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The World Trade Organization's dispute-settlement process was the subject of the Cordell Hull Institute's Trade Policy Roundtable meeting in Washington, DC, on May 1, 2002. **William J. Davey**, former Director of Legal Affairs at the WTO in Geneva, went through the issues.

The meeting was held at the offices of O'Melveny & Myers, attorneys at law, in the Columbia Square building (pictured above), designed by I.M. Pei.

Reproduced here, with permission, is the background paper on which the talk by **William J. Davey** (above) was based.

It was later revised and published as "A Permanent Panel Body for WTO Dispute Settlement: Desirable

DOHA ROUND NEGOTIATIONS…

WTO Dispute Settlement and Proposals for Reform

William J. Davey

THE WTO agreements provide extensive rights and impose many duties on its members and their conduct of international trade. A key issue is how the WTO enforces those rights and duties. A critical part of any enforcement mechanism is an effective system to resolve disputes over what the rules mean and whether they have been broken in a specific case. This is essential to promote compliance with those rules. Without such a system, an elaborate structure of rights and duties means little.

This paper first considers issues relating to the philosophy of dispute settlement – what approach works best: one emphasizing settlement of disputes through negotiations or one emphasizing more judicial-like means. Next, it reviews the basis for dispute settlement in the GATT and evaluates the successes and shortcomings of the GATT dispute-settlement system. The core of the paper describes in detail the WTO's rules on dispute settlement. In concluding sections, it reviews the operation of the WTO dispute-settlement system to date and discusses several proposed reforms.

ADJUDICATION VERSUS NEGOTIATION

Throughout the GATT's history, there was disagreement over whether its dispute-settlement system should be more or less "judicial" in nature.[1] Some critics of the system argued that it should be more judicial so as to promote more precise decisions on the merits of disputes and more effective implementation of decisions.[2] At the same time, other critics argued that the nature and basic philosophy of the GATT dictated that the system should be used only to the extent it facilitated negotiated settlements of trade disputes.[3]

These two conflicting viewpoints are often referred to as the "legalistic" model, which stresses adjudication, and the "pragmatic" or "anti-legalistic" model, which emphasizes negotiation and

or Practical?" in Daniel L.M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law*, Essays in Honour of Robert E. Hudec (Cambridge and New York: Cambridge University Press, 2002).

Robert E. Hudec, who died in 2003, was a founding member of the Cordell Hull Institute's board.

About the Author

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Trade Policy Roundtable

The Cordell Hull Institute's Trade Policy Roundtable is sponsored by seven international law firms in Washington, DC: Akin Gump Strauss Hauer & Feld, Arnold & Porter, Hogan & Hartson, O'Melveny & Myers, Sidley Austin Brown & Wood, Steptoe & Johnson and Wilmer Cutler Pickering Hale & Dorr.

consensus.[4] Put simply, the legalistic view is that the GATT and now the WTO Agreement are codes of conduct and embody a balance of concessions. If a WTO member violates the code or tips the balance, it is appropriate to penalize such behavior and put pressure on that member to conform to the code or right the balance, if necessary by allowing the complaining Member to take offsetting counter-measures. On the other hand, the anti-legalistic position is that the WTO Agreement is not a code of conduct *per se*, but more of a commitment by the members to deal with each other in trade matters so as to work out mutually acceptable solutions to any disagreements. As discussed below, until the closing period of the Uruguay Round negotiations, the United States was generally perceived to have supported the legalistic position, while Japan and the European Union were considered supporters of the opposing position. Many smaller countries tended to support the legalistic position because they saw that approach as a more effective protector of small-country rights.[5]

The text of GATT Article XXIII – the basis for dispute-settlement activities in the GATT and now under the WTO Agreement as well – does not mandate adoption of either approach, although the grant of the power to the GATT contracting parties, acting collectively, to determine the existence of violations and of nullification and impair-ment of benefits, as well as to authorize retaliatory measures, certainly suggests a judicial model was intended. In any event, the basic questions would seem to be: What are the goals of the WTO dispute-settlement system? Would they be better achieved by emphasizing adjudication or negotiation?

The first question seems easy to answer. Clearly the goal of the dispute-settlement system should be to promote compliance with WTO rules. Any lesser goal would have the effect of undermining the WTO system in the long run because negotiated commitments and rules would lose their meaning if they were not enforced.[6] Thus, the question is whether a more adjudicative system would promote greater compliance with WTO rules.

Critics of the adjudicative approach suggest that it will not result in better compliance in the long run for essentially two reasons. First, they argue that disputes in the end must be resolved by negotiated settlement. Even after the WTO dispute-settlement mechanism has produced a decision on the merits of a case, the implementation of that decision will likely be the subject of negotiations between the contending parties as to form and timing. A more contentious, adjudicative approach, they argue, will poison the atmosphere for these negotiations and ultimately undermine the system.

As this author has argued elsewhere, the arguments in support of this position are not compelling.[7] Indeed, emphasis on a negotiation approach is likely to result in more powerful countries dominating the process to the detriment of weaker countries and the integrity of WTO rules. This result is more likely to poison the WTO atmosphere

in the long run than a system that only asks countries to comply with the obligations they have freely undertaken.

Second, it is argued that a more legalistic system will encourage the filing of complaints and that some of these actions will be what could be called "wrong" cases.[8] A wrong case is one that may overwhelm the system because of political considerations. For example, the complaining party may be correct in alleging a violation, but because of domestic political considerations the violator may not be in a position to comply with WTO rules. In this author's view, such cases are likely to be rare and the WTO system has the strength to deal with them. Even if compliance cannot be assured, the violator still may in a position to right the balance of concessions by taking other compensating action.[9] And even if it cannot, the victimized party at least ought to be authorized to suspend concessions otherwise owed to the violator in order to the right the balance.

Thus the criticisms of the adjudicative approach do not seem to be valid. The basic question remains, however. Will the adjudicative approach lead to better compliance with WTO rules? In this author's view, it is likely that it will for two reasons.[10] First, an adjudicative system discourages rule violations because a potential violator knows it is likely that it will be called to account if it ignores the rules. This is particularly true if counter-balancing action is authorized. In such a case, the violator suffers from its violation and a likely consequence will be internal pressure to end the violation. In the negotiation model, the only detriment to the violator would be unpleasant diplomatic encounters.

Second, because experience shows that panel and Appellate Body reports are usually implemented in the long run, more panel and Appellate Body decisions – which is a likely result of an adjudicative system – will result in clearer definition of and closer compliance with WTO rules. Thus, a more adjudicative system will strengthen the system over time.[11]

This philosophical dispute will probably continue, although it is less pronounced today than it has been at times in the past. The results of the Uruguay Round negotiations clearly put a much more judicial-like system in place. That occurred in large part because the European Union and Japan apparently decided that a more adjudicative system would be desirable as a means of limiting the U.S. tendency to take unilateral trade action on the grounds that the GATT dispute-settlement system was inadequate. The hope was that by strengthening the WTO/GATT system by making it more adjudicative and automatic, the United States would be less able to complain about the system's inadequacies and therefore less likely to act unilaterally. And in return for their agreement to the more adjudicative system, they insisted on a provisions designed to prevent unilateralism. Needless to say, to the extent that the new system is ever perceived not to be effective, the philosophical debate over the desirability of an adjudicative system is likely to resurface.

GATT DISPUTE-SETTLEMENT SYSTEM

Before turning to an in-depth examination of the rules for dispute settlement under the WTO Agreement, it is useful to review the operation of the GATT dispute-settlement system. This is particularly appropriate given that the basis for dispute settlement under the WTO agreements continues to be the basic GATT provision on dispute settlement – GATT Article XXIII. Moreover, given that the GATT system had both successes and shortcomings, it is useful to bear them in mind in considering whether the WTO rules preserve the successes and correct the shortcomings.

1. GATT Article XXIII

Generally speaking, dispute settlement under the WTO Agreement, including dispute settlement under GATS, TRIPS and the side agreements to the General Agreement, is based on the principles of GATT Article XXIII.[12] Article XXIII is the General Agreement's basic dispute-settlement mechanism.[13] Article XXIII:1 provides that the dispute-settlement process may be invoked when one party claims that a benefit accruing to it under the General Agreement has been nullified or impaired by another party or that the attainment of any objective of the General Agreement is being impeded[14] as a result of

> (a) the failure of another contracting party to carry out its obligations under [the General] Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the General] Agreement, or
>
> (c) the existence of any other situation.[15]

The vast majority of complaints brought under Article XXIII have alleged a violation of the General Agreement, paragraph (a), but there have been a few cases based on paragraph (b), which are known as non-violation cases. No successful cases have been based on paragraph (c). It should be mentioned that GATT Article XXII is a general consultation provision and under GATT practice consultations under GATT Article XXII are for the most part considered equivalent to consultations under Article XXIII, i.e., if the consultations fail to settle a dispute, the next phases of dispute settlement may be invoked.

It is important to note that proof of a violation is not sufficient to state a cause of action under Article XXIII. Additionally, it is necessary to show that benefits have been nullified or impaired or the attainment of objectives of the agreement has been impeded. In practice, there has not been a finding of the latter condition. All successful cases have claimed that the violation or measure at issue nullified or impaired benefits. In fact, over time in GATT practice, it became the case that if a violation were established, then nullifica-

tion or impaired would be presumed and no party has ever rebutted that presumption. The presumption has been made explicit in the Dispute Settlement Understanding.[16]

Article XXIII:2, which has been effectively replaced by the DSU, sketches the procedures to be followed in the GATT where consultations fail to resolve a dispute. It provides that when a complaint is brought to the contracting parties, they are to investigate the matter and make appropriate recommendations or rulings. If the contracting parties find that the circumstances are serious enough, they may authorize the suspension of concessions benefiting the respondent to the extent they determine is appropriate.

Article XXIII:2 does not provide for any specific procedures to be used to consider complaints, and it is was evident early in the GATT's history that the contracting parties acting as a group were not well suited to hold hearings and issue findings on disputes. Accordingly, the GATT dispute-settlement system traditionally relied on panels of three to five individuals to hear disputes and issue a report that the contracting parties then usually adopted as their own.[17] The procedures to be followed by the panels and the contracting parties in considering disputes evolved over time and were the subject of number of understandings adopted by the contracting parties. To a considerable extent, these procedures have been carried over into the WTO.

2. **Evaluation of the GATT System**

The operation of the GATT dispute-settlement system can be evaluated from at least three perspectives. First, to what extent did countries bringing meritorious complaints have their rights vindicated? Second, to what extent did the system succeed in clarifying GATT obligations and contributing to the growth of a system of GATT law? Finally, how valid were the various general and specific criticisms that have been made of the system?

(a) ***Successes of GATT Dispute Settlement***

Robert E. Hudec has made a careful statistical analysis of the results of the GATT dispute settlement in an attempt to answer assess the effectiveness of the system.[18] He concludes that the system yielded positive results – full or partial satisfaction for the complainant – in almost 90% of all cases.[19] Interestingly, he found that there was a marked increase in negative outcomes in the 1980s, a period that has often have been considered by many to be one of the more successful periods of the GATT dispute settlement. His analysis indicates, however, that there was a great increase in the volume of disputes considered in the 1980s and that in the first half of the decade, there were many successes. By the end of the decade, the situation had changed and he found an increasing number of cases with negative outcomes, i.e., a respondent had been found to have violated GATT rules but either did not accept the loss (by blocking

adoption of the panel report) or did not implement corrective action to remove the offending measure. Professor Hudec's study ended as of the end of 1989, and it appears that the trend toward more negative outcomes that he identified in the later 1980s became even more pronounced in the early 1990s, in part because of the bringing of more controversial cases into the system and in part because of the dependency of negotiations on some issues. Nonetheless, for most of its history, the GATT system rates quite well in terms of providing for the effective vindication of rights.

The GATT dispute-settlement system also contributed greatly to clarifying GATT obligations. GATT dispute-settlement panels had the occasion to consider all of the basic obligations of the General Agreement and their decisions led to a great refinement of those obligations. Moreover, panel reports frequently cited other panel reports, thereby leading to the creation of a system of precedent that reinforced their interpretations of GATT obligations. While the notion of precedent does not mean that panels never reached conclusions differing from those of prior panels, panels generally followed past panel decisions so long as they were well reasoned and were accepted in the GATT system as correct. Thus from this perspective – the creation of a legal system of relatively stable precedents interpreting and clarifying GATT obligations – the GATT dispute-settlement system was quite successful.

(b) ***Shortcomings of GATT Dispute Settlement***

The principal criticisms leveled at the GATT dispute-settlement system arose from the GATT practice of consensus decision-making. The practice meant that the target of a complaint could delay or block the operation of the dispute-settlement process at several distinct stages. For example, it could refuse to agree to refer the matter to a panel in the first place. Even if such a reference were made, it could delay or block agreement on the identity of the panelists and the panel's terms of reference. If it were not satisfied with the results in the panel's report, it could refuse to join a consensus to adopt the panel's report, thereby leaving the report in limbo. Finally, even if it permitted the adoption of the report, it could refuse to implement the recommendations and not suffer any consequences under GATT rules since it could block authorization of sanctions against it.

While it appears that persistent complainants were generally able to get panel established and composed, the problem of blockage of adoption of panel reports became more serious over time, as already noted by Professor Hudec for the late 1980s. Indeed, only about one-half of the panel reports issued in the 1990s were adopted by the GATT contracting parties. As a consequence, the GATT dispute-settlement system became perceived as being incapable of handling controversial cases, since it was assumed that one of the parties would block adoption of the panel report. This meant that disputes that should have been considered in the system were not brought to

it because of a belief that no positive results could be obtained. As a consequence, one of the major concerns in the Uruguay Round negotiations was to correct these problems of delay and blockage and, as will be seen, the DSU addresses both problems, providing for very strict time limits and what is referred to as "automaticity", which effectively removes the power of any party to block the process.

Despite the shortcomings mentioned, all in all Professor Hudec's analysis, described above, suggests that for a system of dispute settlement between sovereign nations, the GATT system was extraordinarily successful. It is instructive now to turn to the WTO dispute-settlement system and consider how it improves on the GATT system.

WTO DISPUTE-SETTLEMENT SYSTEM

As noted above, an effective dispute-settlement system is critical to the operation of the World Trade Organization. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that function is performed by the Understanding on Rules and Procedures Governing the Settlement of Disputes, usually called the Dispute Settlement Understanding (DSU). As stated in Article 3.2 of the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". In the commercial world, such security and predictability are viewed as fundamental, necessary prerequisites to conducting business internationally.

The DSU is effectively an interpretation and elaboration of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round negotiations.[20] As noted above, these articles were the basis for dispute settlement in the GATT system and, since all of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization rely on GATT Articles XXII and XXIII, or very similar provisions as a basis for dispute settlement, they are the basis for dispute settlement in the WTO system as well.[21] Article XXII provides that one WTO member may request another member to consult with respect to any matter affecting the operation of the agreement. Generally speaking, Article XXIII provides for consultations and dispute-settlement procedures where one member considers that another member is failing to carry out its obligations under the agreement.[22]

There are essentially four phases in the WTO dispute-settlement process: consultations, the panel process, the appellate process and surveillance of implementation. After outlining some of the more important general provisions of the DSU, each of these four phases is discussed in turn.

1. **General DSU Provisions**

(a) ***Applicability of the DSU to covered agreements***

The WTO Dispute Settlement Understanding applies to the so-called covered agreements, which are listed in its Appendix 1. The covered agreements consist of all of the Multilateral Trade Agreements, plus the multilateral Agreement on Government Procurement.[23] The Agreement on Trade in Civil Aircraft is not subject to the DSU rules. There are special or additional provisions on dispute settlement in a number of the covered agreements that are identified in DSU Appendix 2 and those provisions apply to the extent that there is a difference between them and the provisions of the DSU. In disputes under more one agreement, if there is a conflict between the applicable special/additional provisions, the chairman of the DSB (see below) is authorized to resolve the conflict if the parties cannot.

(b) ***The Dispute Settlement Body (DSB)***

The DSU is administered by the Dispute Settlement Body (DSB), which is the WTO's General Council meeting to discharge the responsibilities of the DSB under the DSU. As such, all WTO member countries are members and may participate in the DSB. Under the WTO Agreement, the DSB is authorized to elect its own chair (as opposed to having the General Council chair preside) and has done so to date. In particular, and as discussed in more detail below, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of its recommendations and rulings, and authorize suspension of concessions. The DSU provides that the DSB shall take decisions provided for in the DSU by consensus. As we will see, this consensus requirement is sometimes a reverse consensus requirement in that the DSB is deemed to take a decision unless there is a consensus not to take a decision.

(c) ***The DSU's general principles***

The general philosophy of WTO dispute settlement is set out in Article 3 of the DSU. Among the principles that are enshrined in that article are the following:

First, it is recognized that the system serves to preserve the rights and obligations of members and to clarify the existing provisions of the WTO agreements in accordance with the customary rules of interpretation of public international law. In this regard, it is also noted that the prompt settlement of disputes is essential to the functioning of the WTO and the maintenance of a proper balance between the rights and obligations of WTO members.

Second, it is agreed that the results of the dispute settlement process cannot add to or diminish the rights and obligations

provided in the WTO agreements. In this regard, the DSU explicitly notes the rights of Members to seek authoritative interpretation of provisions pursuant to Article IX of the WTO Agreement, which itself provides that it is the exclusive means for interpreting the WTO Agreement.

Third, several provisions highlight that the aim of dispute settlement is to secure a positive solution to a dispute and that a solution that is acceptable to the parties and consistent with the WTO agreements is clearly to be preferred.

Fourth, although the DSU provides for the eventuality of non-compliance, it is explicitly stated in DSU Article 3.7 that "the first objective of the dispute-settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". Retaliatory action is described as the last resort.

(d) ***Multilateralism and the exclusivity of DSU procedures***

As noted above, part of the compromise in which the European Community and Japan agreed to a more adjudicative dispute settlement system was a commitment on the part of WTO Members to submit disputes to the WTO system and not take unilateral action. This part of the compromise is enshrined in DSU Article 23, which provides in part:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:(a) not make any determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding. . . .

In a 1999 case, a panel rejected an EC claim that Section 301 of the US Trade Act of 1974, the provision used by the US to impose trade sanctions on other countries, was inconsistent with DSU Article 23. In an interesting decision, the panel concluded that on its face, Section 301 was in violation of Article 23, but that statements made in 1994 by the US administration and adopted by Congress and made by the US in the panel proceeding cured that facial violation since the US had committed to act in accordance with its WTO obligations. Neither side appealed.

2. **Consultations**

Under the procedures of the WTO dispute settlement system, the first step in the process is consultations. A Member may ask for consultations with another WTO Member if the complaining Member believes that the other Member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it.[24] The goal of the consultation stage is to enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute and to resolve the matter without further proceedings. As noted above, the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the [WTO] agreements is clearly to be preferred."[25] At this stage, as well as at later stages in the process, there is a possibility of utilizing the good offices of the WTO Director-General or mediation to settle a dispute.[26]

If consultations are requested under Article XXII of the GATT 1994 or the equivalent provision of another WTO agreement,[27] WTO Members with a substantial trade interest may request to be joined in the consultations as third parties.[28] If the Member asked to consult agrees that the claim of substantial interest is well-founded, the request to join will be honored. If, however, consultations are requested under Article XXIII (or its equivalent), there is no provision for third parties to join in any of the consultations.

The manner in which the consultations are conducted is up to the parties. The DSU has no rules on consultations beyond that they are to be entered into in good faith and are to be held with 30 days of a request.[29] Typically, they are held in Geneva and involve capital-based officials, as well as the local WTO delegates of the parties. During the consultations, both parties are likely to try and learn more about the facts and the legal arguments of the other party. Written questions may be exchanged and written answers requested. Despite the fact that the structure of consultations is undefined and there are no rules for conducting them, consultations lead to settlements (or at least the apparent abandonment of a case) in respect of a significant number of consultation requests. For example, of the first 100 consultation requests (those made through August 1997), 50 resulted in the establishment of a panel. While a few more of these still pending consultation requests may eventually end up before a panel, this statistic suggests that roughly one-half of the cases brought are disposed of, one way or another, at the consultation stage.

The lack of defined rules for the consultation process has led to a number of proposals for modifying it. Essentially, these proposals can be divided into two categories. On the one hand, there are those that would make the process more formal – a sort of pre-trial discovery mechanism – where parties would have the

opportunity to demand written responses from each other to questions concerning the matter. On the other hand, there are proposals that would attempt to introduce alternative procedures designed to promote settlements, such as improved mediation alternatives. For me, the latter type of proposals is preferable. Promoting settlements in the WTO dispute settlement system is desirable for a number of reasons: It makes the best use of the limited resources of the system; it is consistent with the DSU directive that the preferred solution to a dispute is a mutually agreed settlement; and it reflects the fact that the consultation process is essentially a political process. While the WTO system is becoming ever more legal or judicial in nature, it is important to distinguish those aspects of the system, such as the consultation stage, which are essentially that political in nature and to avoid "over-legalizing" them. Turning the consultation process into a pre-trial discovery mechanism would likely undermine chances of settlement, as the process in practice would likely be directed exclusively at preparing for the panel stage of the process, which would promote an adversarial approach. It seems that such a result would inevitably result in cases that could have been settled ending up before panels, thereby thwarting the whole purpose of the consultation requirement. Given this purpose, promoting and making available alternative dispute resolution approaches – such as mediation – during the consultation process would seem to be the best way to "reform" or "improve" the consultation process.

3. **The Panel Process**

(a) ***Establishment of a panel***

If consultations fail to resolve the dispute within 60 days of the request for consultations, the complaining WTO Member may request the DSB to establish a panel to rule on the dispute.[30] Pursuant to the DSU, if requested, the DSB is required to establish a panel no later than the second meeting at which the request for a panel appears on the agenda,[31] unless there is a consensus in the DSB to the contrary.[32] Thus, unless the Member requesting the establishment of a panel consents to delay, a panel will be established within approximately 90 days of the initial request for consultations.[33] It should be stressed, however, that parties are not required to request a panel at any particular point in time and that in most cases, a panel is not requested until considerably more than 60 days after the start of consultations.

(b) ***Selection of panelists***

After the panel is established by the DSB, it is necessary to select the three individuals who will serve as panelists.[34] The DSU provides that panels shall be composed of

> "well-qualified governmental and/or non-governmental individuals, including persons who have served on or

> presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."[35]

These criteria could be roughly summarized as establishing three categories of panelists: government officials (current or former), former Secretariat officials and trade academics or lawyers. It is specifically provided that panelists shall not be nationals of parties or third parties, absent agreement of the parties.[36] It is also specified that in a case involving a developing country, one panelist must be from a developing country (if requested).[37]

The DSU provides for the creation of an indicative list of individuals qualified for panel service. Members have followed varying practices in respect of nominations to the list – most nominate non-governmental individuals, but many also nominate non-Geneva governmental individuals and some even nominate Geneva-based officials. Most Members do not nominate anyone.

Pursuant to the DSU, the WTO Secretariat suggests the names of possible panelists to the disputing parties. The names may, but often do not, come from the indicative list. The DSU allows the parties to reject a Secretariat proposal only for "compelling reasons,"[38] but in practice the parties have rather free rein to object since their agreement to the composition of the panel is necessary, unless the Director-General of the WTO is requested to appoint the panel. The practice of frequent objections means that the panel selection process is often rather slow and often takes one or two months and even longer in some cases.

If the parties cannot agree on the identity of the panelists within 20 days of the panel's establishment, any party to the dispute may request the WTO Director-General to appoint the panel, which he is required to do within ten days of the request.[39] Over time, it has become more common for the Director-General to appoint panels. In recent years, he has appointed almost one-half of the panels.[40] It should be noted, however, that it is common for the parties to have agreed upon one or two of the panelists on the panels appointed by the Director-General.

In considering the characteristics of the individuals actually chosen for panel service, in appears that the vast majority of panelists are current or former government officials. Panelists have come from a wide range of Members (about 40 in all to date). Interestingly, most panelists are not on the indicative list when they are first selected. In terms of experience, it appears that more than one-half of the WTO panelists selected to date had served on a previous GATT or WTO panel at the time of their selection.

(c) ***Rules of conduct for panelists and secretariat staff***

The DSU provides that panelists serve in their individual capacities and that Members should not give them instructions or seek to influence them.[41] In addition, in December 1996, the DSB adopted rules of conduct applicable to participants in the WTO dispute settlement system.[42] There were no such rules in the past. The rules require that Appellate Body members, panelists, arbitrators, experts and Secretariat staff assigned to assist in the dispute settlement process "shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings." To ensure compliance with the rules, such persons are to disclose "the existence or development of any interest, relationship or matter that person could reasonable be expected to know and that it likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality." Disputing parties have the entitlement to raise an alleged material violation of the rules, which if upheld, would further result in the eventual replacement of the challenged individual.

(d) ***The panel's functions and terms of reference***

Unless the parties agree upon special terms of reference, which rarely occurs, a panel's terms of reference are determined by the complaining party's request for a panel. The DSU requires that such a request be in writing and identify the specific measures at issue and provide a brief summary of the legal basis of the complaint.[43] The standard terms of reference provided for in the DSU state that the panel shall examine, in light of the relevant WTO agreements, the matter referred to the DSB by the complainant and make such findings as will assist the DSB in making the recommendations or in giving the rulings provides for in those agreements.[44]

More generally, DSU Article 11 provides that a panel shall make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant WTO agreements.[45]

(e) ***Panel proceedings***

A panel normally meets with the parties shortly after its selection to set its working procedures and time schedule.[46] The standard proposed timetable for panels makes provision for two meetings between the panel and the parties to discuss the substantive issues in the case.[47] Each meeting is preceded by the filing of written submissions. In the case of the first meeting, the complainant files first and the respondent is expected to file two or three weeks thereafter.[48] Rebuttal submissions filed after the first meeting are typically filed simultaneously.

(f) ***Evidentiary issues***

To evaluate a complaint, panels must follow certain basic evidentiary rules. The most basic rule concerns the assignment of the burden of proof. Generally speaking, the decisions of the Appellate Body have held that the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, then the burden shifts to the other party to rebut the presumption.[49] The Appellate Body has also spoken in terms of the need for a claimant to establish a *prima facie* case.

In the GATT dispute settlement, it was often the case that factual issues were not that important. The basic issue was typically whether a particular governmental measure violated GATT rules and, as noted above, if it was found to do so, nullification or impairment of benefits was presumed. To date, comparatively more WTO disputes have involved disputed factual issues. In order to establish facts, panels normally ask oral and written questions to which the parties are expected to respond. The parties often bring government experts versed in the relevant field to panel meetings. Some parties have submitted affidavit evidence to establish facts. By and large, the fact-finding procedures of panels are relatively less sophisticated that those of national courts, although it can be expected that more sophisticated fact-finding techniques will develop as the need for fact-finding becomes more acute.

One area in which panels have already become more sophisticated is in the use of experts in scientific matters. In this regard, the DSU provides that if a panel deems it appropriate, it may consult either individual experts or form an expert review group to advise it on technical and scientific issues.[50] Panels have consulted multiple experts on an individual basis in the three cases arising under the SPS Agreement and in one case involving environmental issues. In each case, the panel asked the parties to suggest possible experts and sought information from the relevant international scientific agency. The parties were also invited to comment on the questions that the panel proposed to ask the experts. Following receipt of the experts' answers, the parties had the opportunity to comment in writing on the answers and an "experts' meeting" was held at which the panel and the parties could question the experts.

(g) ***Standard of review***

One basic issue faced by panels is what sort of standard of review should be applied in reviewing challenged measures. Of course, in some cases that issue is not particularly significant. The only issue is whether the measure violates a WTO rule. But in an increasing number of cases, the assessment of a measure's consistency with WTO rules involves an assessment of the justification for a

measure, for example, of whether a measure is "necessary" within the terms of the exception contained GATT Article XX or whether a measure is "based on" or rationally related to a risk assessment in the case of an SPS (health) measure. In such a case, to what extent should a panel or the Appellate Body defer to the challenged government's assessment of necessity or rationality?

Although the DSU gives no guidance on this issue (beyond directing panels to make an objective assessment of the matter before them), the Antidumping Agreement provides:[51]

> "(i) [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

These provisions, strongly urged by the United States, are obviously designed to cabin the discretion of panels and reduce the likelihood that they will overturn specific administrative decisions or find national rules to be incompatible with WTO rules. The provisions are worded in such general terms, however, that it remains to be seen whether they will have much impact on the results of panel decisions.[52] A Uruguay Round Ministerial Decision provided that the use of this Antidumping Agreement standard would be reviewed after three years to consider whether it is capable of general application. However, although the issue was raised in the 1998-1999 review of the DSU, there seemed to be little interest on the part of Members in extending the scope of the provision to other agreements.

To date, it is difficult to discern a clear view on the part of the Appellate Body as to how deferential panels should be in reviewing governmental measures. While it cited with seeming approval the principle of *in dubio mitius*[53] in one case (*EC Hormones*), it has in other cases seemed to afford little deference to government decisions.

(h) ***The interim report***

After completing the fact-gathering and argument phase, the panel issues a draft of the "descriptive part" of its report, which summa-

rizes the arguments of the parties and on which the parties may submit comments.[54] Following receipt of comments, the panel issues its "interim report", which contains the descriptive part as revised, as well as the panel's findings and recommendations. The interim report becomes the final report unless one of parties requests the panel to review "precise aspects" of the report.[55] If requested, the panel is required to hold an additional meeting with the parties to hear their views on those aspects of the interim report. Parties almost always comment on some aspects of the interim report. However, it is not uncommon for parties to forego an additional meeting with the panel and make their comments in written form only.[56] The extent of those comments varies widely. Some parties comment only on factual issues, saving their legal arguments for appeal. Others treat the interim review process as a mini-appeal in which they raise a multitude of factual and legal issues. The prevailing party typically suggests ways to strengthen the panel's reasoning. In light of the comments received, the panel then issues its final report. To date, no final report has reached a different result than an interim report, although some significant changes in wording have been made from time to time.

(i) ***The final report***

Several aspects of panel reports merit mention. First, it has become common in WTO dispute settlement cases for the complaining party to assert a broad range of violations, often under several WTO agreements. Considering that the purpose of the WTO dispute settlement is to resolve disputes and not make law, panels often exercise what is referred to as judicial economy. That is to say, they often decide fewer than all of the issues raised by a complainant. This practice has been approved by the Appellate Body, with the understanding that the panel resolves the dispute before it.

Second, as noted above, if a panel finds that a WTO rule has been violated, it typically cites the DSU presumption that there has been a nullification or impairment of benefits. Third, the standard practice of panels, which is specifically provided for in the DSU, is to recommend that any measure found to be in violation of WTO rules be brought into conformity with those rules. Panels are authorized to make suggestions on how that recommendation could be implemented, but panels tend not do so. Typically, the responding party opposes requests for suggestions and argues that it should be allowed to exercise freely its own discretion in deciding how to bring an inconsistent measure into conformity with the relevant agreement(s).

(j) ***Adoption of the panel report***

After its circulation to WTO Members, the final report is referred to the DSB for formal adoption, which is to take place within 60 days unless there is a consensus not to adopt the report or an appeal of

the report to the WTO Appellate Body. This so-called negative consensus rule is a fundamental change from the GATT dispute settlement system where a positive consensus was needed to adopt a panel report, thus permitting a dissatisfied losing party to block any action on the report. Now, as long as one Member wants the report adopted, it will be adopted. However, while the losing party cannot block adoption of a report, it has a right of appeal. If a panel report is appealed, after completion of the appeal, it is adopted as affirmed, modified or reversed by the Appellate Body.

(k) ***Special problems of dispute settlement***

(i) *Third-party rights*

Non-party WTO Members may participate in the dispute settlement process to a limited degree as third parties if they have a substantial interest in the matter.[57] It is generally up to the individual Member to decide for itself if it has a substantial interest, and it is not uncommon for a Member to become a third party because of a "systemic" interest in a case. As a third party, the Member receives the first written submissions of the parties and has the opportunity to make both a written and oral submission to the panel. The oral submission is at a special session of the panel's first substantive meeting with the parties. In some cases, interested parties has sought and obtained expanded third-party rights. For example, in the *Bananas* case, the panel permitted third parties to attend both of its substantive meetings with the parties and make statements at both meetings. Whether to grant such expanded rights is up to the panel. Third parties before a panel may participate as third participants in any appeal. Proposals to expand third-party rights are discussed below.

(ii) *Multiple complaints*

The DSU makes special provision for the multiple complaints. If more than Member asks for a panel on the same matter, a single panel may be established. Where that is not feasible (e.g., the requests are made at different times), the DSU provides that, to the greatest extent possible, the same individuals should serve as panelists on the related panels and their timetables should be harmonized. In practice, these provisions have been utilized frequently, although in some cases, harmonization is simply not possible because of the time difference between the starting dates of the panels.

(iii) *Confidentiality*

Except for the attendance to a limited degree of third parties, panel proceedings are not open to non-parties. Parties may make their own submissions to a panel public and if a party does not do so, it may be requested to provide a non-confidential summary of

its submissions that can be made public.[58] As discussed below, there is interest in expanding access to the system, particularly for other Members, but also for interested non-governmental entities (i.e., NGOs and the public at large).

(iv) *Amicus submissions*

One exception to the rule that the WTO dispute settlement system is open only to WTO Members is embodied in two Appellate Body decisions dealing with the possibility of non-Members filing amicus curiae (friend of the court) submissions to panels and the Appellate Body. The Appellate Body has ruled on the basis of DSU Article 13, which authorizes panels to seek information from any source, that panels may accept unsolicited submissions from non-Members. It reached the same conclusion with respect to its own powers. There are no rules dealing with this possibility. It appears that at least one panel accepted an amicus submission, while another rejected such a submission as untimely since it had arrived after the parties had made their submissions. In the case of the Appellate Body, while it found that it had the power to accept an amicus submission, in the actual case it did not do so because it was unnecessary. Given the possibility, it seems likely that such submissions will become common.

(v) *Provisions for developing countries*

There are a number of DSU provisions that grant special rights to developing countries. For example, it provides the possibility (used only once under the GATT) of an expedited process (art. 3.12), that special consideration should be given to developing countries in consultations (arts. 4.10, 12.10) and in the panel process (arts. 8.10, 12.10, 12.11) and that account should be taken of developing country interests in the surveillance phase (art. 21.2, 21.7, 21.8). There are also special provisions for least developed countries (art. 24), although none of those countries has been involved in the dispute settlement proceedings to date. They provide that particular consideration is to be given to the special situation of the least developed Members and other Members are expected to exercise due restraint in bringing cases against them.

For the most part, these special procedures have not been much used to date, except for the right of developing country parties to request that one member of a panel be from a developing country. Possible reforms to deal with the problems of developing countries in dispute settlement are discussed in the concluding chapter.

(vi) *Role of the Secretariat*

The WTO Secretariat is charged by the DSU with the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matter dealt, and of providing secretarial

and technical support. The Secretariat is also charged with assisting developing country Members in respect of dispute settlement and conducts training course in that regard. The Appellate Body has its own secretariat, which is separate from the WTO Secretariat.

The Appellate Process

(a) ***Structure of the Appellate Body***

The possibility of an appeal is a new feature of the WTO dispute settlement system. The Appellate Body consists of seven individuals, appointed by the DSB for four-year terms. The first seven members of the Appellate Body were James Bacchus (US), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Florentino Feliciano (the Philippines), Said El Naggar (Egypt), Julio Lacarte.Muro (Uruguay) and Mitsuo Matsushita (Japan). Ehlermann, Feliciano and Lacarte-Muro were deemed to have initial two-year terms and were reappointed to four-year terms on expiration of those initial terms (until December 2001). Bacchus and Beeby were re-appointed in 1999 (until December 2003), however, Beeby died in March 2000 and was replaced by Yasuhei Taniguchi (Japan). El Naggar and Matsushita were replaced by Georges Abi-Saab (Egypt) and A.V. Ganesan (India). Only one reappointment is permitted.

The Appellate Body is authorized to draw up its own working procedures, in consultation with the Chairman of the DSB and the Director-General. These procedures regulate the operation of the Appellate Body and process by which appeals are made and considered.

The Appellate Body hears appeals of panel reports in divisions of three, although its rules provide for the division hearing a case to exchange views with the other four Appellate Body members before the division finalizes its report.[59] The members of the division that hears a particular appeal are selected by a secret procedure that is based on randomness, unpredictability and the opportunity for all members to serve without regard to national origin.[60] The Appellate Body is required to issue its report within 60 (at most 90) days from the date of the appeal,[61] and its report is to be adopted automatically by the DSB within 30 days, absent consensus to the contrary.

(b) ***Role and effect of the Appellate Body***

The Appellate Body's review is limited to issues of law and legal interpretation developed by the panel.[62] However, the Appellate Body has taken a broad view of its power to review panel decisions. It has the express power to reverse, modify or affirm panel decisions,[63] but the DSU does not discuss the possibility of a remand to a panel. Partly as a consequence, the Appellate Body has

adopted the practice, where possible, of completing the analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning. This avoids requiring a party to start the whole proceeding over as a result of those modifications.[64]

There have been [26] Appellate Body reports adopted to date. In four cases, the panel was upheld; in one case, it was reversed. In the remaining 21 cases, the Appellate Body has modified, sometimes extensively, the panel's findings. In all but one of those 21 cases, however, the basic finding of a violation reached by the panel has been upheld, albeit sometimes to a different degree and/or on the basis of quite different reasoning.

It is probably much too early to judge an institution that has been in operation only four years. Yet a number of points may be made. First, although the Appellate Body has never articulated a standard of review that it will apply on appeals of panel reports, it is fair to say that it has engaged in fairly intensive review of such reports. In doing so, it has in general left its stamp clearly on all areas of WTO law that have been appealed. Generally speaking the Appellate Body tends to rely on close textual interpretation of the WTO provisions at issue, stressing that a treaty interpreter must look to the ordinary meaning of the relevant terms, in their context and in light of the object and purpose of the relevant agreement (the requirement of Article 31 of the Vienna Convention of the Law of Treaties) and must not interpret provisions so as to render them devoid of meaning. The Appellate Body has expressed the need to respect due process and procedural rights of Members in the dispute settlement process, but by and large it has recognized considerable discretion on the part of panels, which has led it in the end to reject most procedural/due process challenges. On the whole, it is difficult to characterize the Appellate Body as being more or less deferential to Member discretion than panels. While it has cut back on the scope of panel rulings in some cases (*EC-Hormones*, *Canada-Dairy*), it has significantly expanded the scope of liability in others (*EC-Bananas III*, *Canada-Periodicals*).

Overall, to date there seems to be general satisfaction with the overall performance of the Appellate Body and none of the proposals in the 1998-1999 review of the DSU (discussed below) proposed any fundamental change to the Appellate Body or the way it would work, except for the possibility of extending the scope of its review powers and permitting it to remand cases to the original panel for reconsideration in light of its decision.

Surveillance of Implementation

The final phase of the WTO dispute-settlement process is the surveillance stage. This is designed to ensure that DSB recommendations (based on adopted panel/Appellate Body reports) are implemented. As noted above, if a panel finds that an agreement has been violated, it typically recommends that the Member

concerned bring the offending measure into conforming to its WTO obligations.[65] While a panel may suggest ways of implementation, it is ultimately left to Member to determine how to implement.[66]

Under the surveillance function, the offending Member is required to state its intentions with respect to implementation within 30 days of the adoption of the applicable report(s) by the DSB. If immediate implementation is impractical, a Member is to be afforded a reasonable period of time for implementation.[67] Absent agreement, that period of time may be set by arbitration. The DSU provides that, as a guideline for the arbitrator, the period should not exceed 15 months.[68] In the first six cases, the reasonable periods of time, whether set by arbitration or agreement, happened to be 15 months. In the next ten, non-export subsidy cases, the median time was 10 months. Starting six months after the determination of the reasonable period of time, the offending Member is required to report to each regular DSB meeting as to its progress in implementation.[69]

If a party fails to implement the report within the reasonable period of time, the prevailing party may request compensation.[70] If that is not forthcoming, it may request the DSB to authorize it to suspend concessions (i.e. take retaliatory action) owed to the non-implementing party.[71] DSB authorization is automatic, absent consensus to the contrary, subject to arbitration of the level of suspension if requested by the non-implementing Member.[72] To date, suspension of concessions has been authorized in two cases – at the request of Ecuador and the United States vis a vis the European Community in respect of the *Bananas* case;[73] at the request of Canada and the United States vis a vis the European Community in respect of the *Hormones* case. In each case, the level of suspension was set by arbitration.[74] Suspension of concessions is viewed as a last resort and the preference is for the non-implementing Member to bring its measure into conformity with its obligations.[75]

The above-described rules on suspension of concessions work without problem when it is agreed that there has been no implementation. However, if there is a disagreement over whether there has been satisfactory implementation, the provisions of the DSU do not work harmoniously. On the one hand, Article 21.5 of the DSU provides that such a disagreement shall be referred to the original panel, where available, which shall issue its report in 90 days. It is unclear whether there is a requirement for consultations prior to such referral and whether the DSB must make the referral. Likewise it is not clear whether there is a right of appeal. Article 21.5 refers to using "these dispute settlement procedures", which arguably suggests that all of these steps may be necessary (although unlike the case of the panel process, Article 21.5 does not provide that these other steps should be expedited).

At the same time, Article 22.2 of the DSU provides that if a

Member fails to bring its nonconforming measure into compliance, the DSB must authorize (if requested and absent consensus to the contrary) the suspension of concessions within 30 days of the expiration of the reasonable period of time. An Article 21.5 proceeding would normally not be completed within 30 days of the expiration of the reasonable period of time. As a consequence, a number of questions arise. Can the procedures be followed simultaneously or must the Article 21.5 procedure precede the Article 22 procedure? Can the deadline for DSB authorization of suspension pursuant to the negative consensus rule be suspended until completion of an Article 21.5 proceeding? Would the right to a decision absent negative consensus still apply? These issues are not clearly dealt with in the DSU and became quite controversial in the *Bananas* case. As a result, as explained below, the 1998-1999 review of the DSU focused on these issues.

Additional DSU Provisions

(a) ***General rules on timeframes***

The DSU establishes a number of benchmarks for completion of various stages of the dispute settlement process. These are deigned to prevent the delays that had led to criticism of the GATT system. For panels, the DSU sets as a goal that the final report should be issued to the parties within six months of the panel's composition[76] and that, at the latest, the report should be circulated to all Members within nine months of the panel's establishment.[77] In fact, most panel reports are not circulated within that time period. While failures to meet the nine-month target have often involved cases where the panel felt it necessary to have recourse to outside experts, where there were translation delays and where the cases were very complex, the frequency with which the target is missed suggests that inadequate resources are devoted to the dispute settlement system, an issue discussed below.

As noted above, the Appellate Body report is to be circulated within at most 90 days of an appeal. To date, the Appellate Body has missed that deadline only in a couple of cases.

There are also time-frames set for the time by which panel and Appellate Reports are to be adopted and the time by which the reasonable period of time for implementation is to be set. To the extent that panels do not meet the goals mentioned above, these other time-frames will also not likely be met.
For some types of cases – notably cases involving subsidies and government procurement – there are expedited dispute settlement procedures provided for.

(b) ***Non-violation and situation complaints***

The DSU contains special rules for non-violation and situation complaints. For non-violation cases, complaining parties are

required to present a detailed justification in support of their complaint. In the *Japan-Film* case, the panel ruled that this does not establish a higher evidentiary standard. Also, since the measure at issue in a non-violation case does not violate WTO rules, there is no obligation to withdraw. Rather, a panel recommends that the Member concerned make a satisfactory adjustment. As a consequence, it is provided that compensation may be a final settlement of the dispute.

There have not been many non-violations cases initiated and only a few examples of successful cases. In the last 40 years, there has been only one successful case, which involved the US complaint that the EC subsidies on oilseeds production nullified and impaired the zero tariff-binding that the US had negotiated with the EC on oilseeds. In the WTO case, there has been only one case, the *Japan-Film* case, that prominently featured a non-violation claim and the complainant was unsuccessful.

The very concept of non-violation cases remains controversial. Why should a Member be held to provide compensation for doing something that is WTO-legal? In general, however, it is probably useful to have such a mechanism to protect against flagrant evasions of commitments.

So-called situation complaints, which are based on GATT Article XXIII:1 (c), are given very special treatment in the DSU. There has never been a case successfully brought on such grounds, and it seems likely that there will never be such a case. The DSU rules provide that pre-DSU rules apply with respect to the adoption of the report, for example, it may be blocked by the losing party.

OPERATION OF THE WTO SYSTEM TO DATE

The WTO dispute-settlement system has been quite active since the founding of the WTO on January 1, 1995. As of April 2001, there had been more than 225 consultation requests. It appears that roughly one-half of these cases were resolved by the parties without the need for recourse to the panel process.

There are three aspects of the operation of the dispute settlement system that merit comment: first, the continued active use of the system; second, the growth in the use of compliance proceedings; and third, the system's overall implementation record.
The WTO dispute settlement system continues to operate at an increasing level of activity, as the following table of panel/Appellate Body reports adopted on a year-to-year basis demonstrates:

Year	*Reports adopted*	*Compliance reports adopted (including suspension arbitrations)*	*Total*
1995	-	-	-
1996	2	-	2
1997	5	-	5
1998	11	-	11
1999	9	3	12
2000	14	6	20
2001 (April 5)	8	-	

As of mid-April 2001, there were eight active cases at the panel or Appellate Body stage, plus five cases in the panel composition stage. In addition, there were five active compliance panels. Thus dispute-settlement activity in 2001 should be at least on a par with 2000. This highlights the need to ensure adequate resources to run the system.

Second, as is evident from the above statistics, there is an increasing resort to compliance proceedings, which is probably not a desirable development. It suggests that some WTO members are making only minor changes to measures found to be WTO-inconsistent, perhaps hoping that they will be able to postpone full compliance until the complaining member completes a second round of dispute settlement proceedings.

Third, the system continues to have a strong overall implementation record. As of early April 2001, panel and/or Appellate Body reports had been adopted in 49 cases. In seven cases, no implementation was required; in nine cases the period for implementation had not expired. Of the remaining 33 cases, implementation has occurred in 24, or approximately 75% of the cases.

On the nine problematic cases: two have been preliminarily settled (*EC Bananas*, at long last as of 11 April 2001, and *Japan Agricultural Products*); four are in compliance proceedings (*US Foreign Sales Corporations (FSC)*, *US Shrimp*, *Canada Dairy* and *Mexico HFCS*); and one is in negotiations (*Turkey Textiles*, the time for implementation having expired only recently).

Thus, for the moment, only two cases present long-term compliance problems: *EC Hormones,* where non-compliance was conced-

ed in 1999 and the US and Canada have taken retaliatory action; and *Brazil Aircraft*, where Canada has started a second compliance proceeding (and where Brazil has initiated a new panel proceeding against Canada in the same sector). While continued non-settlement of these two cases is unfortunate, they are the exceptions to an otherwise strong record in compliance. The existence of such unsettled cases has raised the question, however, of whether the remedies available under WTO rules need to be improved. It can be argued that the current structure of compliance proceedings encourages foot-dragging and that the ultimate WTO remedy for compliance – "retaliation" through trade sanctions – may not always be effective.

1998-1999 REVIEW OF THE DSU

At the time that the Uruguay Round negotiations were concluded on December 15, 1993, Ministers decided to

> "[i]nvite the WTO Ministerial Conference to complete a full review of dispute settlement rules and procedures under the [WTO] within four years of the entry into force of the [WTO Agreement], and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures".

When the DSB was unable to complete the review by the end of 1998, the review was extended until the end of July 1999. At that time, no agreement could be reached on any action and the review ended. Although many proposals and comments were made in the review process, it appeared that in the main most Members were generally satisfied with the operation of the WTO's dispute settlement system, except perhaps for two matters: first, a perceived need to clarify the ambiguous relationship of Articles 21.5 and 22.6 and second a desire to extend third-party rights.

Prior to the end of the review and thereafter, a small group of Members with interests in the DSU worked on developing a package of amendments to the DSU for adoption at the Seattle Ministerial. This work culminated in a proposed amendment co-sponsored by Canada, Costa Rica, Czech Republic, Ecuador, the EC and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela.[78] The principal part of the proposed amendment was a modification of Articles 21 and 22 to clarify the relationship between so as to avoid the problems that arose in the *Bananas* case because of the split between the EC and the US as to how those articles should be interpreted. As a general proposition, the sponsors of the amendment aimed at establishing a clear sequence of procedures to be followed at the expiration of the reasonable period of time for implementation in the event that there was a dispute over implementation. Since providing for such a sequence required an

overall lengthening of the time for completing a typical case and since there was a desire not to lengthen the overall process, a number of adjustment were made in the consultation and panel stages to reduce the time devoted thereto. These changes are set out in more detail below, along with several additional, unrelated changes contain in the proposed amendment.

1. Changes to DSU Articles 21 and 22

Under the proposed amendment, the requirement that a Member report on the status of its implementation of DSB recommendations is strengthened. The first report is due 6 months after the adoption of the panel/Appellate Body report (as opposed to 6 months after the determination of the reasonable period of time). In addition, there is a new requirement of a report to be made upon compliance (including also a report at least 20 days before expiration of the reasonable period of time, if there has been compliance at that time), which is to include the text of the relevant measures that have been taken to comply.

If there is a disagreement over compliance, the disagreement will be referred to a compliance panel (the Appellate Body, if the underlying panel report had been appealed, or the original panel, it had not been appealed). The compliance panel is to submit its report within 90 days of the referral and the report is to be adopted at a DSB meeting held 10 days thereafter, absent a consensus to the contrary. If the concerned Member is found not to have brought the measure into conformity, the prevailing party may request authorization to suspend concessions at that same meeting.

Article 22 would be revised to make it clear that a request to suspend concessions can be made only if a Member fails to indicate that it will comply with the DSB recommendations, fails to report on implementation as described above or is found not to have complied by a compliance panel. Thus, it is made clear that if there is a disagreement over implementation, there must be a compliance panel finding of non-implementation before suspension of concessions may be authorized. The period for arbitration of the level of suspension is expanded from 30 to 45 days and more detail is added as to how the arbitrators are to approach their task of ensuring that the level of suspension does not exceed the level of nullification or impairment. The proposed amendment had two alternative texts dealing with the question of whether a party suspending concessions could change the products subject to the suspension. Under one variant, only adaptations of a technical nature would be permitted; under the other, such changes would be permitted, subject to review by the arbitrator and approval of the DSB (by reverse consensus).

Article 22 would also be amended to add a procedure by which a Member, who had failed to comply with DSB recommendations and was therafter subject to a suspension of concessions, could

implement a new measure and request that the authorization to suspend concessions be terminated. The authorization is to be with-drawn in such cases unless the complaining party objects, in which case the matter is referred to a compliance panel to consider whether the new measure implements the DSB's recommendations. The authorization must be withdrawn and the suspension lifted if the compliance panel finds that the new measure is not WTO-inconsistent and complies with the DSB's recommendations.

2. **Timing adjustments**

The foregoing compliance procedures would enable a determined complainant to obtain authority to suspend concessions 145 days (four and three-quarters months) after the expiration of the reasonable period of time, as opposed (in the view of some, including the US) to 60 days under the original DSU rules. In order to prevent the overall lengthening of the dispute settlement process, the proposed amendment made a number of adjustments to offset the additional 85 days added at the end of the process. The consultation requirement was cut from 60 to 30 days (saving 30 days), the number of DSB meetings to have a panel established was cut from two to one (saving at least 10 days), the time allotted for a panel's preparation of the interim report was cut by two weeks (saving 14 days), the time for the interim review process was cut from 5 weeks to 20 days (saving 15 days) and the period between the circulation of the report to the parties and to WTO Members generally was cut by 18 days. Thus, there was an overall time savings of 87 days.

3. **Third-party rights**

In the third major change proposed, the rights of third parties would be significantly expanded. At present, they receive the first round of party submissions and attend a special session of the panel devoted to hearing their oral statements. Under the proposed revisions, third parties would receive all submissions to a panel prior to the issuance of the interim report and would be able to attend all panel sessions with the parties.

4. **Other proposed changes**

There were a number of other changes proposed, including a strengthening of the requirement to notify settlements, a provision allowing parties to agree to extend any time limit in the DSU, a requirement that public versions of submissions must be made available within 15 days (no time is now specified) and the substitution of the word "shall" for "should" in two provisions according differential treatment to developing countries.

5. Current status of the proposed amendments

No action was taken on the proposed amendments at the Seattle Ministerial, although it appeared that they had reasonably broad support. They were re-proposed in the General Council in early 2001. There remain several major sticking points. First, there are some concerns about the shortening of the consultation and panel stages, but these concerns are largely felt by developing countries and the proposal would arguably give them as much or, in the case of time for filing a respondent's brief or commenting on the interim report, more time than at present. The problem is that in some cases, they would need the agreement of the other party, which is to give sympathetic consideration to their position. This is, of course, less certain than a provision that clearly grants developing countries additional time if they desire it. Second, some important WTO Members would like additional issues treated in any amendment. For example, the US would like to see improved transparency; the EC would like to see restrictions on the extent to which a Member who has suspended concessions can the product list on which concessions are suspended.

Under the WTO Agreement, to amend the DSU requires a consensus decision of the Ministerial Conference or General Council.[79] Such an amendment has immediate effect. Thus, such an amendment could be implemented quite quickly if there were the will to do so. All of the proposed amendments seem worthwhile. While it is unlikely that the new time limits will be respected in all cases (indeed they often will not be), there is no harm in establishing hard-to-reach goals for the system (as long as they are understood to be goals), particularly if such time limits are necessary to an agreement on clarifying the Article 21/22 relationship.

ADDITIONAL REFORM PROPOSALS

Whatever may become of the Seattle proposal to amend the DSU, there are a number other reforms that should be considered. There are six in particular: (a) the need to increase the WTO's resources for processing disputes; (b) consideration of improving settlements in the consultation phase (c) the need to professionalize panels; (d) the need to improve the transparency of the system and related access issues; (e) the need to improve the surveillance process and provide more effective remedies and (f) the need to improve the capacity of developing-country Members to participate more effectively in the system. In the formal DSU review, the first issue was largely ignored, while the other three have only been introduced.

1. WTO resources for processing disputes

The increase in dispute settlement activity in the WTO system compared to the GATT system can be seen the following statistics:

Pages of panel findings:[80]	1986-1995 (GATT)	855 pages or 86 pages/year
	1996-1999 (WTO)	1509 pages or 377 pages/year
	1999 (WTO)	693 pages

This increase is explained not so much by an increase in the number of disputes (although that has taken place as well) but in their complexity. Claims under more than one agreement were not possible in the GATT system; in the WTO system one-quarter of the cases involve three or more agreements, while another one-quarter involve two agreements. Moreover, the existence of the Appellate Body has tended to make panel reports longer and more analytical and to give panels an impetus to consider more of the claims made, lest a modification of the panel report by the Appellate Body result in the need to start the case over.

While there has been an increase in Secretariat resources devoted to dispute settlement (from panel secretaries to legal officers to translators), the increase has not kept pace with the increase in the workload. For example the staff of the WTO Legal Affairs Division, which has the principal responsibility for providing legal advice to panels, has doubled since 1991, but the panel workload has increased much more. Moreover, the burden placed on panelists has greatly increased in terms of the time that they must devote to a case (including the possibility of subsequent related proceedings) and the range of issues that they must deal with (such as procedural fairness claims). While the system continues to function, it is clear that problems of scarce resources are leading to delays and WTO Members may soon be forced to confront the reality that if more resources are not devoted to the system, its effectiveness may decline significantly. To date, they have not done so.

2. **Improving the prospects of settlement in consultations**

The consultation requirement is a fundamental component of the WTO system and its basic purpose is clear: the promotion of mutually acceptable solutions (DSU art. 3.7). The requirement is clearly a useful one. If parties are not forced to consider formally complaints against one another before proceeding to the "legal" part of the dispute settlement process, it seems clear that panels will be established needlessly. The experience of the WTO dispute settlement system to date bears this out. Although the number of formally settled matters is fairly limited, it appears that for one reason or another (formal or informal settlements, lack of interest, realization of a weak position or initial factual misunderstandings), roughly one-half of the consultation requests do not result in the establishment of panels. Without a consultation requirement, it seems likely that some, perhaps many, of those cases would have ended up before panels and that some cases would thereupon gain a life of their own, which they otherwise would not have had. I

would argue that given the relative brevity of the minimally required consultation period (71 days), any advantages coming from the consultation requirement can easily be justified. In fact, the significant filtering effect of the consultation process is a small price to pay in time for that benefit. There are, however, some complaints made concerning the process and some proposals to "improve" it.

There are complaints by some WTO Members that the consultation process is not useful, or at least not as useful as it could or should be. Some of these complaints are based on experiences where the consultations were not particularly helpful in resolving the dispute, but were rather treated as an annoying procedural step to be overcome as soon as possible. It is undoubtedly true that there are such cases. But that does not demonstrate that the consultation requirement is undesirable. Rather, it highlights that some serious disputes require resolution in the panel/Appellate Body process and that is obvious from the beginning. The advantage of the filtering provided by the consultation requirement remains, however, as long as some panels are avoided.

There are also complaints that the consultation process should be made more useful in preparing cases for the panel stage. For example, it has been proposed that a consulting party should be required to respond in writing to questions propounded by the other party so as to clarify the issues for the panel process. In my view, the imposition of such a requirement would present a risk of inappropriately mixing the political aspects with the legal aspects of dispute settlement. While the clarification of issues in consultations is certainly not to be discouraged, it is the panel process that should ultimately perform that function. The basic function of consultations is to force the parties to talk to each other in a meaningful way before they initiate the formal panel process. To add a discovery function to the consultation process would transform it from a political one into a legal one. To the extent that that occurs, it is less likely that the parties will settle their differences. Instead, the focus will be on tactics designed to improve, or at least to avoid harming, one's position before a panel. As such, the consultation process would involve lawyers to a greater extent and would need to be under third-party supervision, a virtual impossibility without the creation of a permanent panel body. Moreover, the formalization of the consultation procedure would probably work to the disadvantage of developing countries, since it would raise the stakes early in the dispute settlement process before they may have arranged for legal assistance.

Given the political nature of the consultation process and its goal of promoting mutually agreed solutions, if there is a change to be made to the consultation process, it should be one that makes such solutions more, not less, likely. One possibility that could be usefully explored is a greater use of mediation or conciliation. While this possibility is specifically provided for in Article 5 of the

DSU and is said to be available at any time, in fact it is virtually never used. Part of the reason for that may be that the role of mediator is assigned to the Director-General and it is probably the case that most Directors-General would prefer not to insert themselves into disputes. Indeed, in most cases it is probably better if they do not since by doing so they could compromise their position as an impartial party in other contexts, such as negotiations. This suggests that an expansion of the mediation/ conciliation role will probably have to be implemented through use of non-Secretariat persons, or, if technically in the Secretariat, at least persons having no other function besides mediation/ conciliation. One can imagine this role being played by retired officials, whether from the Secretariat, the Appellate Body or diplomats with panel experience. If supported by a small legal staff, such individuals might well be able to give the parties a clearer idea of the likely outcome of a case, such that the outlines of a settlement might be easier to achieve. Given that this role would only be a limited, part-time one, there would not be great expense involved.

Thus, if it is desired to improve the consultation process, the focus should not be on making it more legalistic or in giving what happens in consultations special meaning in what later occurs before a panel and the Appellate Body, but rather through the introduction of procedures that make settlements more likely. When one distinguishes the political and legal aspects of WTO dispute settlement, this approach seems obvious and compelling.

3. **Professionalization of Panels**

One of the proposals made in the DSU review was to form a permanent panel body, like the Appellate Body, from which all panelists would be drawn. While this idea was not ready for action in the review, it seems inevitable that the WTO system will have to move in this direction. Currently, most panelists serve only once or twice. Yet as cases become more complex, particularly in respect of procedural aspects and the evaluation of evidence, experience is evermore necessary. A standing panel body would have a host of advantages: it would speed the process since the time now taken for panelist selection would be avoided and scheduling delays would be less common. The use of a standing body would mean that panelists would likely know each other and be able to establish an effective working relationship immediately. Panelists would have greater expertise on procedural issues and could more easily meet at short notice to deal with preliminary issues. Consistency of approach and results would be more easily achievable.

There are of course a few disadvantages. From the Members' perspective, there would be more expense. Nowadays most panelists are not paid (except to reimburse travel and living expenses). The choice of the members of the panel body would be difficult given the importance of their role. Depending on how Members handled the selection process and the importance given

to nationality, there could be a politicization of the system. Moreover, the use of professional panelists would mean that delegates and government officials would be much less involved in the process than at the moment, which would mean there would less contact with the realities of governments and trade negotiations. In the end, however, these disadvantages do not seem so great, especially given that the same concerns exist in respect of the Appellate Body. Yet, in its case, they do not seem to have prevented its emergence as an effective institution.

4. **Transparency and Access to the WTO Dispute-Settlement System**

There have been complaints, particularly by non-governmental organizations, that the WTO dispute settlement system lacks transparency and does not permit sufficient access for non-Members. In this regard, it is worth noting that panel and Appellate Body reports (and all other WTO documents relating to specific disputes) are issued as unrestricted documents and placed on the WTO website immediately after their distribution to Members.[81]

The United States has proposed that dispute settlement proceedings be open to the public, that submissions are to be made public and that non-parties be permitted to file "friend-of-the-court" submissions to panels. While these proposals were discussed in the review, there was considerable opposition to them. Many developing country Members view the WTO system as exclusively intergovernmental in nature and hesitate to open it to non-governments. In their view, if a non-governmental organization (NGO) wants to make an argument to a panel, it should convince one of the parties to make it; and if no party makes the argument, those Members would view that as evidence that the argument is not meritorious. Moreover, they view such openness as favoring the positions espoused by western, developed-country NGOs, which they view as likely not to be in their interest. Other Members argue that the credibility of the system would be much enhanced if it were more open and that openness would have no significant disadvantages. Given popular fears of globalization and the WTO's connection therewith, such increased credibility is viewed as essential to ensure the future effectiveness of the WTO itself, as well as the dispute settlement system.

In this regard, it is noteworthy that the Appellate Body recently ruled that panels have the right to accept non-requested submissions from non-parties (such as NGOs).[82] It remains to be seen to what extent panels will exercise this right since the Appellate Body also ruled that a panel could appropriately call such submissions to the attention of the parties and ask if the parties wished to adopt all or part of them.

On balance, I think that it is clearly in the interest of the system to

become more transparent. In the end, the system has nothing to hide in the way in which decisions are made and the basis on which they are made. Indeed, all of the arguments of the parties and the reasoning of the panels and Appellate Body is made public when the reports are circulated to WTO Members. The openness issue is essentially a matter of timing. I see no gains to the system in delaying access to the parties' arguments, whereas there is much to be gained, at least symbolically, by openness. I also see no downside in allowing NGOs or others to file amicus briefs with panels and the Appellate Body, so long as parties are assured that they will have a chance to respond to any arguments or facts so submitted on which a panel or Appellate Body intends to rely. It is a question of whether one can trust the good judgment of the panels and the Appellate Body to handle such filings responsibly and I think that they can be so trusted.

5. **Improving Remedies**

Overall, the record of compliance by WTO Members with DSB recommendations has been relatively good, as noted above. However, there are example of "foot-dragging" in implementation and two cases where retaliation has not quickly led to compliance– the *Bananas* and *Hormones* cases. These problems raise the issue of whether improvements in the surveillance/remedy rules could usefully be made.

In considering remedies in the WTO system, it is important to recall that they are prospective – whether in the form of compensation or retaliation. In addition, it is important to consider their two principal aims – to restore the balance of concessions that was upset when one Member violated its obligations; and to give that Member an incentive to comply. The current problem with achieving the first aim – rebalancing – is that if retaliation is authorized, rebalancing takes place at a lower level of trade liberalization that had been agreed to. It would be desirable if a remedy could be devised that would not lead to less liberalization overall. One could consider monetary payments or requiring the payment of compensation through a reduction in other tariffs or trade restrictions maintained by the non-complying Member.[83]

The **mockingbird** is the state bird of Tennessee.

In respect of the second aim – incentive to comply – there are two issues – timing and level of compensation or retaliation. At present, because remedies are prospective, there is an incentive initially to delay the time at which point they might be implemented, such as by seeking a long reasonable period of time for compliance and then forcing the victor to go through an Article 21.5 panel (and Appellate Body) proceeding. Moreover, if the threat of retaliation does not work, it is possible that the actual existence of retaliation will become viewed as the status quo and a long-term solution, even though the WTO rules in theory require compliance. This fear that retaliation will lose effect over time

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"The mockingbird is known for fighting for the protection of his home – falling, if need be, in its defense. Mockingbirds are not intimidated by animals larger than themselves and have been known to attack eagles"

– Diana Wells, *100 Birds and How They Got Their Names* (Chapel Hill, NC: Algonquin, 2002)

Trade Policy Analyses

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explains in part the US desire to implement the so-called carousel provision. A preferable solution may be to create incentives for early compliance, such as by providing that any retaliation will be calculated from a date prior to the date set for implementation or by providing for increasing retaliation over time.

These issues will require careful thought. While retaliation seems to work when threatened by a large country against a smaller one, and has worked as between two large countries, it may not be an effective remedy for a small country (even if it can target sensitive large country sectors such as copyright holders). Moreover, the *Bananas* and *Hormones* cases show that it is not always effective between the large players. Its inefficacy and the unfavorable position in which it leaves developing countries may soon combine to create a serious credibility problem for the system that must be confronted.

6. Developing Countries and Dispute Settlement

Developing countries have made greater use of the WTO dispute settlement system than they made of the GATT system. In some cases, they are bringing claims that would not have been cognizable under the GATT, such as claims based on the Agreement on Textiles and Clothing. Even allowing for this, they seem to be more active users of the system that they were. It is also noteworthy that they have become more frequent targets of complaints (by both developed and developing countries). Their greater involvement is undoubtedly good for the system in the long run.

The principal issue of interest to developing countries in the DSU review concerned the resource difficulty that many developing countries face when they participate in the dispute settlement system. For the moment, the DSU addresses this problem by requiring the WTO Secretariat to provide legal assistance to such countries,[84] which it does through two staff lawyers in the Technical Cooperation Division and through the use of lawyers (typically ex-Secretariat employees) who are hired on a consultancy basis to provide assistance on a regular (e.g., one day a week) or case-specific basis. The Secretariat also conducts a number of training courses that either include or are exclusively focused on dispute settlement. Recently, UNCTAD announced plans for a training program on dispute settlement in the WTO and elsewhere for developing countries. At the Seattle Ministerial, a group of developed and developing countries announced the creation of an Advisory Centre on WTO law, which would be an international intergovernmental organization providing legal assistance to developing countries in respect of WTO matters. While the training programs will be valuable in the long run, for the immediate future, the Centre seems to offer the best hope for a significant improvement in dealing with inadequate developing country resources.

[1] For fuller development of this issue, see William J. Davey, *Dispute Settlement in GATT*, pp. 65-81.

[2] See especially Davey, *supra*.

[3] The decline in the use of the system in the 1960s and 1970s probably reflected the influence of these critics since their position has been subscribed to by some leading GATT officials and parties. See, e.g., Olivier Long, *Law and Its Limitations in the GATT Multilateral Trade System* (1985) (Mr. Long was Director-General of GATT from 1968 to 1980); and Phan van Phi, "A European View of the GATT", *International Business Law*, Vol. 14 (1986), p. 150.

[4] ITC Dispute Settlement Study, at 68.

[5] Id.

[6] See Davey, supra, at 67-69.

[7] Id. at 70-73.

[8] See Hudec, 13 Cornell Int'l L. J. at 159-166.

[9] See Davey, at 73-76.

[10] Id. at 76-81.

[11] See id. at 79-81.

[12] GATS, TRIPS and the side agreements all refer to GATT Article XXIII (as interpreted by the Uruguay Round Dispute Settlement Understanding) as the basis for dispute settlement, although some of them contain provisions that modify or limit the understanding's general dispute settlement rules.

[13] The General Agreement contains many provisions designed to resolve trade disputes between its contracting parties. Most of them provide initially, and sometimes exclusively, for consultations between the contending parties. If the parties are unable to settle their differences through negotiations, however, they may resort to Article XXIII.

[14] No GATT panels have yet decided a case on the grounds that an objective of the Agreement is being impeded.

[15] No GATT panels have yet decided a case on the grounds of paragraph (c) and the 1994 understanding on dispute settlement provides that the pre-Uruguay Round procedures, which require consensus to approve a dispute settlement panel report, will continue to apply to paragraph (c).

[16] DSU Article 3.8.

[17] Pescatore, The GATT Dispute Settlement Mechanism -- Its Present Situation and Its Prospects, J. World Trade, vol. 27, no.1, at 5-20 (1993).

[18] See generally Robert E. Hudec, *Enforcing International Trade Law*.

[19] *Idem.*, pp. 285-87.

[20] Article 3.1 of the DSU provides: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

[21] See General Agreement on Trade in Services, arts. XXII, XXIII; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 64; Agreement on Agriculture, art. 19; Agreement on the Application of Sanitary and Phytosanitary Measures, art. 11; Agreement on Technical Barriers to Trade, art. 14; Agreement on Trade-Related Investment Measures, art. 8; Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), art. 17; Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), art. 19; Agreement on Preshipment Inspection, art. 8; Agreement on Rules of Origin, arts. 7-8; Agreement on Import Licensing Procedures, art. 6; Agreement on Subsidies and Countervailing Measures, art. 30. Agreement on Safeguards, art. 14. The DSU may also be applied by plurilateral agreements. See Agreement on Government Procurement, art. XXII. It is not applicable, however, to the Agreement on Trade in Civil Aircraft. Appendix 2 of the DSU contains a list of special or additional dispute settlement rules in WTO agreements that prevail over DSU rules. DSU, art. 1.2. For an interpretation of the relationship of these special and additional rules to the DSU rules, see Appellate Body Report on Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico, adopted on 25 November 1998, WT/DS60/AB/R.

[22] This is an oversimplification of the provisions of Article XXIII. More precisely, it covers either of two situations – where benefits accruing to a Member under the agreement have been nullified or impaired or where attainment of the objectives of the agreement has been impeded – that arise as a result of one of three reasons – the failure of a Member to carry out its obligations, the application by a Member of any measure (whether or not it conflicts with the agreement) or the existence of any other situation. Of the six possible combinations, the vast majority of cases involve allegations of nullification or impairment arising from a failure of a Member to carry out its obligations. A few cases – referred to as non-violation cases – involve allegations of nullification or impairment by a measure not in conflict with the agreement. No panel reports have been based on an impedance of the objectives of the agreement or on the existence of any other situation, although allegations thereof have occasionally been made. The automatic adoption rules of the DSU do not apply to so-called "situation" complaints. DSU, art. 26.2.

[23] In respect of matters involving a plurilateral agreement, only parties to that agreement may participate in matters related to disputes under that agreement.

[24] The actual grounds depend on the specific agreement, but are generally those of GATT Article XXIII.

[25] DSU, art. 3.7.

[26] DSU, art. 5. In fact, the author is aware of no cases where this provision was invoked. The DSU also provides for ad hoc arbitration on agreement of the parties. DSU, art. 25.

[27] The equivalent provisions are listed in a footnote to DSU, art. 4.11.

[28] DSU, art. 4.11.

[29] DSU, art. 4.3. If a Member does not respond to a request within 10 days or does not enter into consultations within 30 days, the requesting Member may proceed directly to request the establishment of a panel. In cases of urgency, consultations are to be held within 10 days of a request.

[30] DSU, art. 4.7. In cases of urgency, a panel may be requested after 20 days. However, in the case of a developing country respondent, that country may ask the Chairman of the DSB to extent the consultation period if the parties cannot agree that the consultations have concluded. DSU, art. 12.10. This provision has not yet been invoked formally.

A proposed revision of the DSU would allow a panel to be requested after 30 days, subject to an extension to 60 days if the respondent is a developing country and the parties agree to such

extension. A complainant is bound to give sympathetic consideration to such a request. WT/MIN(99)/8.

[31] The wording of the relevant DSU provision is "the DSB meeting following that at which the request first appears as an item on the DSB's agenda". DSU, art. 6.1. This has led some Members to argue that the second request must be made at the next DSB meeting after the request is first made. If the requests are not consecutive, these Members argue that the panel need not be established by the DSB, unless there is an affirmative consensus to do so. So far, this view is shared by only a few Members. A proposed revision of the DSU would provide for a panel to be established under the reverse consensus rule at the first meeting at which it is requested. WT/MIN(99)/8. This would eliminate the so-called consecutivity issue.

[32] DSU, art. 6.1.

[33] The DSB's Rules of Procedure effectively require that a request for an item to appear on the agenda must be made 11 days in advance of the meeting since the agenda is circulated 10 days in advance of the meeting. Although the matter is disputed, the practice seems to be developing that it is not appropriate to put a request for the establishment of a panel on the agenda until the 60-day consultation period has expired. Thus, in practice at the moment, the first panel request will not be considered at a DSB meeting until 71 days after the request for consultations. Thereafter, the DSU provides that the complaining party may request a second meeting within 15 days of the first. Thus, even with the possible inconvenient interference of weekends and other non-working days, a determined complainant should be able to ensure that a panel is established within 90 days of its request for consultations. If the proposed revisions referred to above were implemented, a determined complainant could obtain a panel within about 45 days of its consultation request.

[34] The DSU provides for the possibility of using five panellists. DSU, art. 8.5. Such panels were used in the early years of GATT. All of the WTO panels to date have consisted of three panellists.

[35] DSU, art. 8.1.

[36] DSU, art. 8.3.

[37] DSU, art. 8.10.

[38] DSU, art. 8.6.

[39] DSU, art. 8.7.

[40] Not including Article 21.5 panels.

[41] DSU, art. 8.9.

[42] WT/DSB/RC/1. See generally Gabrielle Marceau, Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism, *Journal of World Trade*, vol. 32, no. 3, June 1998, page 57. The Appellate Body had previously adopted similar rules on the basis of an earlier draft. It modified its rules in light of the final text adopted by the DSB. WT/AB/WP/1; WT/AB/WP/2.

[43] DSU, art. 6.2. This provision is interpreted in Appellate Body Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, adopted on 25 September 1997, WT/DS27/AB/R; Appellate Body Report on Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, adopted on 12 January 2000, WT/DS98/AB/R.

[44] DSU, art. 7.1. Article 7.3 allows the DSB to authorize its chairman to draw up terms of reference in consultation with the parties. Such authorization was granted in one case (WT/DSB/M/12) and the chair's designee brokered an agreement between the parties on non-standard

terms of reference. See WT/DS22/6. For a discussion of the powers of the DSB chairman to impose non-standard terms of reference in the absence of agreement of the parties, see WT/DS21/5.

[45] DSU, art. 11.

[46] Panels have relatively broad discretion to craft their own working procedures. For example, they can revise the standard working procedures listed in DSU Appendix 3 after consulting the parties. DSU, art. 12.1.

[47] DSU, appendix 3.

[48] A proposed revision would give the respondent 4 to 5 weeks to respond. WT/MIN(99)/8.

[49] India - Shirts & Blouses.

[50] DSU, art. 13.

[51] 1994 Antidumping Code, art. 17.6.

[52] In fact, GATT panels in the past have tended to defer to national administrative decisions so long as the decisionmakers considered all of the issues required to be addressed by the relevant rules. Compare United States -- Measures Affecting Imports of Softwood Lumber from Canada, BISD --S/--- (Case 91) (para. 335) with Korea -- Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, BISD --S/--- (Case 90).

[53] It explained the principle as deferring to sovereign states by assuming that where a term in a treaty is ambiguous, the less onerous interpretation is to be preferred.

[54] DSU, art. 15.1. A proposed revision of the DSU would eliminate this step and provide that the parties' arguments would be appended to the report. WT/MIN(99)/8.

[55] DSU, art. 15.2.

[56] A proposed revision of the DSU would eliminate the possibility of an oral hearing on the interim review comments. WT/MIN(99)/8.

[57] DSU, art. 10. A proposed revision of the DSU would allow third parties to attend all panel hearings and receive all submissions up to the time of the issuance of the interim report. WT/MIN(99)/8.

[58] DSU, arts. 14, 19.

[59] Appellate Body Working Procedures, rule 4(3).

[60] Appellate Body Working Procedures, rule 6(2).

[61] DSU, art. 17.5. In recent cases, 90 days has been the standard.

[62] DSU, art. 17.6.

[63] DSU, art. 17.13.

[64] See, e.g., Appellate Body Report on Canada – Certain Measures Affecting Periodicals, adopted on 30 July 1997, WT/DS31/AB/R.

[65] As a consequences, WTO remedies are typically viewed as prospective in nature. There is no reparation of past damage awarded.

[66] DSU, art. 19.1.

[67] DSU, art. 21.3.

[68] DSU, art. 21.3.

[69] DSU, art. 21.6. A proposed revision of the DSU would expand this reporting requirement. WT/MIN(99)/8.

[70] DSU, art. 22.2.

[71] DSU, art. 22.2, 22.6.

[72] DSU, art. 22.6, 22.7.

[73] Ecuador requested authority to suspend concessions in the *Bananas* case and the arbitrators set the amount at US$ 201.6 million and approved retaliation against EC consumer goods and distribution services and in respect of certain EC intellectual property right holders. WT/DS27/ARB/ECU (March 24, 2000). As of this writing Ecuador has not made a new request based on the arbitration award.

[74] In the *Bananas* case, the level of suspension requested was US$520 million and the amount authorized was US$191.4 million. WT/DS27/ARB. In the *Hormones* case, the amounts requested were US$202 million and Can$75 million. The amounts authorized were US$116.8 million and Can$11.3 million. WT/DS26/ARB; WT/DS48/ARB.

[75] DSU, arts. 3.7, 22.1.

[76] DSU, art. 12.8. The goal is three months in case of urgency. Id.

[77] DSU, art. 12.9. There are shorter time-frames specified for certain cases under the Agreement on Subsidies and Countervailing Measures and the Government Procurement Agreement. A proposed revision of the DSU would reduce this period to 8 months. WT/MIN(99)/8.

[78] WT/MIN(99)/8 & Corr. 1.

[79] WTO Agreement, art. X:8.

[80] The date of circulation to Members is used to assign reports to specific years. The page totals focus only on the pages of panel findings, because most of the rest of the report is a detailed summary of the parties' arguments and while its preparation is sometimes time-consuming, it is largely a question of editing existing texts, while panel findings are the analytical part of the report and must be drafted from scratch.

[81] A party may request that a panel report be restricted for up to 10 days after its issuance, but no party has ever done so.

[82] Appellate Body Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted on 6 November 1998, WT/DS58/AB/R, paras. 99-110.

[83] See Joost Pauwelyn, Enforecement and Countermeasures in the WTO, 94 AJIL 335 (2000).

[84] DSU, art. 27.2.