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Dispute Settlement in the World Trade Organization: Key Legal Concepts

The World Trade Organization (WTO) agreements set forth rules for government practices that affect international trade in goods and services. The agreements address import tariffs on products, as well as nontariff trade barriers such as product standards and subsidies. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) provides a means for WTO Members to resolve disputes arising under the WTO agreements. The United States is a Member of the WTO.

This In Focus summarizes key legal principles that often arise in dispute settlement cases. For more on WTO dispute settlement generally, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*. For more on the WTO generally, see CRS In Focus IF10002, *The World Trade Organization*, by Ian F. Fergusson and Rachel F. Fefer.

Standing to Bring a Dispute

In the legal context, the concept of “standing” generally refers to a party’s legal right to bring a dispute before a court or other tribunal for possible resolution of the issues in the party’s complaint. Various legal instruments governing a tribunal’s powers (e.g., constitutional provisions or prudential concerns incorporated into judge-made law) may establish requirements that a party must meet in order to have standing before that tribunal. For example, a key element of standing doctrine in U.S. law holds that in order to maintain a lawsuit in federal court, a party must have suffered some type of injury to a legally protected interest. U.S. Const. Art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

However, the concept of standing differs in WTO dispute settlement, which involves state-to-state disputes between WTO Member countries brought before international tribunals. WTO jurisprudence suggests that a WTO Member could potentially maintain a dispute settlement case without having suffered direct economic injury to its trade interests. In *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body noted that nothing in the WTO agreements requires a Member to have a legal interest in a dispute in order to bring that dispute before a WTO panel. WT/DS27/AB/R, ¶ 132. Although the Appellate Body did not specifically hold that a WTO Member may bring a complaint without having suffered any injury to its economic interests, it did suggest that the WTO Agreements may allow a WTO Member to bring a dispute settlement complaint against another Member even when its “legal interest” in the case is remote or indirect. *Id.* at ¶¶ 132-38.

In addition, a provision in the General Agreement on Tariffs and Trade (GATT) suggests that there are some circumstances in which a WTO Member could bring a case without having suffered direct economic injury. The provision allows a WTO Member to bring a “non-violation” claim against a Member that has not violated the GATT if application of one of that Member’s measures (e.g., a law or regulation) has nullified or impaired benefits accruing to the complaining Member *or impeded the attainment of GATT objectives*. GATT Art. XXIII:1(b). However, the Appellate Body has stated that this remedy “should be approached with caution and should remain an exceptional remedy.” See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 186.

De Jure vs. De Facto Discrimination

A key WTO principle is the concept of nondiscrimination. Several provisions in the agreements prohibit a WTO Member from discriminating against an imported product, service, or service supplier based on its foreign (WTO Member) origin. *E.g.*, GATT Art. III; Agreement on Technical Barriers to Trade Art 2.1; General Agreement on Trade in Services (GATS) Arts. II, XVII. WTO jurisprudence holds that a law or other “measure” may violate the WTO agreements not only when it facially discriminates against imported products based on origin (*de jure* discrimination) but also when an origin-neutral law nevertheless discriminates *in effect* against imported products of WTO Member origin (*de facto* discrimination).

A WTO panel’s decision in the *Canada—Autos* dispute illustrates this principle. In that case, Canada exempted from import duties automobiles brought into the country by a select group of eligible importers. WT/DS139/R, ¶¶ 10.43, 10.45-50. Although this group could theoretically import cars originating in any WTO Member country, the group of Canadian importers in practice imported cars mostly from those WTO member countries that hosted car manufacturers affiliated with the importers. Consequently, the WTO panel determined that the duty exemption conferred an advantage on products (i.e., cars) of the WTO Members that hosted the importer-affiliated manufacturers. Moreover, this advantage was not accorded to like products of other WTO Members that did not host importer-affiliated companies. Thus, the measure violated GATT Article I:1.

Although the *Canada—Autos* case concerned the GATT’s most-favored nation (MFN) treatment provision, the Appellate Body has recognized that *de facto* discrimination may also occur under other WTO nondiscrimination provisions, such as the MFN provision in the GATS. *EC—Bananas III*, ¶¶ 233-34.

Mandatory vs. Discretionary Legislation

When a WTO Member challenges another Member's law "as such" (i.e., as written and not as applied by an official of that Member in a particular situation), whether that law conforms with WTO rules may depend on whether the law requires officials of the responding Member to take WTO-inconsistent action or merely permits such action. See Appellate Body Report, *U.S. – Anti-Dumping Act of 1916*, ¶¶ 88-91, WT/DS136/AB/R, WT/DS162/AB/R (August 28, 2000). Although a law that requires WTO-inconsistent action will likely violate the agreements, it is unclear whether a law that gives an official discretion to take an action that would violate WTO agreements may itself violate those agreements.

Some early precedents under the predecessor to the WTO, the GATT 1947, held that a panel would find a law to be consistent with a Contracting Party's international trade obligations when: (1) the law provided an official of that Party with discretion to apply that law in a way that did not violate the agreements; and (2) the official applied the law in such a manner. *Id.* However, in the context of WTO dispute settlement, the Appellate Body has expressed some ambivalence about this "mandatory/discretionary" distinction. Appellate Body Report, *U.S.—Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing"), ¶¶ 211, 214, WT/DS294/AB/R (April 18, 2006).

In 1999, a WTO panel examined the U.S. Section 301 program, which authorizes the executive branch to take action against unfair foreign trade practices, and held that it provisionally violated the DSU because "in a treaty the benefits of which depend in part on the activity of individual [economic] operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals." *U.S.—Sections 301-310 of the Trade Act of 1974*, ¶ 7.81, WT/DS152/R. The panel wrote that the "threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members." *Id.* at ¶ 7.89. However, the panel in that case nevertheless found that Section 301 did not violate the WTO agreements because the U.S. Statement of Administrative Action submitted by the President and approved by Congress with the Uruguay Round Agreements Act (URAA), H. Doc. 103-316, appeared to prevent the executive branch from interpreting and applying the law at issue in a manner that violated U.S. WTO obligations.

Interpretation of the WTO Agreements

WTO adjudicators often must interpret a phrase in the WTO agreements. Article 3.2 of the DSU provides that the agreements should be interpreted "in accordance with customary rules of interpretation of public international law." WTO panels have held that key customary rules are contained in the Vienna Convention on the Law of Treaties (VCLT). 1155 U.N.T.S. 331 (May 23, 1969).

Article 31 of the VCLT states, in part, that a "treaty 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." If interpretation under Article 31 fails to clarify the treaty's meaning or leads to an unreasonable result, then Article 32 of the VCLT provides that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to ... determine the meaning."

Effect of WTO Agreements and Decisions on U.S. Domestic Law

The WTO agreements and decisions rendered by panels thereunder cannot modify U.S. law. If a WTO Member considered a U.S. measure to violate the WTO agreements, it could potentially challenge the measure in a dispute settlement proceeding under the rules and procedures of the DSU. If an adverse WTO decision were ultimately rendered, the United States would be expected to remove the offending measure, generally within a reasonable period of time, or face the possibility of paying compensation to the complaining Member or being subject to sanctions. Such sanctions might include the imposition by the complaining Member of higher tariffs on imports of selected products exported from U.S. territory.

Although the WTO's Dispute Settlement Body could authorize a WTO Member to retaliate against the United States for maintaining a measure in violation of WTO rules, no WTO body could compel the United States or one of its political subdivisions to alter its laws. While the Supremacy Clause of the U.S. Constitution puts treaties on equal footing with federal law, U.S. Const. art. VI, cl. 2, Congress did not consider the WTO agreements to be self-executing. *E.g.*, S. Rept. 103-412, at 13. Thus, the agreements did not have domestic legal effect until Congress passed legislation implementing the agreements. Congress approved and implemented the WTO agreements in URAA, P.L. 103-465. Section 102(a)(1) of the URAA states that "No 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." As a result, WTO panel and Appellate Body reports adopted by the WTO Members that are in conflict with federal law do not have domestic legal effect unless and until Congress or the executive branch, as the case may be, takes action to modify or remove the conflicting statute, regulation, or regulatory action.

Nor do WTO dispute settlement decisions in conflict with state law have domestic legal effect without federal or state action. Section 102(b)(2)(A) of the URAA provides that "[n]o State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid." Notably, URAA Section 102 does not foreclose the possibility that Congress (or a federal agency), acting within its authority, could preempt a state law by enacting legislation or promulgating a rule.

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