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Dispute Settlement in the World Trade Organization (WTO): An Overview

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Summary

Dispute settlement in the World Trade Organization (WTO) is carried out under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In effect since January 1995, the DSU provides for consultations between disputing parties, panels and appeals, and possible retaliation if a defending party fails to comply with a WTO decision by an established deadline. Automatic establishment of panels, adoption of panel and appellate reports, and authorization of requests to retaliate, along with deadlines and improved multilateral oversight of compliance, are aimed at producing a more expeditious and effective system than had existed under the General Agreement on Tariffs and Trade (GATT). To date, 398 complaints have been filed, approximately half involving the United States as complainant or defendant.

Expressing dissatisfaction with WTO dispute settlement results in the trade remedy area, Congress, in the Trade Act of 2002, directed the executive branch to address dispute settlement in WTO negotiations. WTO Members have been negotiating DSU revisions in the currently stalled Doha Development Round of trade negotiations but no final agreement on the DSU has been reached. Use of the DSU has revealed procedural gaps, particularly affecting the compliance phase of a dispute. These include a failure to coordinate procedures for requesting retaliation with procedures for tasking a WTO panel with determining whether a defending Member has complied in a case and the absence of a procedure for withdrawing trade sanctions imposed by a complaining Member where the defending Member believes it has fulfilled its WTO obligations. As a result, disputing Members have entered into bilateral agreements permitting retaliation and compliance panel processes to progress on an agreed schedule and have initiated new dispute proceedings aimed at removing retaliatory measures.

Where a U.S. law or regulation is at issue in a WTO case, the adoption by the WTO of a panel or Appellate Body report finding that the measure violates a WTO agreement does not give the report direct legal effect in this country; thus federal law is not affected until Congress or the executive branch, as the case may be, takes action to remove the offending measure. Where a restrictive foreign trade practice is at issue, Section 301 of the Trade Act of 1974 provides a mechanism by which the United States Trade Representative (USTR) may challenge the measure in a WTO dispute settlement proceeding and authorizes the USTR to take retaliatory action if the defending Member has not complied with the resulting WTO decision. Although Section 301 was challenged in the WTO on the ground that it requires the USTR to act unilaterally in WTO-related trade disputes in violation of DSU provisions requiring resort to multilateral WTO dispute settlement, the United States was ultimately found not to be in violation of its DSU obligations.

H.R. 496 (Rangel) would create an Office of the Congressional Trade Enforcer (CTE) that would, inter alia, investigate restrictive foreign trade practices in light of WTO obligations and call on the USTR to initiate WTO dispute proceedings where the CTE finds that WTO violations have occurred; express congressional dissatisfaction with WTO dispute settlement decisions finding that the U.S. practice of "zeroing" (i.e., disregarding non-dumped sales in the calculation of dumping margins) violates the WTO Antidumping Agreement and with decisions of the WTO Appellate Body generally; and place restrictions on the Department of Commerce in implementing the revised antidumping methodology that it adopted in 2007 in response to the WTO "zeroing" decisions. S. 363 (Snowe), would give the U.S. Court of International Trade exclusive jurisdiction to review *de novo* 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; the bill would also amend various Section 301 authorities themselves.

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Background

From its inception in 1947, the General Agreement on Tariffs and Trade (GATT), signed by the United States and ultimately by a total of 128 countries, provided for consultations and dispute resolution, allowing a GATT Party to invoke GATT dispute settlement articles if it believes that another Party's measure, whether violative of the GATT or not, caused it trade injury. Because the GATT did not set out a dispute procedure with great specificity, GATT Parties 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, a consensus decision-making process that allowed a GATT Party against whom a dispute was filed to block the establishment of a dispute panel and the adoption of a panel report by the GATT Parties as a whole, and laxity in surveillance and implementation of panel reports even when reports were adopted and had the status of an official GATT decision.

Congress made reform of the GATT dispute process a principal U.S. goal in the GATT Uruguay Round of Multilateral Trade Negotiations, begun in 1986 and concluded in 1994 with the signing of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The WTO Agreement requires any country that wishes to be a WTO Member to accept all of the multilateral trade agreements negotiated during the Round, including the General Agreement on Tariffs and Trade 1994, an updated version of the GATT adopted in 1947, as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to disputes arising under virtually all WTO agreements.

The Uruguay Round package of agreements not only carries forward original GATT obligations, such as according goods of other parties nondiscriminatory treatment, not placing tariffs on goods that exceed negotiated or "bound" rates, generally refraining from imposing quantitative restrictions such as quotas and embargoes on imports and exports, and avoiding injurious subsidies, but also expands on these obligations in new agreements such as the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Antidumping, and the Agreement on Subsidies and Countervailing Measures.

Congress approved and implemented the WTO Agreement and the other agreements negotiated in the Uruguay Round in the Uruguay Round Agreement Act, P.L. 103-465. The agreements entered into force on January 1, 1995.

WTO Dispute Settlement Understanding

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) continues past GATT dispute practice, but also contains features aimed at strengthening the prior system.[1] The DSU provides for integrated dispute settlement under which the same rules apply to

[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-topics/enforcement. 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.

disputes under virtually all WTO agreements, subject to any special or additional rules in an individual agreement.

The WTO Dispute Settlement Body (DSB), created under the DSU and consisting of representatives of all WTO Members, administers WTO dispute settlement 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 will 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 would otherwise be adopted automatically, WTO Members have a right to appeal a panel report on legal issues. The DSU creates a standing Appellate Body to carry out this added appellate function. The Appellate Body has seven members, three of whom serve on any one case.

Dispute settlement under the WTO is primarily Member-driven, that is, it is up to the parties to a dispute to decide whether or not to take particular actions available to them, e.g., to request a panel if consultations fail, to request authorization to impose countermeasures against a non-complying member, or to impose such measures even if the DSB has authorized them. As stated in Article 3.7 of the DSU, the preferred outcome of a dispute 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.

As of the date of this report, 398 complaints have been filed under the DSU, approximately half involving the United States as complaining party or defendant. The United States Trade Representative (USTR) manages U.S. participation in the WTO and represents the United States in WTO disputes.

The DSU was scrutinized by WTO 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 current WTO Doha Development Round of multilateral trade negotiations, doing so on a separate track permitting an agreement to be adopted apart from any overall Doha Round accord. In 2008, the chairman of the dispute settlement negotiations prepared a consolidated draft legal text based mainly on Member proposals, which Members recently agreed to use in their negotiations.[2] The United States has proposed such revisions as greater Member control over the process, guidelines for WTO adjudicative bodies, and increased transparency, e.g., open meetings and timely access to submissions and final reports.[3] Other Member proposals include, inter alia, a permanent roster of panelists, enabling the Appellate Body to remand decisions to panels for further proceedings,

[2] Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee,* TN/DS/23 (December 5, 2008).

[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). See also documents posted on the USTR website, at http://www.ustr.gov/trade-topics/enforcement/us-proposals-wto-dispute-settlement-understanding-negotiations.

rules for sequencing and 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, with the applicable DSU articles for each:

Consultations (Article 4)

The DSU permits a WTO Member to consult with another Member regarding "measures affecting the operation of any covered agreement taken within the territory" of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, that Member must enter into consultations within 30 days.[5]

If the dispute is not resolved within 60 days, the complaining party may request a panel. The complainant may request a panel before this period ends if the other Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

Establishing a Dispute Panel (Articles 6, 8)

A panel request, which must be made in writing, must "identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly" (Art. 6.2). Under GATT and now WTO dispute settlement practice, a Member may challenge a measure of another Member "as such," "as applied," or both.[6] An "as such" claim challenges the measure independent of its application in a specific situation and, as described by the WTO Appellate Body, seeks to prevent the defending Member from engaging in identified conduct before the fact.[7]

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. Thus, while a defending Member may block the establishment of a panel the first time the complaining Member makes its

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[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.

[5] Once the WTO is notified that a request for consultations has been made, the dispute will be assigned a number. Disputes are numbered in chronological order. The prefix WT/DS, followed by the assigned number, is then used to designate WTO documents issued in connection with the dispute. For example, the pending dispute between the United States and China, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio Entertainment Products* is DS363, with the U.S. request for consultations sent to China on August 10, 2007, numbered WT/DS363/1, and the WTO panel report circulated August 12, 2009, numbered WT/DS363/R.

[6] Appellate Body Report, *United States—Anti-dumping Act of 1916*, paras. 60-61, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000).

[7] Appellate Body Report, *United States—Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, para. 172, WT/DS268/AB/R (Nov. 29, 2004). The Appellate Body further described "as such" claims as follows: "By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situation as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties brining 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims."

request at a DSB meeting, the panel will be established, virtually automatically, the second time such a request is placed on the DSB's agenda.

The panel is ordinarily composed of three persons. The WTO Secretariat proposes the names of panelists to the disputing parties, who may not oppose them except for "compelling reasons" (Art. 8.6). If there is no agreement on panelists within 20 days from the date that the panel is established, either disputing party may request the WTO Director-General to appoint the panel members.

Panel Proceedings (Articles 12, 15, Appendix 3)

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. Following a review period, a final report is issued to the disputing parties and later circulated to all WTO Members. A panel must generally provide its final report to disputants within six months after the panel is composed, but may take longer if needed; extensions are usual in complex cases. The period from panel establishment to circulation of a panel report to WTO Members should not exceed nine months. In practice, panels have been found to take more than 13 months on average to publicly circulate reports.[8]

Adoption of Panel Reports/Appellate Review (Articles 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 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 (Article 21)

In the event that the WTO decision finds the defending Member has violated an obligation under a WTO agreement, the Member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is "impracticable" for the Member to comply immediately, the Member will have a "reasonable period of time" to do so. The Member is expected to implement the WTO decision fully by the end of this period and to act consistently with the decision after the period expires.[9] Compliance may be achieved by withdrawing the

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[8] See, e.g., Henrik Horn & Petros C. Mavroidis, The WTO Dispute Settlement System 1995-2006: Some descriptive statistics, at 28-29 (Mar. 14, 2008), at http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf.

[9] E.g., Report of the Appellate Body, *United States—Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, paras. 153-158, WT/DS322/AB/RW (Aug. 18, 2009).

WTO-inconsistent measure or, alternatively, by issuing a revised measure that modifies or replaces it.[10]

Under the DSU, the "reasonable period of time" is: (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 six 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.

Compliance Panels (Article 21.5)

Where there is disagreement as to whether a Member has complied—i.e., whether a compliance measure exists, or whether a measure that has been taken is consistent with the WTO decision in the case—either disputing party may request that a compliance panel be convened under Article 21.5. A compliance panel is expected to issue its report within 90 days after the dispute is referred to it, but it may extend this time period if needed. Compliance panel reports may be appealed to the WTO Appellate Body and both reports are subject to adoption by the DSB.[11]

Compensation and Suspension of Concessions (Article 22)

If the defending Member fails to comply with the WTO decision within the established compliance period, the prevailing Member may request that the defending Member negotiate a compensation agreement. If such a request is made and agreement is not reached within 20 days after the compliance deadline expires, or if negotiations have not been requested, the prevailing Member may request authorization from the DSB to retaliate, i.e., suspend concessions or obligations owed the non-complying Member under a WTO agreement.

Generally, a Member should first try to suspend concessions or obligations in the same trade sector as the one at issue in the dispute (Art. 22.3(a)). If this is "not practicable or effective," the Member may then seek to suspend concessions in another sector under the same WTO agreement (Art. 22.3(b)). If, however, suspending concessions in other sectors under the same agreement is not "practicable or effective" and "the circumstances are serous enough," the Member may seek to suspend concessions or obligations under another WTO agreement, or "cross-retaliate" (Art. 22.3(c)).

Retaliation most often involves the suspension of GATT tariff concessions, i.e., the imposition of tariff surcharges, on selected products from the non-complying Member. In some cases, however, the non-compliant Member may not be a major exporter of goods to the prevailing Member or some or all of the goods that are exported are considered to be critical to the prevailing Member's economy. In such case, if firms of the non-compliant Member are active service providers or exercise significant intellectual property rights in the prevailing Member's territory, the prevailing

[10] *Id.* para. 154.

[11] As of the date of this report, there have been 29 compliance panel proceedings, 13 of which involved the United States. Seventeen of the 29 panel reports were appealed.

Member may seek to suspend market access obligations under the General Agreement on Trade in Services (GATS) or obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement on TRIPS).

The DSB is to grant a retaliation 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. Depending on the contents of the proposal, the defending Member may object to the level of the proposed retaliation, i.e., that it is not equivalent to the level of trade injury in the dispute, claim that DSU principles and procedures for requesting cross-retaliation have not been followed, or both.[12] Once requested, arbitration is automatic and is to be completed within 60 days after the compliance period ends. An arbitral decision is considered final.

After the arbitral decision is issued, the prevailing party may request that the DSB approve its proposal, subject to any modification by the arbitrator. The prevailing Member is not required to request authorization, however, nor is the Member required to do so by a given date if it chooses to pursue such a request. If imposed, retaliation is permitted to remain in effect only until the offending measure is removed or the disputing parties otherwise resolve the dispute.

Use of Multilateral Dispute Settlement Procedures

Article 23 of the DSU requires that WTO Members invoke DSU procedures in disputes involving WTO agreements and that they act in accordance with the DSU (i.e., not unilaterally) when determining if another Member has violated a WTO agreement, determining a date by which the Member must comply with a WTO decision, and taking any retaliatory action against a non-complying Member. Whether U.S. trade remedy law, specifically Section 301 of the Trade Act of 1974, requires the United States to act in violation of Section 23 of the DSU was at issue in an early WTO case, *United States—Sections 301-310 of the Trade Act of 1974*, discussed below.

Compliance Issues

"Sequencing"

Although many WTO rulings have been satisfactorily implemented, difficult cases have tested DSU implementation articles, highlighting 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 banana import regime. Article 22 allows a prevailing party to request

[12] See Decision by the Arbitrator, *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.21 of the* SCM Agreement, paras. 5.10-5.236, WT/DS267/ARB/1 (Aug. 31, 2009), for a recent arbitral analysis of a request to cross-retaliate. In response to U.S. non-compliance in Brazil's challenge of U.S. cotton subsidies, Brazil sought authorization to suspend concessions under the Agreement on Trade-Related Aspects of Intellectual Property Right and the General Agreement on Trade in Services, arguing, as required under the DSU, that suspending concessions on goods alone was not "practicable or effective" and that the circumstances in the case were "serious enough" to permit it to do so. The arbitrator ultimately allowed Brazil to cross-retaliate, but required that a variable annual threshold tied to the level of U.S. imports into Brazil be exceeded before Brazil could exercise this option.

authorization to retaliate within 30 days after a compliance period ends, while Article 21.5 provides that disagreements over the existence or adequacy of compliance measures are to be decided using WTO dispute procedures, including resort to panels. A compliance panel's report is due within 90 days after the dispute is referred to it and may be appealed. The DSU does not integrate an Article 21.5 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.

Removal of Retaliatory Measures

The DSU is also silent on how authorized retaliation is to be terminated in the event a defending Member believes that it has complied in a dispute. This issue has been the subject of *United States - Continued Suspension of Obligations in the EC—Hormones Dispute* (DS320), a dispute initiated by the European Communities (EC)[13] against the United States in 2004 for continuing to maintain increased, i.e., 100% *ad valorem*, tariffs on EC goods first imposed in 1999 in retaliation for the EC's failure to comply with the adverse WTO ruling on the EU's ban on hormone-treated beef. The EC also initiated a separate case against Canada on the same basis.[14] The Appellate Body and modified panel reports in the underlying beef hormone case, *EC -Hormones,*[15] found that an EC ban on imports of meat and meat products from cattle produced from six specific growth-promotion hormones violated the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement); the reports were adopted by the WTO in February 1998. Claiming that a 2003 European Union Directive rendered it WTO-compliant, the EC argued that the defending Members, by maintaining their increased tariffs on EC products, were violating the GATT most-favored-nation article, the GATT prohibition on tariff surcharges, and various DSU provisions, including Article 23, which requires WTO Members to invoke WTO dispute settlement for disputes arising under WTO agreements and precludes certain unilateral actions in trade disputes, and Article 22.8, which permits sanctions to be imposed only until the defending Member's WTO-inconsistent measures have been removed or the dispute is mutually resolved.

In separate panel reports issued March 31, 2008, the WTO panel found that the EC was maintaining bans on certain hormones without a sufficient scientific basis in violation of the SPS Agreement, and that United States and Canada had breached Article 23 requirements to resort to WTO dispute settlement and to refrain from unilateral actions by (1) not initiating a WTO proceeding to resolve the EC compliance issue and (2) determining unilaterally that the EC was still in violation of the *EC - Hormones* decision. The panel also found, however, that to the extent that the challenged EC measure had not been removed, the United States and Canada had not violated Article 22.8, which requires that sanctions be removed once the offending measure is withdrawn.[16] The panel noted that it had functioned similarly to a compliance panel for the sole

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[13] The European Union participates in the World Trade Organization as the European Communities (EC). The European Union along with its 27 member States are WTO Members. See http://www.wto.org/english/theWTO_e/countries_e/european_union_or_communities_popup.htm.

[14] *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321.

[15] *European Communities—Measures Concerning Meat and Meat Products (Hormones),* WT/DS26 (complaint by Untied States); *European Communities—Measures Affecting Livestock and Meat (Hormones),* WT/DS48 (complaint by Canada).

[16] Panel Report, *United States - Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/R (continued...)

purpose of determining whether Article 22.8 was violated and, because it did not have jurisdiction to make a definitive determination in this regard, it suggested that the United States and Canada initiate a compliance panel proceeding against the EC under Article 21.5 in order to comply with their DSU obligations and to promptly resolve the dispute.

The Appellate Body, in separate reports issued October 16, 2008, reversed the panel's findings that the U.S. and Canada were in breach of the DSU as well as the panel's findings that the EC was still in violation of the SPS Agreement.[17] Because the Appellate Body could not complete the analysis needed to determine whether the contested EC measure had been withdrawn, however, it recommended that the parties initiate an Article 21.5 compliance panel proceeding to resolve their disagreement as to whether the EC is in compliance with the *EC—Hormones* decision and thus whether the U.S. and Canadian countermeasures have a legal basis. The AB and modified panel reports were adopted November 14, 2008.

The EC requested consultations under Article 21.5 in December 2008,[18] but the proceeding involving the United States has been suspended under a bilateral agreement. In a May 2009 memorandum of understanding (MOU) intended to resolve the underlying beef hormone dispute, the United States and the European Union (EU) agreed, inter alia, that the EU will expand market access for exports of U.S. beef in three phases. In the first phase, the United States may maintain retaliatory tariffs currently applied to EU products and will not impose the new duties that it announced in January 2009 under its "carousel" retaliation provision (see below).[19] The two parties also agreed that they will suspend WTO litigation, i.e., not request a compliance panel, for the first 18 months of the agreement.[20]

(...continued)

(Mar. 31, 2008); Panel Report, *Canada - Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/R (Mar. 31, 2008). At the request of the disputing parties, panel proceedings in the case were opened to the public via closed-circuit TV broadcast at the WTO, this being the first time that public access was permitted in a WTO dispute settlement proceeding. Disputing parties have also agreed to public access of this type in several subsequent disputes.

[17] Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008).

[18] Press Release, European Commission, EU requests WTO consultations concerning WTO-compliance of its restrictions on hormone-treated beef and WTO inconsistency of continued US and Canadian trade sanctions (Dec. 22, 2008), at http://ec.europa.eu/trade/issues/respectrules/dispute/pr221208_en.htm.

[19] At the time of the May 2009 agreement, some products had been removed from the list of covered items pursuant to the USTR's January 2009 announcement. While the Office of the USTR delayed the effective date of the additional duties until August 15, 2009, the *removal* of items announced in January became effective as of March 23, 2009. See Additional Delay in Modification of Action Taken in Connection with WTO Dispute Settlement Proceedings on the European Communities' Ban on Imports of U.S. Beef and Beef Products, 74 Fed. Reg. 22626 (May 13, 2009). The effective date for the additional duties has since been extended to September 19, 2009. Implementation of the U.S.-EC Beef Hormones Memorandum of Understanding, 74 Fed. Reg. 40864 (Aug. 13, 2009).

[20] Press Release, Office of the USTR, USTR Announces Agreement with European Union in Beef Hormones Dispute (updated June 22, 2009), at http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones-; European Commission, Memorandum on Beef Hormones dispute signed with the United States (May 14, 2009), at http://ec.europa.eu/trade/issues/respectrules/dispute/memo140509_en.htm.

WTO Dispute Settlement and U.S. Law

Legal Effect of WTO Decisions

The adoption by the WTO Dispute Settlement Body of a panel or Appellate Body report finding that a U.S. law, regulation, or practice violates a WTO agreement does not give the report direct legal effect in this country. Thus, federal law is not affected until Congress or the executive branch, as the case may be, changes the law or administrative measure at issue.[21] Procedures for executive branch compliance with adverse decisions are set out in §§ 123(g) and 129 of the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C. §§ 3533(g), 3538. Only the federal government may bring suit against a state or locality to declare a state or local law invalid because of inconsistency with a WTO agreement; private remedies based on WTO obligations are also precluded.[22] Federal courts have held that WTO panel and Appellate Body reports are not binding on the judiciary[23] and have treated determinations involving "whether, when, and how" to comply with a WTO decision as falling within the province of the executive rather than the judicial branch.[24]

Section 301 of the Trade Act

Sections 301-310 of the Trade Act of 1974 (referred to collectively as Section 301), 19 U.S.C. §§ 2411 *et seq.*, provide a mechanism for private parties to petition the United States Trade Representative (USTR) to take action regarding harmful foreign trade practices. If the USTR decides to initiate an investigation, whether by petition or the USTR's own motion, regarding a foreign measure that allegedly violates a WTO agreement, the USTR must invoke the WTO dispute process to seek resolution of the problem. Section 301 authorizes the USTR to impose retaliatory measures to remedy an uncorrected foreign practice, some of which may involve suspending a WTO obligation (e.g., imposing a tariff increase on a product in excess of the rate negotiated in the WTO or the "bound" rate). The USTR may terminate a Section 301 case if the dispute is settled, but, under § 306 of the act, the USTR must monitor foreign compliance and may take further retaliatory action if compliance measures are unsatisfactory.

If the USTR has taken action against the goods of another country for its failure to comply with a WTO decision, § 306(b)(2)(B)-(F), of the Trade Act, 19 U.S.C. § 2416(b)(2)(B)-(F), directs the USTR periodically to revise the list of imported products 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. This authority to rotate the products subject to retaliatory action is often referred to as "carousel retaliation." The EC filed a WTO complaint challenging the

[21] See Uruguay Round Agreements Act Statement of Administrative Action, H.Doc. 103-316, vol. 1, at 1032-33. Uruguay Round 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." Uruguay Round Agreements Act (URAA), P.L. 103-465, § 102(a)(1); see also H.Rept. 103-826, Pt. I, at 25.

[22] URAA, P.L. 103-465, § 102(b), (c).

[23] 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, *World Trade Organization (WTO) Decisions and Their Effect in U.S. Law*, by Jeanne J. Grimmett.

[24] Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008).

statutory provision shortly after its enactment in 2000, alleging that the statute mandates unilateral action and the taking of retaliatory action other than that which had been authorized by the WTO in violation of the DSU.[25] Because the United States had not invoked the provision, the EC refrained from seeking a panel in the case.

In December 2008, however, the United States exercised "carousel" authorities to propose modifications to the list of EC products subject to the WTO-authorized tariff surcharges that it had originally imposed in *EC—Hormones*, discussed earlier. A final modified list was published in January 2009.[26] Originally applicable to all covered goods entering the United States on or after March 23, 2009, the revisions include removal of some products from the original list of covered products, the addition of new products to the list, modified coverage with regard to certain EC member states, and an increase to 300% *ad valorem* of duties on one product, Roquefort cheese. The EC announced on January 15, 2009, that it had decided to "start preparations" to pursue WTO dispute settlement regarding the carousel statute, stating that it "breaches the WTO requirement of equivalence between the damage caused by the sanction or ban and the retaliation proposed."[27] As noted above, under an MOU with the EU aimed at settling the beef hormone dispute, the United States has agreed not to impose the announced tariff increases and has postponed their effective date until September 19, 2009.[28]

The EC filed a broader challenge to Section 301 in 1998 based on various obligations in Article 23 of the DSU, which, as noted earlier, precludes certain unilateral actions in trade disputes involving WTO agreements. Section 301 may generally be used consistently with the DSU, though some U.S. trading partners have complained that the statute allows unilateral action and

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[25] Request for Consultations by the European Communities, *United States—Section 306 of the Trade Act of 1974 and Amendments Thereto*, WT/DS200/1 (June 13, 2000).

[26] Modification of Action Taken in Connection with WTO Dispute Settlement Proceedings on the European Communities' Ban on Imports of U.S. Beef and Beef Products, 74 Fed. Reg. 4265 (Jan. 23, 2009).

The continued imposition of the beef hormone sanctions as applicable to toasted bread products from Spain has been successfully challenged in the U.S. Court of International Trade, the specialized federal trade court located in New York City, on the ground that the sanctions expired by operation of law in late July 2007. Gilda Industries, Inc. v. United States, 625 F.Supp.2d 1377 (Ct. Int'l Trade 2009).

Section 307(c)(1) of the Trade Act of 1974, 19 U.S.C. § 2417(c)(1), provides that if "a particular action" has been taken by the USTR under Section 301 during any four-year period, e.g. the imposition of increased tariffs on the products of a foreign country, and neither the petitioner in the Section 301 case nor any representative of the domestic industry which benefits from the action has submitted to the USTR during the last 60 days of the four-year period a written request for the continuation of the action, the action is to terminate at the end of the four-year period. It was alleged in the case that the operative four-year period for the beef hormone sanctions began at the end of July 2003 and that no request was made to continue the sanctions during the final 60 days of this period. The court found that the retaliatory measures terminated by operation of law on July 29, 2007, absent a timely petitioner or industry request, neither of which had occurred. The court ordered the U.S. Department of Customs and Border Protection to refund to the plaintiff all retaliatory duties collected on its imported products between July 29, 2007, and March 23, 2009, the date these items were officially removed from the list of goods subject to the increased tariffs.

The United States has since appealed this decision as well as an earlier decision in the proceeding to the U.S. Court of Appeals for the Federal Circuit (Gilda Industries v. United States, No. 2009-1492). See generally *U.S. Faces Flood of Lawsuits after CIT Orders Refund of Duties*, INSIDE U.S. TRADE, Aug. 21, 2009, at 1.

[27] Press Release, European Commission, EU Prepares WTO action over US trade sanction law (Jan. 15, 2009), at http://ec.europa.eu/trade/issues/respectrules/dispute/pr150109_en.htm. Article 22.4 of the DSU provides that "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." The "carousel" issue has also been raised by the EC in Doha Round dispute settlement negotiations. Dispute Settlement Body, Special Session, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding,* at 6, TN/DS/W/1 (Mar. 13, 2002).

[28] See *supra* note 19 and accompanying text.

forces negotiations through its threat of sanctions. The WTO panel found 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 USTR determination—and statutorily reserves a right for the USTR to determine that a practice is WTO-inconsistent—before DSU procedures are completed.[29] 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), a document submitted to Congress along with the Uruguay Round agreements, and U.S. undertakings 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 of the Trade Act of 1974, 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. The panel report, which was not appealed, was adopted in January 2000.

Recent Legislation

Legislation introduced in the 110th and 111th Congresses generally reflects congressional concerns that the executive branch has not challenged restrictive foreign trade practices in the WTO to a sufficient degree and that, where WTO decisions have been adverse to the United States, the executive branch has too readily used existing statutory authorities to comply with these decisions, particularly where U.S. trade remedies are involved. A particular concern has been U.S. compliance with WTO decisions faulting the use of "zeroing," a practice employed by the Department of Commerce in antidumping proceedings to determine the applicable dumping margin, i.e. the amount by which the price of an import when sold in the United States falls below the fair value of the product, generally the price in the exporting country. The amount of antidumping duties finally imposed on an imported product is based on this margin. "Zeroing" is a practice under which sales above fair value are disregarded or given a "zero" value, thus allowing the dumping margin to be determined solely on the basis of less than fair value sales and, as alleged by some, improperly inflating the dumping margin. The Commerce Department abandoned the use of "zeroing" in original antidumping investigations in early 2007, but has not yet responded to WTO decisions rejecting U.S. use of the practice in later stages of such investigations.

111th Congress

H.R. 496 (Rangel) would create an Office of the Congressional Trade Enforcer (CTE), which, inter alia, would investigate restrictive foreign trade practices in light of WTO obligations and call on the United States Trade Representative (USTR) to initiate WTO dispute proceedings where the CTE finds that practices violate such obligations; express congressional dissatisfaction with WTO dispute settlement decisions finding that the U.S. practice of "zeroing" violates the WTO Antidumping Agreement and with decisions of the WTO Appellate Body generally; and place restrictions on the Department of Commerce in implementing the revised zeroing practice that it adopted in 2007 in response to the WTO decisions. **S. 363** (Snowe) would give the U.S. Court of International Trade, the specialized federal trade court based in New York City,

[29] Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

exclusive jurisdiction to review de novo certain USTR determinations under Section 301 of the Trade Act of 1974, including in some cases determinations that may involve the initiation and conduct of WTO disputes, and would amend various Section 301 authorities themselves.

110th Congress

110th Congress legislation with implications for WTO dispute settlement included: **S. 364** (Rockefeller), which would have established a Congressional Advisory Commission on WTO Dispute Settlement to review WTO decisions in light of enumerated criteria, provided for private party participation in WTO disputes, required congressional approval under an expedited procedure of any domestic administrative modification or final rule proposed to comply with an adverse WTO decision, required 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, prohibited the executive branch, under certain circumstances, from modifying an administrative measure in order to comply with the decision, and rescinded certain administrative actions already taken to comply; **H.R. 708** (English), which like S. 364, would have established a Congressional Advisory Commission on WTO Dispute Settlement and provided for private party participation in WTO disputes; **H.R. 1278** (Camp) and **S. 445** (Stabenow), which would have created a Trade Enforcement Officer in the Office of the USTR intended in part to assist the USTR in undertaking WTO disputes. **S. 460** (Snowe), identical to S. 363 (111th Congress); **S. 1919** (Baucus), which would have, inter alia, created a Chief Trade Enforcement Officer in the USTR, established a WTO Dispute Settlement Review Commission to evaluate WTO decisions under statutory norms, and prohibited a domestic regulatory modification taken to comply with an adverse WTO decision from taking effect unless and until Congress received the new Commission's report on the WTO decision involved; and **H.R. 6530** (Rangel), similar to **S. 496** (111th Congress). No action was taken on any of these bills.

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