a compensation agreement. If agreement is not reached within 20 days after the compliance deadline expires, or where negotiations have not been requested, the prevailing party may request authorization from the DSB to retaliate. The DSB is to grant any such request within 30 days after the compliance deadline expires unless it decides by consensus not to do so, or the defending Member requests that the retaliation proposal be arbitrated (most often, on the ground that it exceeds the level of trade injury in the dispute). Arbitration is to be completed within 60 days after the compliance period ends; once a decision is issued, the prevailing party may request that the DSB approve its proposal, subject to any modification by the arbitrator. If imposed, retaliation may remain in effect only until the offending measure is removed or the disputing parties otherwise resolve the dispute.

**Compliance Issues.** While many WTO rulings have been satisfactorily implemented, difficult cases have tested the implementation articles of the DSU, highlighting some deficiencies in the system and prompting suggestions for reform. For example, gaps in the DSU have resulted in the problem of "sequencing," which first manifested itself in 1998-1999 during the compliance phase of the successful U.S. challenge of the European Union's (EU's) banana import regime. As noted earlier, Article 22 of the DSU allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends if the defending party has not complied. Article 21.5 provides that disagreements over the existence or adequacy of compliance measures are to be decided using WTO dispute procedures, "including whenever possible resort to the original panel"; a compliance panel's report is due within 90 days and may be appealed. The DSU does not integrate an Article 21.5 panel procedure into the 30-day Article 22 deadline, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue action under Article 22. Absent the adoption of multilateral

rules on the matter, disputing parties have entered into ad hoc procedural agreements in individual disputes.

The DSU is also silent on procedures for terminating authorized retaliation in the event the Member subject to sanctions maintains that it has complied with its WTO obligations. This gap has given rise to a question whether the prevailing or defending party in a dispute must initiate WTO proceedings to determine if and when sanctions should be removed. The issue has been raised in a dispute brought by the European Communities (EC) against the United States and Canada for continuing to maintain increased tariffs on EC goods imposed in 1999 for failure to comply with a WTO ruling regarding the EU's ban on hormone-treated meat. The EC, claiming that a 2003 EU Directive on the subject renders it WTO-compliant, is arguing that the United States and Canada, in continuing to apply sanctions, are violating the GATT most-favored-nation obligation, the GATT prohibition on imposing tariffs in excess of bound rates, and various DSU provisions including those precluding certain unilateral actions in trade disputes. A panel report is expected to be publicly circulated later in 2007.[5]

**WTO Dispute Settlement and U.S. Law.** Adoption of panel and appellate reports finding that a U.S. measure violates a WTO agreement does not give the reports direct legal effect in this country. Thus, federal law would not be affected until Congress or the Executive Branch, as the case may be, changed the law or administrative measure at issue.[6] Procedures for Executive Branch compliance with adverse WTO decisions are set out in §§ 123 and 129 of the Uruguay Round Agreements Act (URAA). Only the federal government may bring suit against a state or locality to declare its law invalid because of inconsistency with a WTO agreement; private remedies based on WTO obligations are also precluded by statute (URAA, § 102(b),(c)).

Sections 301-310 of the Trade Act of 1974 (Section 301), 19 U.S.C. §§ 2411 *et seq.*, provide a means for private parties to petition the USTR to take action regarding harmful foreign trade practices. If the USTR decides to initiate an investigation, whether by petition or on its own motion, regarding an allegedly WTO-inconsistent measure, he or she must invoke the WTO dispute process to seek resolution of the problem. The USTR may impose retaliatory measures to remedy an uncorrected foreign practice, some of which may involve suspending a WTO obligation (e.g., a tariff increase in excess of

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[5] See generally Request for the Establishment of a Panel by the European Communities, *United States - Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/6 (Jan. 14, 2005). An interim panel report was reportedly submitted to the disputing parties in late July 2007. *WTO Ruling Said to Aid U.S., Canada in Beef-Hormone Disputes with Europe*, 24 Int'l Trade Rep. (BNA) 1112 (Aug. 2, 2007). The dispute has also been notable because, as requested by the disputing parties, panel proceedings for the first time were made open to the public via closed-circuit TV broadcast at the WTO.

[6] See Uruguay Round Agreements Act (URAA) Statement of Administrative Action, H.Doc. 103-316, vol. 1, at 1032-33. Implementing legislation states that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." URAA, § 102(a)(1); see also H.Rept. 103-826, Pt. I, at 25. Note that federal courts have held that WTO reports are not binding on the judiciary. E.g., *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006); see generally CRS Report RS22154, *WTO Decisions and Their Effect in U.S. Law*, by Jeanne J. Grimmett.

negotiated rates). The USTR may terminate a Section 301 case if the dispute is settled, but under § 306 of the Act must monitor foreign compliance and may take further retaliatory action if compliance measures are unsatisfactory. A "carousel" provision added to § 306 in 2000 directs the USTR periodically to revise the list of imports subject to retaliation unless the USTR finds that implementation of WTO obligations is imminent or the USTR and the petitioner agree that revision is unnecessary.

Article 23 of the DSU requires WTO Members to use DSU procedures in disputes involving WTO agreements and to act in accord with the DSU when determining if a violation has occurred, determining a compliance period, and taking any retaliatory action. Section 301 may be generally be used consistently with the DSU, though some U.S. trading partners continued to complain that the statute allows unilateral action and forces negotiations through its threat of sanctions. The EC challenged Section 301 in the WTO in 1998, with the dispute panel finding that the language of § 304, which requires the USTR to determine the legality of a foreign practice by a given date, is prima facie inconsistent with Article 23 because in some cases it mandates a determination and statutorily reserves the right for the determination to be one of inconsistency with WTO obligations before the exhaustion of DSU procedures. The panel also found, however, that the serious threat of violative determinations and consequently the *prima facie* inconsistency was removed because of U.S. undertakings, as set forth in the Uruguay Round Statement of Administrative Action (H.Doc. 103-316) and made before the panel, that the USTR would use its statutory discretion to implement Section 301 in conformity with WTO obligations. Moreover, the panel could not find that the DSU was violated by § 306, which directs USTR to make a determination as to imposing retaliatory measures by a given date, given differing good faith interpretations of the "sequencing" ambiguities in the DSU. See Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) (*adopted* Jan. 27, 2000). The EC has also challenged the "carousel" statute described above, but the case remains in consultations (WT/DS200). The issue has also been raised in Doha dispute settlement negotiations.

**110th Congress Legislation.** S. 364 (Rockefeller) and H.R. 708 (English) would establish a Congressional Advisory Commission on WTO Dispute Settlement to review WTO decisions in light of enumerated criteria and provide for private party participation in WTO disputes. S. 364 would also require congressional approval under an expedited procedure of any administrative modification or final rule proposed to comply with an adverse WTO report, require the USTR after any adverse dispute finding to work within the WTO to seek clarification of U.S. WTO obligations under the agreement at issue and under certain circumstances prohibit the executive branch from modifying an administrative measure in order to comply with the decision, and rescind certain administrative compliance actions currently in effect. H.R. 1278 (Camp) and S. 445 (Stabenow) would create a Trade Enforcement Officer in the Office of the USTR intended in part to assist the USTR in undertaking WTO disputes. S. 460 (Snowe) would allow judicial review of certain USTR determinations under Section 301 of the Trade Act, which may in some cases involve the initiation and conduct of WTO disputes, along with making other amendments to the statute. S. 1919 (Baucus) would, inter alia, create a Chief Trade Enforcement Officer in the USTR, establish a WTO Dispute Settlement Review Commission to evaluate WTO decisions under statutory norms, and prohibit a domestic regulatory modification taken to comply with an adverse WTO decision from taking effect unless and until Congress receives the Commission's report on the WTO decision involved. To date, no action has been taken on any of these bills.