



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

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## Summary

The World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides a means for WTO Members to resolve disputes arising under WTO agreements. WTO Members must first attempt to settle their dispute through consultations, but if these fail the Member initiating the dispute may request that a panel examine and report on its complaint. The DSU provides for Appellate Body (AB) review of panel reports, panels to determine if a defending Member has complied with an adverse WTO decision by the established deadline in a case, and possible retaliation if the defending Member has failed to do so. Automatic establishment of panels, adoption of panel and appellate reports, and authorization of a Member's request 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, 450 complaints have been filed under the DSU, with nearly one-half involving the United States as a complainant or defendant. The Office of the United States Trade Representative (USTR) represents the United States in WTO disputes.

Use of the DSU has revealed procedural gaps, particularly in the compliance phase of a dispute. These include a failure to coordinate DSU procedures for requesting retaliation with procedures for requesting a compliance panel and the absence of a specific procedure aimed at the removal of trade sanctions in the event the defending Member believes it has fulfilled its WTO obligations in a case. To overcome these gaps, disputing Members have entered into bilateral agreements permitting retaliation and compliance panel procedures to advance in sequence and have initiated new dispute proceedings seeking the removal of retaliatory measures believed to have outlived their legal foundation. Expressing dissatisfaction with WTO dispute settlement results involving U.S. trade remedies, 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.

Section 301 of the Trade Act of 1974 provides a mechanism for the USTR, either by petition of an "interested party" or on its own accord, to address restrictive foreign trade practices through the initiation of a WTO dispute and authorizes the USTR to take retaliatory action in the event the defending WTO Member has not complied with the resulting WTO decision. While the European Union challenged Section 301 in the WTO on the ground that it requires the USTR to act unilaterally in WTO-related disputes in violation of DSU requirements, the United States was ultimately found to be in compliance with its DSU obligations. Where a U.S. law or regulation is at issue in a WTO case, the WTO's adoption of a panel and, if appealed, AB report finding that the U.S. measure violates a WTO agreement does not give the WTO decision 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.

S. 239 (Klobuchar), the Innovate America Act, would, inter alia, authorize to be appropriated to the USTR \$2 million for each of FY2011, FY2012, and FY2013 for the purpose of initiating any proceeding to resolve a dispute relating to market access barriers with WTO member countries. S. 708 (Brown, Ohio) would establish mechanisms under the Trade Act of 1974 to require the USTR annually to identify particularly harmful foreign trade practices and, where appropriate, to initiate WTO dispute settlement proceedings to remedy these practices.

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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 between GATT parties. A party could invoke Articles XXII and XXIII, the GATT consultation and dispute settlement provisions, if it believed that another party's measure, whether violative of the GATT or not, nullified or impaired benefits accruing to it under the agreement. Because the GATT did not set out specific dispute procedures, GATT Parties developed a more detailed process including ad hoc panels and other practices. Over time, however, the GATT procedure was perceived to have certain deficiencies, 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. negotiating objective 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).<sup>1</sup> The resulting WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or DSU) reflects the U.S. negotiating objective of creating a mechanism that is more judicial in approach (and, it was hoped, fairer and more predictable) than the diplomatically oriented system favored by other trading partners.<sup>2</sup> While the DSU retains diplomatic elements—for example, the goal of the process is to secure a “mutually agreed solution” and contains provisions that may foster a negotiated outcome—the DSU sets out a mechanism that is overall more “rule-bound” than the process developed under the GATT.

Further, the DSU applies to disputes arising under virtually all WTO agreements (referred to in the Understanding as “covered agreements”) and thus exists in the context of the full Uruguay Round package of multilateral trade agreements, all of which must be accepted by a country as a condition of WTO membership. The Uruguay Round package not only carried forward original GATT obligations—for example, according goods of other parties most-favored-nation (MFN) and national treatment, not placing tariffs on goods in excess of negotiated or “bound” rates, generally refraining from imposing quantitative restrictions such as quotas and embargoes on imports and exports, and avoiding injurious subsidies<sup>3</sup>—but also expanded on these obligations in

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<sup>1</sup> Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, §1101(b)(1), 19 U.S.C. §2901(b)(1).

<sup>2</sup> See, e.g., Mitsu Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 107-108 (2d ed. 2006); Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 *AM. J. INT'L L.* 477, 479-81 (1994); Uruguay Round Agreements Act Statement of Administrative Action, H.Doc. 103-316, v. 1, at 339 (1994). Regarding the “diplomatic” versus the “rule-oriented” approach to dispute settlement, see, e.g., Ernst-Ulrich Petersmann, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 66-70 (1997), and John H. Jackson, *THE WORLD TRADING SYSTEM* 85-88, 109-113 (1989).

<sup>3</sup> The General Agreement on Tariffs and Trade 1994 (GATT 1994), one of the multilateral trade agreements that must be accepted as a condition of WTO membership, is an updated and enlarged version of the GATT adopted in 1947. The GATT 1994 retains the text of the 1947 agreement, as amended in the interim, but also includes various GATT tariff protocols, protocols of accession, decisions on waivers, other GATT decisions, Understandings on GATT articles agreed to during the Uruguay Round, and the Marrakesh Protocol to GATT 1994. It is under the Marrakesh Protocol that tariff concessions and market access commitments agreed to by negotiating countries during the Uruguay Round become legally binding. See generally Kevin Kennedy, *The GATT 1994* in 1 *THE WORLD TRADE ORGANIZATION*: (continued...)

new agreements such as the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Antidumping, the Agreement on Subsidies and Countervailing Measures, and the General Agreement on Trade in Services (GATS).<sup>4</sup> The application of the DSU to these new agreements thus created the potential not only for trade disputes on matters that had not been subject to adjudication in the past, but also for adjudication of these disputes under a more judicially styled process than had existed in the past.

Congress approved and implemented the WTO Agreement and the other agreements negotiated in the Uruguay Round in Section 101 of the Uruguay Round Agreement Act.<sup>5</sup> The agreements entered into force on January 1, 1995.

## WTO Dispute Settlement Understanding

While the DSU continues past GATT dispute practice,<sup>6</sup> a variety of new features are aimed at strengthening the prior system. These include a “reverse consensus” voting rule at key points in the process, legal review of panel reports by a new Appellate Body, deadlines for various phases of the dispute procedure, and improved multilateral oversight of compliance.<sup>7</sup> Under the integrated system of dispute settlement created by the DSU, the same dispute settlement rules apply to disputes under virtually all WTO agreements, subject to any special or additional rules in an individual agreement.

The WTO Dispute Settlement Body (DSB), created in Article 2 of the DSU and consisting of representatives of all WTO Members, administers WTO dispute settlement proceedings. As was the case under the GATT, the DSB ordinarily operates by consensus (i.e., without objection). The DSU reverses past practice, however, in a manner that prevents individual Members from blocking certain DSB decisions that are considered critical to an effective dispute settlement system. Thus, unless it decides by consensus *not* to do so, the DSB will (1) approve requests to establish panels, (2) adopt panel and Appellate Body reports, and (3) if requested by the prevailing Member in a dispute, authorize the Member to impose a retaliatory measure where the defending Member has not complied. In effect, these decisions are virtually automatic.

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LEGAL, ECONOMIC AND POLITICAL ANALYSIS 112-114 (Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer eds. 2005).

<sup>4</sup> For further background on WTO agreements, see WTO, *Understanding the WTO: The Agreements*, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm).

<sup>5</sup> P.L. 103-465, 19 U.S.C. §3511.

<sup>6</sup> In addition, GATT Articles XXII and XXIII, the GATT consultation and dispute settlement articles, continue to serve as the legal basis for dispute settlement under WTO agreements on trade in goods. See, e.g., Agreement on Agriculture art. 19.

<sup>7</sup> The text of the DSU, panel and Appellate Body reports, and information on the WTO dispute settlement process, individual WTO disputes, and the status of each dispute are available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm). Summaries of panel and Appellate Body reports are available in WTO, *WTO Dispute Settlement: One-Page Case Summaries, 1995-2011* (2012 ed.), at [http://www.wto.org/english/res\\_e/booksp\\_e/dispu\\_summary95\\_11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/dispu_summary95_11_e.pdf). 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>.

Given that panel reports would otherwise be adopted under the reverse consensus rule, 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.

Notwithstanding the rule-oriented nature of the DSU, dispute settlement in the WTO is primarily Member-driven. In other words, it is up to the disputing Members (complaining or defending, as the case may be) to decide whether or not to take particular actions available to them. These actions include initiating the dispute; requesting a panel and, in doing so, setting out the scope of dispute; asking the WTO Director-General (DG) to appoint panelists if the disputing Members cannot agree on the WTO Secretariat's proposed slate; seeking authorization to impose countermeasures against a non-complying Member; requesting that the prevailing Member's retaliation proposal be arbitrated; and imposing retaliatory 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, 450 complaints have been filed under the DSU. Not all of these have resulted in panels, however, and in some cases where panel proceedings were initiated, the panel process was discontinued due to a settlement of the dispute or for other reasons. To date, 153 original panel reports have been publicly circulated. Some original panels have also issued compliance panel reports as a result of proceedings initiated by complaining Members under Article 21.5 of the DSU to determine whether defending Members had complied in particular disputes; 29 compliance panel reports have been issued thus far. Well over one-half of all panel reports have been appealed, resulting in 108 Appellate Body reports issued as of this writing.<sup>8</sup>

Nearly one-half of the 450 WTO complaints filed to date involve the United States as complaining party or defendant. The United States Trade Representative (USTR) manages U.S. participation and is the chief representative of the United States in the WTO, including in WTO disputes.<sup>9</sup>

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 WTO Doha Development Round of multilateral trade negotiations initiated in 2001, 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 agreed to use in their negotiations; in April and September 2011, the chairman issued reports summarizing subsequent discussions.<sup>10</sup> Although the Doha Round negotiations have stalled, discussions of revisions to the DSU have continued into 2012.<sup>11</sup>

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<sup>8</sup> Lists of WTO panel and Appellate Body reports are available in the "Free Resources" section of WorldTradeLaw.net at, respectively, <http://www.worldtradelaw.net/reports/wtopanels/wtopanels.asp>, and <http://www.worldtradelaw.net/reports/wtoab/abreports.asp>.

<sup>9</sup> Trade Act of 1974, P.L. 93-618, §141(c)(1)(C),(D), 19 U.S.C. §2171(c)(1)(C),(D). See also Uruguay Round Agreements Act, P.L. 103-465, §§123, 127, 129, 19 U.S.C. §§3533, 3537, 3538.

<sup>10</sup> Special Session of the Dispute Settlement Body, Minutes of Meeting, September 30, 2011, TN/DS/M/35 (October continued...)

The United States has proposed such revisions as greater Member control over the process, guidelines for WTO adjudicative bodies, and increased transparency—for example, open meetings and timely access to submissions and final reports.<sup>12</sup> Other Member proposals include, inter alia, a permanent roster of panelists, enabling the Appellate Body to remand decisions to panels for further proceedings, 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.<sup>13</sup>

## Steps in a WTO Dispute

The WTO dispute settlement process consists of three broad stages: (1) consultations; (2) panel and, if requested, Appellate Body review; and (3) if needed, implementation. In conducting their work, WTO panels and the Appellate Body are guided by Article 3.2 of the DSU, which provides that the WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,” adding that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” In an early WTO dispute settlement proceeding, the WTO Appellate Body confirmed that the “general rule of interpretation” set out in Article 31 of the Vienna Convention on the Law of Treaties constitutes an interpretative rule under international law for purposes of Article 3.2.<sup>14</sup> Article 31 generally states that a treaty or other

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26, 2011), as corrected, TN/DS/M/35/Corr.1 (November 9, 2011); Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/25 (April 21, 2011); Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/23 (December 5, 2008).

<sup>11</sup> WTO News Item, Lamy cites progress on trade facilitation and development issues (July 17, 2012), at [http://www.wto.org/english/news\\_e/news12\\_e/gc\\_17jul12-e.htm](http://www.wto.org/english/news_e/news12_e/gc_17jul12-e.htm); Report by the Chairman of the Trade Negotiations Committee, in WTO News Item, Lamy: Members continue to explore opportunities for Doha progress (May 1 and 2, 2012), at [http://www.wto.org/english/news\\_e/news12\\_e/gc\\_rpt\\_01may12\\_e.htm](http://www.wto.org/english/news_e/news12_e/gc_rpt_01may12_e.htm); Office of the U.S. Trade Representative, 2012 Trade Policy Agenda and 2011 Annual Report, ch. II, at 14-15 (March 2012), at <http://www.ustr.gov/sites/default/files/Chapter%20II.%20The%20World%20Trade%20Organization.pdf>; WTO, Eighth Ministerial Conference, Chairman’s Concluding Statement, at 5, WT/MIN(11)/11 (December 17, 2011). Note also *WTO Members Quietly Adopt Reforms to Dispute Proceedings*, 29 Int’l Trade Rep. (Bloomberg BNA) 357 (March 8, 2012).

<sup>12</sup> See, e.g., WTO documents TN/DS/W/79 (July 13, 2005), TN/DS/W/82 (October 24, 2005), TN/DS/W/82/Add.1 (October 25, 2005), as corrected, and TN/DSW/86 (April 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>.

<sup>13</sup> For further information on proposals, see World Trade Organization, *New Negotiations on the Dispute Settlement Understanding*, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#negotiations](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations).

<sup>14</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* at 17, WT/DS2/AB/R (April 29, 1996). The widely-ratified Vienna Convention on the Law of Treaties (VCLT) is the primary source of international law concerning treaties. Although the United States has not yet become a party, it has signed the Convention and recognizes its authoritative status in the area. See generally Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Committee on Foreign Relations, United States Senate* 43-45 (2001)(S. Prt. 106-71). The text of the Convention is printed in *id.* at 384-402. For purposes of the Vienna Convention, the term “treaty” means “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention on the Law of Treaties (VCLT), art. 2.1(a).

international agreement “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>15</sup>

Following are the steps in a WTO dispute settlement proceeding, with the applicable DSU articles for each.

## **Consultations (Article 4)**

Under the DSU, a WTO Member may request consultations 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, the latter Member must enter into consultations with the former within 30 days.<sup>16</sup>

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

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<sup>15</sup> VCLT, art. 31.1. In addition to the text of the agreement, including its preamble and annexes, the “context” for purposes of interpretation under the VCLT includes “(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” VCLT, art. 31.2. In addition, Article 31.3 of the VCLT provides that treaty interpreters are to take the following into account together with the context of a treaty: “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.” Article 32 of the Convention permits the use of “supplementary means of interpretation” in order to confirm the meaning determined under Article 31 or when the interpretation under Article 31 “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

In two disputes challenging U.S. laws under the Agreement on Technical Barriers to Trade (TBT Agreement), the WTO Appellate Body found that a provision of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns and a 2000 decision of the WTO Committee on Technical Barriers to Trade, being decisions adopted by consensus by all WTO Members that “bore specifically” on terms or provisions of the TBT Agreement, constituted “subsequent agreements” between the parties to the TBT Agreement under Article 31.3(a) of the Vienna Convention. As such, they could be used to inform the interpretation and application of those terms or provisions. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 256-275, WT/DS406/AB/R (April 2, 2012); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, paras. 371-372, WT/DS381/AB/R (May 16, 2012). In a dispute challenging the European Union’s treatment of biotech products as violative of the Agreement on the Application of Sanitary and Phytosanitary Measures, a WTO panel found that the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety to the Convention (Biosafety Protocol) did not constitute “rules of international law applicable in relations to the parties” under Article 31.3(c) of the Vienna Convention in that the United States was not a party to the former and none of the complaining Members (the United States, Canada, and Argentina) was a party to the latter. Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, paras. 7.51-7.75, WT/DS291/R, WT/DS392/R, WT/DS393/R (September 29, 2006).

<sup>16</sup> 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 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 Appellate Body report issued on December 21, 2009, numbered WT/DS363/AB/R.



## **Establishing a Dispute Panel (Articles 6, 8)**

The WTO Member requesting a panel must do so in writing and “identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly.” Under GATT and now WTO dispute settlement practice, a Member may challenge a measure of another Member “as such,” “as applied,” or both.<sup>17</sup> 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.<sup>18</sup>

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 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. Although the DSB ordinarily meets once a month, the complaining Member may request that the DSB convene for the sole purpose of considering the panel request. Any such meeting must be held within 15 days after the complaining Member requests that the meeting be held.

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 the disputing parties fail to agree 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. Because the Director-General may only act upon request in this situation, it is possible that disputing Members may not make such a request immediately or may not do so at all, thus permitting them to attempt to resolve their dispute before the adjudicatory process begins.

## **Panel Proceedings (Articles 12, 15, Appendix 3)**

Once the panel is constituted, it hears written and oral arguments from the disputing parties. After considering these presentations, it issues the descriptive part of its report (facts and argument) to the disputing parties. Taking into account any comments from the parties, the panel then submits this portion of the report, 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.

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<sup>17</sup> Appellate Body Report, *United States—Anti-dumping Act of 1916*, paras. 60-61, WT/DS136/AB/R, WT/DS162/AB/R (August 28, 2000).

<sup>18</sup> Appellate Body Report, *United States—Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, para. 172, WT/DS268/AB/R (November 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 situations as well—will necessarily be inconsistent with that Member’s WTO obligations. In essence, complaining parties bringing “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.

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 common 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.<sup>19</sup>

## **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. Article 17.6 of the DSU limits appeals to “issues of law covered in the panel report and legal interpretations developed by the panel.”

Within 60 days of being notified of an appeal (extendable to 90 days), the WTO 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 9 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.<sup>20</sup> Compliance may be achieved by withdrawing the WTO-inconsistent measure or, alternatively, by modifying or replacing it.<sup>21</sup>

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

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<sup>19</sup> See, e.g., Henrik Horn & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2006: Some descriptive statistics*, at 28-29 (March 14, 2008), at [http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics\\_031408.pdf](http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf). An example is the panel in *China—Measures Related to the Exportation of Various Raw Materials*, a dispute proceeding initiated separately by the United States, the European Union, and Mexico. In this case, the panel, which was established on December 21, 2009, and composed on March 30, 2010, reported to the DSB that it would not meet the six-month deadline and instead expected to conclude its work by April 2011. Communication from the Chairman of the Panel, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/10, WT/DS395/10, WT/DS398/9 (October 21, 2010). The final panel reports were submitted to the parties on April 1, 2011, and publicly circulated to WTO Members on July 5, 2011. Panel Reports, *China—Measures Related to the Exportation of Various Raw Materials*, para. 1.9, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011); *id.*, Corrigendum, WT/DS394/R/Corr.1, WT/DS395/R/Corr.1, WT/DS398/R/Corr.1 (August 17, 2011).

<sup>20</sup> E.g., Appellate Body Report, *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 (August 18, 2009).

<sup>21</sup> *Id.* para. 154.

days after the report or reports are adopted by the DSB; or (3) failing agreement, the period determined through binding arbitration. Arbitration is to be completed within 90 days after adoption of the reports. To aid the arbitrator in determining the length of the compliance period, the DSU provides a non-binding guideline of 15 months from the date of adoption. Arbitrated compliance periods have ranged from six months to 15 months and one week. The DSU envisions that a maximum 18 months will elapse from the date a panel is established until the reasonable period of time is determined.

## **Compliance Panels (Article 21.5)**

Either disputing Member may request that a compliance panel be convened under Article 21.5 of the DSU in the event the disputants disagree as to whether the defending Member has complied. The disagreement may have do with whether a compliance measure exists, or whether a measure that has been taken to comply is consistent with the WTO decision in the case. The DSU provides that, wherever possible, the original panel should be re-convened to hear the compliance dispute. 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.

## **Compensation and Suspension of Concessions (Article 22)**

If the defending Member fails to comply with the WTO decision within the established compliance period, Article 22 permits the prevailing Member to 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, more likely, if negotiations have not been requested, the prevailing Member may request authorization from the DSB to retaliate, that is, suspend concessions or obligations owed the non-complying Member under a WTO agreement. Article 22 requires the DSB to authorize the request within 30 days after the compliance deadline expires unless the DSB decides by consensus not to do so, or the defending Member requests that the retaliation proposal be arbitrated.

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

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

As noted above, the defending Member has a right under the DSU to object to a retaliation proposal. Article 22.6 of the DSU permits the defending Member to 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.<sup>22</sup> Once requested, arbitration is automatic and is to be completed within 60 days after the compliance period ends. An arbitral decision is considered final.<sup>23</sup>

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, nor is the Member required to do so by a given date if it chooses to pursue such a request. Further, even if measures are authorized, the prevailing Member is not required to impose them. If the Member does so, however, the measures may not remain in effect once the offending measure is removed or the disputing parties otherwise resolve the dispute.

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<sup>22</sup> 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 (August 31, 2009), for an 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. The United States and Brazil subsequently entered into an agreement forestalling the imposition of sanctions by Brazil.

<sup>23</sup> Nineteen Article 22.6 arbitral awards have been issued to date; a list of these awards is available at <http://www.worldtradelaw.net/reports/226awards/suspensionawards.asp>. Of the 19 awards, two involve retaliation requests by the United States (*European Communities—Measures Concerning Meat and Meat Products (Hormones)*(EC—Hormones)(DS26) and *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (EC—Bananas)(DS27), while 12 awards involve retaliation requests by other WTO Members against the United States. The 12 awards involve disputes over five separate matters: *United States—Tax Treatment for “Foreign Sales Corporations”* (U.S.—FSC)(DS108); *United States—Antidumping Act of 1916* (DS136); *United States—Continued Dumping and Subsidy Offset Act of 2000* (U.S.—CDSOA (Byrd Amendment))(DS217/DS234); *United States—Subsidies on Upland Cotton* (DS 267); and *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS285). The United States requested authorization to impose sanctions following the arbitral awards in both EC—Hormones and EC—Bananas and imposed increased tariffs on EU goods in each; the continued imposition of U.S. sanctions in the EC—Hormones case is discussed in the text at pages 10-12.

Sanctions in U.S.—FSC, which had been imposed and then suspended by the European Union (EU), were formally discontinued by the EU in 2006 following the repeal of a “grandfather” provision contained in the American Jobs Creation Act, P.L. 108-357, legislation that had been enacted in 2004 to comply with the WTO decision in the case. The “grandfather” provision was repealed in P.L. 109-222, §513(b). The EU and Japan are continuing to impose sanctions in U.S.—CDSOA (Byrd Amendment), albeit at reduced amounts due to declining distributions of funds to U.S. firms under the statute. See Communication from the European Union, U.S.—CDSOA (Byrd Amendment), WT/DS217/61 (May 10, 2012); Communication from Japan, U.S.—CDSOA (Byrd Amendment), WT/DS217/62 (August 27, 2012). The CDSOA, which required the distribution of antidumping and countervailing duties for qualifying expenses to domestic producers that had supported the underlying antidumping and countervailing duty petitions, was repealed effective October 2005, but the repealer authorized continued distributions of antidumping and countervailing duties collected on goods entered before October 1, 2007 (P.L. 109-171, §7601). For further background on this dispute and the CDSOA, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by (name redacted), and CRS Report RL33045, *The Continued Dumping and Subsidy Offset Act (“Byrd Amendment”)*, by (name redacted) and (name redacted).

## 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—that is, not unilaterally—when taking various dispute-related actions. These are (1) determining if another Member has violated a WTO agreement (Art. 23(a)); (2) determining a date by which the Member must comply with a WTO decision (Art. 23(b)); and (3) taking any retaliatory action against a non-complying Member (Art. 23(c)). Regarding retaliatory action, the prevailing Member must follow DSU procedures in determining the amount of trade retaliation to be imposed and must obtain authorization from the DSB in accordance with DSU procedures before suspending WTO tariff concessions or other WTO obligations in the event the defending Member has failed to comply.

## 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 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 the 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 retaliatory 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 under which compliance panel proceedings and procedures involving retaliation requests, including the arbitration of retaliation proposals, advance in sequence.<sup>24</sup> Generally, Members agree that if a compliance panel finds that a Member has not complied, the prevailing Member may proceed with its retaliation request even though the 30-day DSU deadline has passed.

## 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 was the subject of *United States*—

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<sup>24</sup> Note, for example, the procedural agreement between the United States and Brazil in Brazil’s challenge of U.S. cotton subsidies. Understanding between Brazil and the United States Regarding Procedures Under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States—Subsidies on Upland Cotton*, WT/DS267/22 (July 8, 2005). See generally Sylvia A. Rhodes, *The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?* 3 J. INT’L ECON. L. 553 (2000).

*Continued Suspension of Obligations in the EC—Hormones Dispute* (DS320), a dispute initiated by the European Union (EU)<sup>25</sup> against the United States in 2004 for continuing to maintain increased (i.e., 100% *ad valorem*) tariffs on EU goods first imposed in 1999 in retaliation for the EU's failure to comply with the adverse WTO ruling on the EU's ban on hormone-treated beef. The EU also initiated a separate case against Canada on the same basis.<sup>26</sup> The Appellate Body and modified panel reports in the underlying beef hormone case, *EC—Hormones*,<sup>27</sup> found that an EU 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 EU argued that the United States and Canada were violating the following WTO obligations in continuing to impose their retaliatory tariffs: (1) the GATT most-favored-nation article; (2) the GATT prohibition on tariff surcharges; and (3) 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 EU was maintaining bans on certain hormones without a sufficient scientific basis in violation of the SPS Agreement, and that the 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 EU compliance issue and (2) determining unilaterally that the EU was still in violation of the *EC—Hormones* decision. The panel also found, however, that to the extent that the challenged EU 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.<sup>28</sup> The panel noted that it had functioned similarly to a compliance panel for the sole 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 EU under Article 21.5 in order to comply with their DSU obligations and to promptly resolve the dispute.

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<sup>25</sup> As of December 1, 2009, "European Union" replaced "European Communities" as the official name of this WTO Member. The terms European Communities and EC still appear in older WTO materials, including panel and Appellate Body reports, bilateral procedural agreements in particular disputes, and communications to the WTO Dispute Settlement Body. For further information, see *European Union or Communities?*, at [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_union\\_or\\_communities\\_popup.htm](http://www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm).

<sup>26</sup> *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321.

<sup>27</sup> *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 (complaint by United States); *European Communities—Measures Affecting Livestock and Meat (Hormones)*, WT/DS48 (complaint by Canada).

<sup>28</sup> Panel Report, *United States - Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/R (March 31, 2008); Panel Report, *Canada - Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/R (March 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.

The Appellate Body, in separate reports issued October 16, 2008, reversed the panel's findings that the United States and Canada were in breach of the DSU as well as the panel's findings that the EU was still in violation of the SPS Agreement.<sup>29</sup> Because the Appellate Body could not complete the analysis needed to determine whether the contested EU 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 EU 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 EU requested consultations under Article 21.5 in December 2008,<sup>30</sup> 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 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). 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.<sup>31</sup> The USTR delayed the imposition of the additional duties on new items until September 19, 2009, and officially terminated these duties as of this date.<sup>32</sup> As a result of these actions, the duties were never imposed.

## WTO Dispute Settlement and U.S. Law

### Legal Effect of WTO Decisions

The adoption by the WTO Dispute Settlement Body of a panel and, if appealed, subsequent Appellate Body report finding that a U.S. law, regulation, or practice violates a WTO agreement does not give the report or reports direct legal effect in the United States. Thus, federal law is not affected until Congress or the executive branch, as the case may be, changes the law or

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<sup>29</sup> Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (October 16, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/AB/R (October 16, 2008).

<sup>30</sup> 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 (December 22, 2008), at [http://ec.europa.eu/trade/issues/respectrules/dispute/pr221208\\_en.htm](http://ec.europa.eu/trade/issues/respectrules/dispute/pr221208_en.htm).

<sup>31</sup> 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](http://ec.europa.eu/trade/issues/respectrules/dispute/memo140509_en.htm).

<sup>32</sup> 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 ultimately delayed the effective date of the additional duties on new products until September 19, 2009, the *removal* of items announced in January became effective as of March 23, 2009. Implementation of the U.S.-EC Beef Hormones Memorandum of Understanding, 74 Fed. Reg. 40864 (August 13, 2009). The United States officially terminated the additional duties on new items on September 19, 2009, leaving in place the additional duties on the reduced list of products that had been in force since March 23, 2009. Implementation of the U.S.-EC Beef Hormones Memorandum of Understanding, 74 Fed. Reg. 48808 (September 24, 2009).

administrative measure at issue.<sup>33</sup> Procedures for executive branch compliance with adverse decisions are set out in Sections 123(g) and 129 of the Uruguay Round Agreements Act.<sup>34</sup> 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.<sup>35</sup> Federal courts have held that WTO panel and Appellate Body reports are not binding on the judiciary<sup>36</sup> 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.<sup>37</sup>

## Section 301 of the Trade Act

Sections 301-310 of the Trade Act of 1974 (referred to collectively as Section 301)<sup>38</sup> 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 regarding a foreign measure that allegedly violates a WTO agreement, the USTR must invoke the WTO dispute process to seek resolution of the problem.<sup>39</sup> Section 301 authorizes the USTR to impose retaliatory measures to remedy an uncorrected foreign practice, some of which may involve suspending a WTO obligation—for example, 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 Section 306 of the act, the USTR must monitor foreign compliance and may take further retaliatory action if compliance measures are unsatisfactory. While Section 301 also permits the USTR to initiate an investigation on its own motion, it is not necessary for the USTR to invoke Section 301 in order to initiate a WTO dispute. Nevertheless, the authorities in Section 301 are available to the USTR if it decides to impose sanctions in a WTO dispute that it initiated earlier.

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<sup>33</sup> 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.

<sup>34</sup> P.L. 103-465, 19 U.S.C. §§3533(g), 3538.

<sup>35</sup> URAA, P.L. 103-465, §102(b), (c).

<sup>36</sup> 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 (name redacted).

<sup>37</sup> *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008).

<sup>38</sup> 19 U.S.C. §§2411 *et seq.*

<sup>39</sup> Most recently, the United States Trade Representative, in response to a petition filed by a labor union in September 2010, initiated an investigation with respect to acts, policies, and practices of the People’s Republic of China involving trade and investment in green technology, focusing on whether any of these measures deny U.S. rights or benefits under the General Agreement on Tariffs and Trade 1994 (GATT 1994), the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), or China’s WTO Accession Protocol. Initiation of Section 302 Investigation and Request for Public Comment: China—Acts, Policies and Practices Affecting Trade and Investment in Green Technology, 75 Fed. Reg. 64776 (October 20, 2010). In late December 2010, the United States initiated a dispute in the WTO involving one of the measures cited in the petition, claiming, *inter alia*, that China violated obligations in the SCM Agreement by providing subsidies on wind power equipment under its Wind Power Equipment Fund that are contingent upon the use of domestic over imported products and, as such, are prohibited under Article 3.1(b) of the SCM Agreement. Request for Consultations by the United States, *China—Measures Concerning Wind Power Equipment*, WT/DS419/R (January 6, 2011); see also WTO Dispute Settlement Proceeding Regarding China—Subsidies on Wind Power Equipment, 75 Fed. Reg. 82130 (December 29, 2010). The dispute remains in consultations.



If the USTR has taken action against the goods of another country for its failure to comply with a WTO decision, Section 306(b)(2)(B)-(F), of the Trade Act<sup>40</sup> 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 European Union filed a WTO complaint challenging the 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.<sup>41</sup> Because the United States had not invoked the provision, the EU 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 EU 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.<sup>42</sup> 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 EU member states, and an increase to 300% *ad valorem* of duties on one product, Roquefort cheese. The EU 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.”<sup>43</sup> 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 on new items and officially terminated these additional duties as of September 19, 2009.<sup>44</sup>

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<sup>40</sup> 19 U.S.C. §2416(b)(2)(B)-(F).

<sup>41</sup> 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).

<sup>42</sup> 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 (January 23, 2009).

<sup>43</sup> Press Release, European Commission, EU Prepares WTO action over US trade sanction law (January 15, 2009), at [http://ec.europa.eu/trade/issues/respectrules/dispute/pr150109\\_en.htm](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 (March 13, 2002).

<sup>44</sup> See *supra* note 32 and accompanying text. The continued imposition of the beef hormone sanctions by the USTR on toasted bread products from Spain was successfully challenged in *Gilda Industries v. United States*, 625 F.Supp.2d 1377 (Ct. Int’l Trade 2009), on the ground that the sanctions had expired by operation of law in late July 2007. The sanctions were challenged in the U.S. Court of International Trade, the specialized federal trade court located in New York City. The United States appealed the decision to the U.S. Court of Appeals for the Federal Circuit, which affirmed the lower court judgment on October 13, 2010. *Gilda Industries v. United States*, No. 2009-1492, 2010 WL 3987360 (Fed. Cir. 2010), available at <http://www.ca9.uscourts.gov/images/stories/opinions-orders/09-1492.pdf>. While the United States may appeal the decision to the U.S. Supreme Court, the Court grants only a small number of petitions for certiorari and, in general, hears relatively few trade cases.

*Gilda Industries* involves the interpretation of statutory requirements contained in Section 307(c)(1) of the Trade Act of 1974, 19 U.S.C. §2417(c)(1), which provides that if “a particular action” has been taken by the USTR under Section 301 during any four-year period, for example, 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 (continued...)

The EU 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 forces negotiations through its threat of sanctions. In *United States—Sections 301-310 of the Trade Act of 1974* (DS152), the WTO panel found that the language of Section 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.<sup>45</sup> 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 Section 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.<sup>46</sup>

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(...continued)

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 U.S. Court of International Trade 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.

<sup>45</sup> Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (December 22, 1999).

<sup>46</sup> The European Union also cited Article 23 of the DSU in *United States—Import Measures on Certain Products from the European Communities* (DS165), a case in which the EU challenged a measure taken by the United States in the compliance phase of a trade dispute in the WTO between the two Members. Here, the EU argued that the temporary imposition by the United States of increased bonding requirements on certain EU imports was a violation of, among other DSU and GATT articles, Article 23.1(c) of the DSU, which prohibits a WTO Member from suspending WTO tariff concessions or other obligations in a WTO dispute before being authorized by the DSB to do so. In this case, the United States had imposed the bonding requirement before the issuance of an arbitral report on the level of retaliation that the United States had proposed in response to the EU’s failure to comply with the adverse WTO decision on the EU banana import regime (DS27), and therefore before obtaining authorization from the DSB to suspend concessions in the case. While the WTO Appellate Body reversed several of the panel’s findings, it left intact the panel’s conclusion that the U.S. measure violated Article 23.1(c), a panel finding that had not been appealed by the United States. At the same time, because the bonding requirement had expired and had thus been removed by the time that the panel in the EC challenge had issued its report, the WTO Appellate Body criticized the panel for recommending that the United States bring its measure into conformity with WTO obligations. Panel Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/R (July 17, 2000); Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (December 11, 2000). See also Implementation of WTO Recommendations Concerning the European Communities’ Regime for the Importation, Sale and Distribution of Bananas, 64 Fed. Reg. 19209 (April 19, 1999). For additional discussion of both DS152 and DS165, see John H. Jackson and Patricio Grane, *The Saga Continues: An Update on the Banana Dispute and its Procedural Offspring*, 4 J. INT’L ECON. L. 581 (2001).

## 112<sup>th</sup> Congress Legislation

S. 239 (Klobuchar), the Innovate America Act, would, inter alia, authorize to be appropriated to the USTR \$2 million for each of FY2011, FY2012, and FY2013 for the purpose of initiating any proceeding to resolve a dispute relating to market access barriers with WTO member countries. S. 708 (Brown, Ohio), the Trade Enforcement Priorities Act, would establish mechanisms under the Trade Act of 1974 to require the USTR annually to identify particularly harmful foreign trade practices and, where appropriate, to initiate WTO dispute settlement proceedings to remedy these practices. To date, no action has been taken on either of these bills.

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