

## CANADIAN COMPETITION RECORD

# REGULATORY AND TRADE DEVELOPMENTS

## WTO DISPUTE SETTLEMENT AND THE DOLE COMMISSION

By: Gary N. Horlick and Kristy L. Balsanek  
O'Melveny & Myers, Washington, D.C.

One of the most contentious issues during the debate over the U.S. implementing legislation of the Uruguay Round Multilateral Trade Agreement was the newly agreed upon Dispute Settlement Understanding ("DSU") under the World Trade Organization (the "WTO") and its effect upon U.S. sovereignty. Under the old dispute settlement system of the General Agreement on Tariffs and Trade ("GATT"), each member country of the GATT could block (i.e., veto) the adoption of adverse GATT panel decisions. As a result, panel reports were effectively non-binding. After years of frustration with this dispute settlement process, Congress mandated U.S. negotiators through the 1988 *Omnibus Trade Act* to negotiate for "more effective and expeditious dispute settlement mechanisms and procedures" that "enable better enforcement of U.S. rights" in the Uruguay Round Agreement. Therefore, a main goal for the U.S. in the Uruguay Round trade negotiations was to replace the original GATT dispute settlement system with a binding and automatic dispute settlement process within the new WTO.

After seven years of negotiations, the Uruguay Round Agreement was signed by more than 100 countries on April 15, 1994. The WTO entered into effect on

January 1, 1995. The major changes under the DSU provide for the automatic adoption of WTO panel decisions and binding resolutions. If a member of the WTO refuses to adhere to a panel report, member countries can retaliate through sanctions.

The debate in the U.S. during the vote to implement the Uruguay Round Agreement centered on the issue of the DSU and its possible effects upon U.S. sovereignty. Under the WTO, the U.S. must ensure that its state and federal laws are in conformity with the Uruguay Round Agreement. Therefore, criticism was related directly to the operation of the dispute settlement decision and panel report process.

One of the leading critics of the DSU was Senate Majority Leader Robert Dole (R-Kansas) (then Senate Minority Leader). Just before the U.S. House of Representatives vote on the Uruguay Round implementing legislation on November 29, 1994 and the Senate vote on December 1, 1994, Senator Dole stated that he would only support the legislation if the Clinton Administration backed his proposal to allow for greater congressional oversight of U.S. participation in the WTO. In this respect, Senator Dole called for separate legislation which would be taken up in early 1995 and would address protecting U.S. sovereignty under the WTO. His proposal was to set up a commission to determine on a regular basis if U.S. interests were

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being harmed by the WTO. If the commission found that the WTO dispute settlement system was harmful, then a process would begin which could lead to a congressional vote on the U.S. withdrawing from the WTO.

President Clinton responded by negotiating with Senator Dole to draft language and legislation that would satisfy his concerns about U.S. standing in the WTO. The Administration wanted to respond to Senator Dole's concerns in order to allow the Uruguay Round implementing legislation to be approved by the Senate. Although the U.S. Administration believed that the current legislation already addressed Senator Dole's sovereignty concerns, it was willing to consider additional provisions in order to increase confidence in the WTO. Senator Dole's backing was viewed by the Administration as crucial for passage of the legislation and needed his support. Therefore, in its negotiations with Senator Dole, the Administration sought language to ensure U.S. sovereignty but also which would not violate the Uruguay Round Agreement.

Finally, on November 23, 1994, Senator Dole announced that he would support the passage of the Uruguay Round implementing legislation. The Administration had agreed to support legislation to be taken up by Congress in early 1995 which would establish a commission of judges to review WTO dispute settlement decisions. Senator Dole's support of the ratification of the Uruguay Round ensured its passage by the Senate on December 1, 1994.

On January 4, 1995 Senator Dole introduced legislation entitled the "WTO Dispute Settlement Review Commission Act" (s. 16) which would

establish a commission to monitor decisions taken by the WTO dispute settlement panels against the U.S. The Commission would be composed of five federal appellate judges appointed for a period of five years by the President in consultation with the House of Representatives and the Senate as well as the trade committees of both.

The Commission would be responsible for reviewing all adopted reports of the dispute settlement panels or the Appellate Body of the WTO which are adverse to the U.S. (i.e., a report which determines that a U.S. law or regulation is inconsistent with international obligations under the Uruguay Round). In reviewing reports, the Commission would determine whether the WTO panel (i) exceeded its authority, (ii) engaged in misconduct, (iii) departed from panel procedures, or (iv) deviated from the applicable standard of review.

A Commission report is due within 120 days after the panel report is adopted by the Dispute Settlement Body of the WTO. If the Commission finds that the panel followed proper procedures then no further action is necessary. However, if the Commission found that the WTO panel reached an inappropriate decision, it would transmit its report to Congress. Any member of Congress would then be permitted to introduce a resolution requiring renegotiation of the WTO dispute settlement rules. If the resolution is passed, the President must then initiate negotiations to reform the system. If there are three findings during a five year period by the Commission that panels acted inappropriately, members of Congress could then introduce a resolution with privileged status that the U.S. would withdraw from the WTO. Both resolutions are subject to Presidential veto.

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Section 16 has received considerable support including that of the President's Advisory Committee on Trade Policy and Negotiations (the "ACTPN") whose members consist of the heads of various businesses as well as labor and environmental organizations. The legislation is expected to be approved after modifications. Those who support the bill believe that it provides an effective deterrent to WTO members who may be tempted to misuse the new dispute settlement system. At a hearing before the Senate Finance Committee on May 10, 1995, most panelists agreed that the bill establishes a fair and orderly means to negotiate appropriate changes to the dispute settlement system. It was also observed that it would serve as a warning to WTO panelists that their actions will be scrutinized by U.S. jurists and Congress which will in turn make the WTO dispute settlement system more effective. Additionally, if the Commission agrees with the WTO panel report, then public confidence in the WTO would increase.

However, concern has been raised over the question of using federal judges as members of the Commission. Judge Stanley Harris testified on behalf of the Judicial Conference of the U.S. that the Judicial Conference opposes the provision of section 16 which appoints federal judges to serve on the Commission. The Judicial Conference believes that this provision would cause a drain on scarce judicial resources during a time of increased judicial workload.

Other panelists responded that federal judges are best qualified to be on the Commission for several reasons. First, their primary judicial function is to review determinations of lower courts and Federal agencies. The analysis relating to the standard of judicial review is required in their daily duties. In

addition, they are best suited for the role since the nature of their position must be to act without conflicts. If the Commission was made up of private practitioners or academics, there would be no guarantee of independence for the Commission to function properly. Questions would arise over conflict of interest and also their qualifications to act in the role of judges. Finally, witnesses argued that the workload for federal judges would only increase modestly as a result of serving on the Commission, since over the past five years the average number of GATT cases decided against the U.S. has amounted to less than two per year.

Overall, the Commission established in section 16 seeks assurances that U.S. sovereignty will be protected within the WTO by monitoring the integrity and fairness of dispute procedures. It should enhance the credibility of the WTO by ensuring that the dispute settlement system is fair and impartial and does not exceed its authority or scope. In addition, instead of having WTO panel reports judged solely by purely political processes, the bill would create a group of impartial judges who would review WTO panel decisions.

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