DISPUTE SETTLEMENT PROCESS IN THE WTO

By

Claire M. Bechara

Submitted to the Faculty of Political Science, Public Administration, & International Affairs and Diplomacy

In Partial Fulfillment of the Requirements for the Degree of Master of Arts in International Law

Notre Dame University
Louaize – Lebanon
June 21, 2004

N. D. U. LIBRARY
29 SEP 2004
RECEIVED

Approved by: Advisor : Dr. Georges Labaky Dr. Georges T. Labaky

First Reader : Dr. Youssef Mouawad .....

Second Reader : Dr. Akl Keyrouz .....

In memory of a special person to my heart,
A person who taught me that life can be so simple and joyful,
A person who made me believe in myself and in what I can be,
A person whose presence was so helpful and enjoyable,
To you, Grandpa Adib, I dedicate this work……

Acknowledgments

I would like, first of all, to thank GOD for granting me such caring parents, Mansour and Hoda, without which I would not have reached this far, as well as my brother Elie and my sister Sandra, whose advice are always important.

I would like to thank the Dean of the Faculty of Political Science and Public Administration, Dr. Michel Nehme, for his support and help. I am also grateful to all the members of the Department of Political Science and Public Administration at Notre Dame University, especially Dr. Chahine Ghais, for making me part of their family.

Special thanks to Dr. Georges Labaky and Dr. Akl Keyrouz who contributed significantly to my work in preparing this thesis.

I would like to express my highest gratitude towards Dr. Yousef Mouawad for his valuable suggestions and comments; as well as for the endless patience and tolerance he had in guiding me all along my thesis.

In addition, I am much indebted to my friends and colleagues who were generous enough with me to share their opinions that were extremely helpful in reaching this final work.

Thank you all for making my work as enjoyable as possible!!!!!!!

CLAIRE

Abstract

The power to settle international disputes with binding authority distinguishes the World Trade Organization from most other intergovernmental institutions. The Understanding on Rules and Procedures Governing the Settlement of Disputes gives the WTO unprecedented power to resolve trade-related conflicts between nations and assign penalties and compensation to the parties involved.

A Dispute Settlement Body (DSB) that consists of the WTO's General Council administers dispute settlement. The DSB has the authority to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations." The Dispute Settlement system aims to resolve disputes by clarifying the rules of the multilateral trading system; it cannot legislate or promulgate new rules.

When a Member believes that another party has taken an action that impairs "benefits accruing to it directly or indirectly" under the Uruguay Round Agreements, it may request consultations to resolve the conflict through informal negotiations. If consultations fail to yield mutually acceptable outcomes after 60 days, Members may request the establishment of a panel to resolve the dispute. Panels typically consist of three individuals with expertise in international trade law and policy; these panelists hear the evidence and present a report to the DSB recommending a course of action within six months. The panel can solicit information and technical advice from any relevant source, though it is not required to do so. Only submissions from Members are guaranteed to be heard, although in rare cases, panels have consulted submissions from interested non-governmental organizations. Third-party member nations may also involve themselves in the dispute settlement process. All deliberations and communications are confidential, and only the final panel reports become part of the public record.

Once panel reports have been prepared, they are presented to the Dispute Settlement Body, which either adopts the report or decides by consensus not to accept it. Alternatively, if one of the parties involved decides to appeal the decision, the report will not be considered for adoption until the completion of the appeal.

In the case of an appeal, a three-person Appellate Body chosen from a standing pool of seven persons will assess the soundness of the panel report's legal reasoning and procedure. An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership.

The primary goal of dispute settlement is to ensure national compliance with multilateral trade rules. Accordingly, the Dispute Settlement Body encourages Members to their make best possible efforts to bring legislation into compliance with the panel ruling within a "reasonable period of time" established by the parties to the dispute. If a Member does not comply with rulings, the DSB can authorize the complainant to suspend commitments and concessions to the violating Member. In

general, complainants are encouraged to suspend concessions with respect to the same sector as the subject of the dispute; however, if complainants find this ineffective or impracticable, they may suspend concessions in other sectors of the same Agreement or even under separate Agreements.

Some groups have criticized the dispute settlement process for its lack of transparency and democratic accountability, as well as for a perceived insensitivity to environmental and social standards. The increasing use of the system by developing countries, however, is one indicator of its institutional success. Ultimately, the dispute settlement system is a significant milestone in the development of a rules-based multilateral trading system.

Table of Contents

Introduction:

The rapid development of technology is profoundly altering the means by which multinational disputes are settled. Disputes demanding the implication of advanced technology result from an increasingly significant portion of multinational commercial transactions. However, such advanced technology has been viewed as leading to an even more complicated multinational disputes. For this reason, national governments and private institutions are obliged to find new ways to resolve the complex, cross-border disputes that such a technology engenders. The question that arises here is *whether the existing lawmaking and dispute settlement mechanisms can handle these growing disputes.*

The WTO is the International Organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly and as freely as possible. It is charged with enforcing a set of trade rules including the General Agreement on Tariffs and Trade [GATT], Trade Related Intellectual Property Measures [TRIPS], the General Agreement on Trade in Services [GATS], and many more.

The World Trade Organization (WTO) was formed in 1994 at the culmination of the Uruguay Round of GATT, a decade-long [1986-1994] process of negotiations on a broad range of trade and "trade related" topics. The WTO, headquarter in Geneva, Switzerland, currently has 146 member-countries. It has numerous committees, sub-committees, and working groups made up of trade diplomats from member-countries, a General Council of all member-countries, which is responsible for setting its agenda, and a Secretariat of Administrators. Many of these bodies meet every day in the WTO headquarters in Geneva.

However, the WTO's unique contribution to the stability of the global economy is the dispute settlement. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The system is based on clearly defined rules, with timetables for completing a case. First, rulings are made by a panel of experts, and then, appeals based in points of law are possible. But, the point is not to pass judgment. The priority is to settle disputes, through consultations, if possible. Yet, even when slowly and carefully built, international dispute settlement structures still intrude on national sovereignty by supplanting the role of national courts or the use of national laws as rules of decision.

Several questions are to be discussed in this paper: *Is a Dispute Settlement System really appropriate for this endeavor? Is it adequate to cope with the problems of the next century? Or does this choice merely reflect compromises, which attempt to balance alternative and competing policy goals?*

Chapter one will provide a historical overview of the WTO, then look closely in Chapter two at the Dispute Settlement Procedures of the WTO System. The focus will be on a deep examination of how the WTO's Dispute Settlement Understanding operates in practice, then a number of key issues that have arisen will be considered, such as: *What sort of claims may be brought before the panel? How are those claims evaluated? What remedies are available?*

It is necessary to note that certain International agreements contain special or additional rules that supersede those of the DSU for matters arising under those agreements. If Dispute Settlement Proceedings involve two or more Uruguay Round

Agreements with conflicting special rules and the parties cannot agree on which rules will apply, the Chairman of the Dispute Settlement Body will decide the issue.

Under the WTO, there are strict time limits for each step in the Dispute Settlement Process, the defending party cannot block findings unfavorable to it, and there is one comprehensive Dispute Settlement Process covering all the Uruguay Round Agreements.

Chapter three will examine in detail the Appellate Body. It is a permanent seven-member body that broadly represents the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

Chapter four will discuss the effectiveness of the WTO. How are the claims evaluated? What remedies are available? In Chapter five, six, and seven, several cases that were solved under the DSS will be presented. The flaws and the reforms of such a dispute settlement process will be illustrated.

With all the points that paralyzed the efficiency of the WTO Dispute Settlement System, the WTO Dispute Settlement System can be viewed as relatively successful.

Moreover, in order to assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring the procedures that would facilitate compliance with adopted recommendations.

Many disputes were settled without resort to the panel procedures. That is why I think it is time for us to call for a new convention regarding the dispute settlement system and its effectiveness. The time has arrived for us to impose the panel's decision on all parties same as international arbitration.

We are waiting for such a move and we hope it will take place in the future.

CHAPTER 1: The WTO's Constitution:

Section 1:From GATT to the WTO:

The General Agreement on Tariffs and Trade (GATT), negotiated in 1947, was a treaty containing reciprocal obligations to reduce tariffs following the pattern of US bilateral treaties. GATT was never intended to become an organization. It was supposed to depend on the International Trade Organization (ITO) for its organizational context and secretariat services. Nevertheless, it managed to fill the void left by the ITO's failure and emerged as the de facto international trade organization.

GATT is a set of bilateral agreements among countries around the world. It is basically a global generalization of what the United States started in the 1930's. A major weakness of the GATT as a world trade organization was that **it had no real enforcement mechanism.** If a country broke a bilateral agreement with another country, nothing could be done. There were some rules for enforcement but they were basically dysfunctional. When member countries' internal political pressures or special-interest demands became overwhelming, the "rules" were ignored. (http://www.globalpolicy.org/socecon/bwi-wto/indexwto.htm).

From the late 1940's through the mid 1980's, the imperfect GATT system was surprisingly successful due to ingenious and highly pragmatic leadership of President Reagan. The US Congress chose to shield itself from domestic special-interest demands for tariff protection by delegating its Constitutional prerogative over international trade to the President. Basically, Congress told the President to go out and make the trade deals and promised to pass them. There followed a series of

international trade negotiations or "rounds," approximately one each decade, during which bilateral agreements were reached. Congress ratified them.

The Reagan Administration sought to counter this protectionist trend by calling for a new round of global trade negotiations. The new round opened in Punta del Este, Uruguay in 1986, and is therefore known as the Uruguay Round. Negotiations dragged on from 1986 until 1993. (Hudec (2001), p.p.369-400).

Finally, there was a need for an improved system to settle trade disputes. Under the dysfunctional GATT dispute-settlement procedures, the loser in a case could simply block any kind of quasi-judicial GATT judgment finding it out of compliance with treaty obligations. (Pauwelyn (2000), p. 335).

There is no doubt that the dispute settlement system was vastly improved and the WTO was established to adjudicate claims of treaty violation. Thereafter, a country found to be in violation of its treaty obligations by the WTO would either have to bring its offending practices into compliance or face WTO-authorized retaliation by the injured country. Countries could no longer violate trade treaty obligations with impunity. The GATT continues to exist as a substantive agreement, establishing a set of disciplines on the trade policies of its members. The WTO itself does not embody substantive rules regarding government policies-it is simply a formal institutional structure under whose auspices members negotiate and implement their trade agreements.

Trade issues in agriculture and services were not satisfactorily resolved during the Uruguay Round. Having made little progress on trade in agriculture and remaining fundamentally in violation of GATT rules, the US and the EU agreed not to bring trade cases against each other over violations in agricultural trade for a period of ten

years. This is known as the "peace clause." The "peace clause" was due to expire in 2003. Because of the "peace clause" and US dissatisfaction with the services agreement, the Uruguay Round ended with a "built-in agenda" for further negotiations. It was specified in the Uruguay Round agreement that the organization would reconvene to address agriculture and services issues.

In fact, most developing countries felt that the Uruguay Round had saddled them with tremendous obligations that they were having trouble implementing. The last thing they needed was a new set of obligations to implement. In the meantime, promised technical assistance to the developing countries had not been forthcoming. They found themselves to have undertaken obligations making them subject to punishment for noncompliance, yet they literally did not have the technical capacity or money to institute required changes. (Rubenstein and Schultz (1984), p.p.224-225).

The US Constitution gives the Congress the prerogative to regulate international commerce, when the President through the Office of the US Trade Representative (USTR) negotiates new trade agreements that Congress is empowered to amend those agreements. Consequently, other countries are reluctant to negotiate trade agreements with the US knowing that very sensitive compromises worked out at the WTO might be altered by the US Congress. Therefore, to make US negotiations credible, Congress has for the past twenty-five years committed itself for specified periods of time to vote on trade agreements in a simple yes or no manner without any amendment. This is called "fast-track" negotiating authority. Nevertheless, the "built-in agenda" loomed. The approaching expiration of the "peace clause" and the risk of an EU-US agricultural trade war means that new negotiations were urgently needed.

Section 2: The World Trade Organization Constitution:

A- The Internal Constitution of the WTO:

The World Trade Organization was created in 1994 as the successor organization to the General Agreement on Tariffs and Trade (GATT) and represents 146 countries in an effort to globalize commerce. All the major countries including China are members, and with the United States as the dominating actor. It is almost like a world court on trade where debates on everything from restrictions on imports and e-commerce issues are discussed and settled; then rules are made. These agreements are coming together in order to implement treaties among member nations that would liberalize and eventually eliminate tariffs and other restrictions on trade in various sectors of the world economy. Those in favor of this economic one world order see it as a way to liberalize trade barriers. Those countries opposed the WTO sees it as an exploitative, oppressive system of world economic domination that takes away worker's rights, weakening consumer and public health, despoiling the environment, enslaving workers around the world and usurping the rights of each country to make its own trade laws. (Jackson (1997), p.p.60,62-63).

The protests actually started at Geneva in 1998, which was a celebration to mark the 50th year of the free trade system or GATT. This was the second Ministerial Conference of the WTO and will be remembered as a turning point in the rush towards economic globalization. The protests were against the rapid liberalization of free trade and the continued exploitation of the third world and local small business. The small companies and farmers as well as the economies of entire nations will not survive the take-over of their markets and lands due to this globalized economy. The opening up of the poorer countries in agriculture, services, and industry to giant

multinationals has already brought the smaller countries to their knees and forced weaker businesses with increasing closure in their inability to compete with the giant foreign firms. The protest groups see the WTO's as an unbalanced emphasis on breaking down trade barriers no matter what the cost to workers' rights and environmental protections. One by one, the proponents of unrestricted free trade have a record of broken promises for new jobs, higher wages, and safeguards for workers, consumers and the environment. (Corr (1997), p.p.60, 62-63).

1- THE STRUCTURE OF THE WTO:

The Structure of the WTO is dominated by its highest authority, the Ministerial Conference, composed of representatives of all WTO members, which is required to meet at least every two years and which can take decision on all matters under any of the multilateral trade agreements. The day-to-day work of the WTO is carried out by a number of subsidiary bodies; primarily the General Council, which is also composed of all WTO members, which is required to report to the Ministerial Conference. As well as conducting its regular work on behalf of the Ministerial Conference, the General Council convenes in two particular forms - as the Dispute Settlement Body (DSB), to oversee the dispute settlement procedures, and as the Trade Policy Review Body to conduct regular reviews of the trade policies of individual WTO members.

The General Council delegates responsibility to three other major bodies: the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade Related Aspects of Intellectual Property. The Council for Trade in Goods overseas the implementation and functioning of all the agreements covering trade in goods, though many such agreements have their own specific overseeing bodies. The other

two Councils are responsible for their respective WTO agreements and may establish their own subsidiary bodies as necessary.

The WTO General Council convenes as the DSB to deal with disputes arising from any agreement contained in the Final Act of the Uruguay Round. The DSB is solely authorized to establish panels, adopt panel and appellate reports, maintain surveillance of implementation or rulings and recommendations, and authorize retaliatory measure in cases of non-implementation of recommendations.

The WTO dispute settlement mechanism gives the possibility of appeal to either party in a panel proceeding. Appeals are heard by a standing Appellate Body established by the DSB. This Appellate Body is composed of seven persons, which broadly represent the WTO's membership. They serve four-year terms. They are required to be persons of recognized standing in the field of law and international trade, and cannot be affiliated with any government.

The WTO Secretariat, which is located in Geneva, Switzerland, has a staff of about 500 and is headed by a Director General and four Deputy Directors General. Its responsibilities include the servicing of WTO delegate bodies with respect to negotiations and the implementations of agreements. It has a particular responsibility to provide technical support to developing countries, and especially the least developed countries. WTO economists and statisticians provide trade performance and policy analysis while its legal staff assists in the resolution of trade disputes involving the interpretation of WTO rules and precedents. Much of the Secretariat's work is concerned with accession negotiations for new members and providing advice to governments considering membership. (Qureshi (1996, p. 268-270).

2- THE DIFFERENCE BETWEEN WTO AND GATT:

The principle differences between WTO and GATT are:

- GATT was a set of rules, a multilateral agreement, with no institutional foundation, only a small associated secretariat that had its origins in the failed attempt to establish the International Trade Organizations in the 1940s. The WTO is a permanent institution with its own secretariat.
- GATT was applied a "provisional basis" even though it lasted more than forty years and governments chose to treat it as a permanent commitment. The WTO commitments are full and permanent.
- GATT rules applied to trade in merchandise goods. In addition to goods, the WTO covers trade in services and trade related aspects of intellectual property.
- GATT was a multilateral instrument, by the 1980s many new agreements had been added of a plurilateral, therefore selective nature. The agreements, which constitute the WTO, are almost all multilateral and involve commitments for the entire membership.
- The WTO dispute settlement system is faster, more automatic, and less susceptible to blockages, than the old GATT system. The implementation of WTO dispute findings will be more easily assured. (Reitz (1996), p.585).

B- The External Relation in the WTO Constitution:

A central principle of the 1947 General Agreement on Tariffs and Trade (now enforced by the WTO) was that of non-discrimination: products imported from one country should be treated the same as those imported from all other countries as well as those produced within the importing country. This principle is expressed in two technical terms:

- National treatment - Goods imported from countries that have signed the treaty must be treated the same manner as domestic ones.
- Most-favored nation treatment - Goods imported from each signatory country must be treated equally.

WTO provisions and rulings, however, go far beyond these concepts in turning trade into an end in itself rather than a means to improve peoples' lives. Under them, even national standards that respect these well-established benchmarks can still be declared illegal restrictions on trade. (Strengthening Developing Countries in the WTO, Trade & Development Series No. 8, Third World Network, 1999).

The WTO's version of "free trade" has distinct limits. Countries and corporations can manipulate negotiations and dispute settlements to their advantage. When it comes to intellectual property, for example, the WTO's Trade Related Intellectual Property Services (TRIPS) agreement enforces *restrictions* on trade—copyrights and patents—under the pretext of encouraging innovation. This benefits almost exclusively wealthy nations and transnational enterprises, while harming small farmers and indigent AIDS victims. Yet the WTO outlaws other exceptions to free trade that might benefit poor people and countries.

For many sectors in many countries, lowering barriers to international trade may be a viable policy. But no developed country has industrialized without protection and government support of critical industries. And many developing countries who have thrown their economies open to international markets have sunk deeper into poverty and debt.

Developing and industrialized countries alike should be able to weigh the pros and cons of trade liberalization for their particular economy against other social values and goals. The WTO is harmful not because it promotes free trade, but because it forecloses with closed tribunals and draconian penalties the possibility of any economic strategy other than corporate-managed trade. It attempts to impose an anti-democratic monoculture on an exuberantly heterogeneous world. (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization).

1- The Role Of Non-governmental Organizations:

The basic question and the most vital one is the role of NGOs. We should thus recognize both the advantages and disadvantages of NGO participation. The governments are the authorized legitimate representatives in the WTO structure. In some cases, an NGO may have no legitimate role and no true constituency. Generally, NGOs, even the good ones, can create resource problems. For example, it will involve some resources to open hearings and provide additional documentation, space, and time. On the other hand, there are advantages to NGO participation. First, they can be quite useful. Sometimes they have resources for study and analysis that governments lack. They can bring to the table information that can be very useful in the proceedings. They can also transmit information to concerned and important constituencies in the various countries. They can come to an understanding and then explain the issues to a broader constituency that has not had the time or the information to try to grasp them. (Jackson (2001), p.p.1209-1210).

I think that it is surprising how far the WTO is, compared to most of the International Organizations in Geneva and other cities, with respect to how it handles NGOs. Other

Organizations have very elaborate methodologies of accreditation of NGOs based on a variety of criteria, which may vary from Organization to Organization. For example, the United Nations has been doing this for forty or fifty years. (United Nations Non-Governmental Liaison Service, the NGLS Handbook of UN Agencies, Programmes and Funds Working for Economic and Social Development, 2nd ed., 1997).

In addition, the International Labor Organization (ILO) has fairly elaborate measures, as does the World Intellectual Property Organization (WIPO). WIPO integrates key NGOs that have expertise in some of the technical aspects, such as its 'domain name' exercise. Why not WTO? At a minimum, there should be a study, which could be done by a committee reporting to the General Council chairman or one under the supervision of the Director-General.

2-Transparency and Participation:

With respect to transparency, there is a problem of documents. To some extent, the program of documentation in the WTO is quite advanced and can be a real help as part of the outreach, not only to delegates themselves, but also to civil society and NGOs. There is also a question of whether meetings should be open or closed. I suggest that maybe the Council meetings could be open, or maybe there could be a press gallery for the various Councils, not just the General Council.

Likewise, in the dispute settlement system, some of the same questions arise. For example, there is a problem of documentation, particularly in the panel reports and the delay that is caused in part by translation resource problems, which surely can be overcome. (Jeffrey and Watal (2000), p. 312).

" Participation" is a different and more difficult question in the context of decision-making. There may be grounds to call upon some of the NGOs for assistance as experts, and there certainly is authority to do so. Indeed, the WTO Charter, Article IX, paragraph 2, suggests certain relationships for NGOs. In the dispute settlement system, we will see the "amicus curiae" brief as one way to transmit information to the panels. That can be constructive, but it needs to be thought through so as not to cause certain kinds of problems.

By providing leadership, the trade superpowers- the United States, the European Union, and Japan can play a major role. Already suggested by the European Community and the Director General and others, is the idea of forming a group of parliamentarians to meet at the WTO on a regular basis to exchange information, ideas, and attitudes. Other ideas have been brought to include the formation of a setting group and an NGO consultative group. Suggestions for increasing transparency include public sessions and increased access to reports and other documents. Short of amending the agreements, there are many steps that can be taken to strengthen the institution and its agreements. It is worthwhile to focus our efforts on these steps. Clearly, this chapter only touches the surface, and I hope that further analysis and discussion on the WTO will occur in the near future.

Chapter 2: The WTO Dispute Settlement Understanding:

The WTO Agreement provides that one of its principal functions is the administration of the Understanding on Rules and Procedures governing the settlement of disputes, which is Annex 2 to the WTO Agreement and which is set out in the Documents Supplement. Indeed, the Dispute Settlement Understanding (DSU) states that the dispute settlement system:

> ***"is a central element in providing security and predictability to the multilateral trading system" (art.3.2).***

The DSU sets forth a comprehensive statement of dispute settlement rules and, builds on the past GATT practices. It makes several fundamental changes in the operation of the system. The DSU is administered by the Dispute Settlement Body (DSB), which is the WTO General Council acting in a specialized role under a separate chair. The DSU regulates dispute settlement for all covered WTO agreements, although under some agreements special rules and procedures will be applicable. (Appendix 2 to the DSU lists the special or additional dispute settlement rules and procedures).

The general philosophy of the 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 its members.

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

agreements. In this regard, the DSU explicitly outlines 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 to be preferred. (Palmeter and Mavroidis, (1999), p. 204).

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 to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".***

Section 1:The DSU Procedures:

There are four major phases of the WTO dispute settlement: First, the parties must attempt to resolve their differences through consultations. **Second**, if that fails, the complaining party may demand that a panel of independent experts be established to rule on the dispute. **Third,** the parties to a dispute have the right to appeal before the Appellate Body. **Finally,** if the complaining party succeeds, the DSB is charged with monitoring the implementation of its recommendations. In the event that the recommendations are not implemented, the possibility of negotiated compensation or authorization to withdraw concessions will be considered. The following materials describe the issues relevant at each of these stages, with particular emphasis on how the DSU deals with them, and, in particular, on the innovations it introduced compared to the GATT system. (Davey (2001), p.p.119-122).

1- Consultation:

The requirement that disputing parties consult, aiming at satisfactorily adjusting the matter, is contained in Article XXIII itself. The hope is that the parties would resolve their dispute without having to invoke the formal dispute settlement procedures. The rules regarding consultations are set out in article 4 of the DSU. 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 within 30 days of the request. During the consultations, both parties try to learn more about the facts and the legal arguments of the other party. Despite the fact that the structure of consultations is undefined and there are no rules for conducting them, a significant number of cases end at the consultations stage (either through settlement or abandonment of a case). If consultations fail to settle a dispute within 60 days after the request therefore, the complaining party may request the establishment of a panel (Article 4.7). In fact, consultations often go on for more than 60 days. (Grier, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm).

2-Panel Process:

Under the DSU, the right of party to have a panel established is clearly set out in article 6.1. If consultations fail to resolve a dispute within the 60-day time frame specified in article 4, a complainant may insist on the establishment of a panel and, at the meeting following that at which the request first appears on the DSB's agenda, the DSB is required to establish a panel unless there is a consensus in the DSB not to do so. A party must submit a written request for the establishment of a panel, and indicate whether consultations were held, identify the measures at issue and summarize the legal basis of the complaint.

1-Setting up the panel:

Once a panel is established, it is necessary to select the three individuals who will serve as panelists. The parties to the dispute may agree to five panelists. DSU article 8 provides for the Secretariat to propose potential panel members to the parties, who are not to object except for compelling reasons. In practice, parties are relatively free to reject proposed panelists; but if the parties do not agree on panel members within 20 days of establishment, any of the disputing parties may request the WTO Director-General to appoint the panel on his or her own authority (Art.8.7). In recent years, the Director-General has appointed some members of almost one-half of the panels composed.

Article 8.1 of 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".***

These criteria could be 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 to the dispute.. It is also specified that in a case involving a developing country, one panelist must be from a developing country (if requested). Of the individuals actually chosen for panel service, it appears that the vast majority (over 80%) are current or former government officials.(Jackson (2001), p.260).

The DSU provides that panelists serve in their individual capacities and that Members shall not give them instructions or seek to influence them. In addition, the DSB has

adopted rules of conduct applicable to participants in the WTO dispute settlement system. The rules require that panelists:

> ***"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 reasonable be expected to know and that it likely affect, or give rise to justifiable doubts as to, that person's independence or impartiality."***

Disputing parties have the right to raise an alleged material violation of the rules, which if upheld, would lead to the replacement of the challenged individual. (Marceau Gabrielle, Rules on Ethics for the new WTO Dispute Settlement Mechanism, Journal of World Trade, vol.32, n° 3, June 1998, p.57).

2-The task of panels:

The DSU provides in article 7.1 for standard terms of reference (absent agreement to the contrary). The standard terms direct a panel:

> ***"To examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document DS /...and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."***

The Appellate Body has emphasized in its rulings that panels may not stray beyond their terms of reference. In practice, the document mentioned above will be the panel request made pursuant to article 6.2, which requires that, the request:

> ***"specify the measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."***

There are often lengthy arguments over whether second requirement has been met. (Davey (2000), p.291-307).

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.

3-Panel Procedures:

A panel normally meets with the parties shortly after its selection to set its working procedures and time schedule. The DSU's standard proposed timetable for panels makes provision for two meetings between the panel and the parties to discuss the substantive issues in the case. Each meeting is preceded by the filing of written submissions by the parties to the dispute. The DSU permits other WTO members to intervene as third parties and present arguments to the panel. Otherwise, the panel proceedings are not open to the public. It was firmly established by the Appellate Body in the *Bananas Case* between the United States and the European Community, that a party is free to choose the members of its delegation to the hearings. Thus, parties may be assisted, as is often the case by private counsel. We will discuss in a further chapter, and in more details, the EC-Bananas Case. (European Communities Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27/AB/R, paras. 4-12, Appellate Body Report adopted by the DSB on September 25, 1997).

Among the most fundamental issues that arise in assessing a complaint is 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. The Appellate Body has also spoken in terms of the need for a claimant to establish a *prima facie* case. (United States-Measures Affecting Imports on Woven Wool Shirts and Blouses WT/DS33/AB/R, p.p.12-17, Appellate Body Report adopted by the DSB on May 23, 1997).

In 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. 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 than 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.

After hearings and deliberations, the panel prepares a report detailing its conclusions. Traditionally, the panel has submitted its description of the dispute and of the parties' arguments to the disputants for comment. Under the DSU, panels are required to submit an interim report containing their legal analysis for comment as well (Article 15). Appendix 3 of the DSU specifies time limits for implementations of the various stages in the panel process. Those time limits suggest that the panel report should

normally be issued within six to eight months of the establishment of the panel. In practice, cases typically take more time than that. (Jackson (2001), p.p.262-263).

4-Consideration and adoption of panel reports:

Under GATT dispute settlement practice, after a panel issued its report, it was considered for adoption by the GATT Council. Traditionally, decisions in the Council were made by consensus, which meant that any party-including the losing party-could prevent the Council from adopting a panel report. If not adopted, a report would represent only the view of the individual panel members. While parties did not often permanently block adoption of reports, some reports were never adopted (even when the underlying dispute was resolved) and others were adopted only after months of delay. Many commentators felt that this was a major failing in what was otherwise a fairly successful GATT dispute settlement system. Indeed, it is difficult to explain to someone new to the subject why the losing party by itself should be able to prevent adoption of a panel report.

The DSU fundamentally changed this procedure. It eliminates the possibility of blockage by providing in Article 16 that a panel report shall be adopted unless there is an appeal or a "*reverse consensus*" i.e., a consensus **not to adopt** the report. This switch from requiring a consensus for adoption to requiring a consensus to block adoption is a very significant change. It appears that it was adopted in hopes that it would satisfy U.S. complaints in its using the system in the future instead of taking unilateral action as it had done sometimes in the past. Indeed, article 23.1 of the DSU requires WTO members to use the WTO dispute settlement system exclusively if it:

> ***"seeks the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements."*** (Jackson (2001), p.p.264).

C-The Appellate Body:

The change in the consensus rule described above was paired with the introduction of the right to appeal a panel decision. The DSU creates a standing Appellate Body with seven members, appointed for four-year terms and representative of WTO membership. 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 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).

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. 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 regardless of national origin. The Appellate Body is required to issue its report within 60 (at most 90) days from the date of the appeal, and its report is to be adopted automatically by the DSB within 30 days. The appealed panel report is also adopted at that time, as modified by the Appellate Body report. We will discuss further this issue in Chapter 3.

The Appellate Body's review is limited to issues of law and legal interpretation developed by the panel. 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; but the DSU does not include a possibility of remanding a case to a panel. Partly as a consequence, the Appellate Body has adopted the practice, where possible in light of a panel's reasoning. This avoids requiring a party to start the whole proceeding over as a result of those modifications.

There had been 58 WTO dispute settlement cases where reports had been adopted by the DSB as of September 1, 2001 (including compliance cases). In 40 of those cases, there was an Appellate Body report. In seven cases, panels were upheld; in one case the panel was reversed. In the remaining 32 cases, the Appellate Body modified, sometimes extensively, the panel's findings. In all but one of those 32 cases, however, the basic finding of a violation reached by the panel was upheld, albeit sometimes to a different degree and/or on the basis of quite different reasoning. Eighteen panel reports had been adopted without an appeal. Thus, slightly more than two-thirds of the cases had been appealed. (Jackson (2001), p.p.265-266).

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 has engaged in fairly intensive review of such reports. In doing so, it has in general left its stamp clearly on most areas of WTO law that have been appealed. (Japan-Taxes on Alcoholic Beverages, WT/DS8 and 11/AB/R, p.p.12-14, Appellate Body Report adopted by the DSB on November 1, 1996).

Generally speaking, the Appellate Body tends to rely heavily 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 (a 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 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 significantly cut back on the scope of panel rulings in some cases, it has significantly expanded the scope of liability in others.

D-Implementation and Suspension of Concessions:

If it is found that a complaint is justified, the panel/Appellate Body report typically recommends that the offending member cease its violation of WTO rules, normally by withdrawing the offending measure. After it adopts a report, the DSB monitors whether or not its recommendations are implemented. The DSU requires a losing respondent to indicate what actions it plans to take to implement the panel's recommendations. If immediate implementation is impracticable, then implementation is required within a reasonable period of time (Article 21.3). The reasonable period of time is normally set by agreement of the contending parties, or, absent agreement, by arbitration. Normally, the period is not to exceed 15 months; a range of 8-10 months is average. (Jackson (2001), p.266-267).

If the recommendations are not implemented, the prevailing party is entitled to seek compensation from the non-complying member or request DSB authority to suspend concessions previously made to that member (sometimes referred to as "*retaliation*")(Article 22.1). In this regard, the DSU modifies past GATT practice. Article XXIII permitted GATT contracting parties to authorize the prevailing party to retaliate if the losing party failed to end its violation of GATT rules. Such

authorization was granted only once, however, and that was in 1955 to allow the Netherlands to suspend concessions made to the United States in a case involving GATT-inconsistent U.S. quotas on Dutch agricultural products. The Netherlands apparently never utilized the authorization. Attempts to obtain authorizations in the 1980's failed because of the consensus rule, with the target country opposing the authorization. Now, under the DSU, suspension of concessions is to be authorized automatically in the absence of implementation or compensation, absent a consensus in the DSB to the contrary (Article 22.6). There are specific arbitration procedures for determining the level of such a suspension if no agreement can be reached.

The DSU provides:

> ***" Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes to the benefit of all Members" (Article 21.1).***

The DSB will normally recommend the withdrawal of any measure found to be inconsistent with a member's obligations, and the DSU explicitly provides that withdrawal of a nonconforming measure is preferred to compensation or suspension of concessions (Article 22.1). Compensation and suspensions of concessions are viewed as *"temporary measures"*, to be used when a report is not implemented in a reasonable time. The preference for withdrawal is also found in the WTO Agreement itself, where article XVI: 4 provides that :

> ***"each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."***

Thus, there would appear to be an international law obligation to implement recommendations to withdraw inconsistent measures. (Hudec (1993), p.p.590-608).

Finally, and before concluding this section, I would like to stress on the major alternatives the DSU provided other than formal dispute settlement if parties cannot

resolve their disputes. Article 5 includes provisions on good offices, conciliation, and mediation, and provides specifically that the Director-General may offer to provide such services in an effort to assist members in resolving disputes. These informal methods may be used in addition to or in lieu of the panel process. However, a major question is still raised in this case: What if a major economic power, such as the United States or Japan, refuses to comply with the panel or Appellate Body decisions, will the WTO dispute settlement system collapse? We will try to answer this question after examining in details the Appellate Body in Chapter three.

Section 2:The Operation of the WTO Dispute Settlement System: 1995-2001:

The WTO dispute settlement system has been quite active since the founding of the WTO on January 1, 1995. As of September 1, 2001, there had been 237 consultation requests. The annual number of consultation requests peaked at 50 in 1997 and more recently has been running at an annual rate of around 30 or so.

It appears that roughly one-half of the cases are settled (sometimes after commencement of panel proceedings) or abandoned (in the sense that one year after the consultation request, no panel has been requested).

The panel system and the Appellate Body have seen their work load increase significantly in recent years, in part because of compliance cases, which are expedited proceedings to determine if DSB recommendation have been implemented.

The activity of this part of the system can be seen in the following table of panel/Appellate Body reports adopted on a year-to-year basis, which demonstrates:

Year	Report adopted	Compliance reports adopted	Total
1995	-	-	-
1996	2	-	2
1997	5	-	5
1998	11	-	11
1999	9	1	12
2000	14	4	20
2001 (to Sept. 1)	11	1	12
Total	52	6	58

In addition, there have been four arbitrations concerning the level of retaliation to be authorized. As of September 1, 2001, there were 12 active cases at the panel or Appellate Body stage, plus 6 cases in the panel composition stage. (Jackson (1969) p.181).

The DSU provides that panel reports should be circulated within nine months of the establishment of the panel. To date, panels have often missed this deadline-sometimes because of the complexity of the cases or the need to consult experts, sometimes simply because of translation delays. Nonetheless, given the circumstances, the reports have generally appeared reasonably close to the DSU requirements. In the case of the Appellate Body, it has seldom missed its 90-day deadline for circulating its

reports. Thus, the system has largely eliminated delays that characterized some periods of GATT dispute settlement. (Jackson (2001), p.p.269-270).

WTO dispute settlement proceedings have produced a huge corpus of what might be called WTO law. While the 40 reports of the Appellate Body have probably received the most attention, it is important to remember that 58 panel reports have also been adopted by the DSB and in many of the 40 cases that were appealed, the panel reports rule on issues that were not appealed. Compared to GATT cases, WTO cases have tended to involve more issues and often involve claims under more than one agreement. Thus, there is a very rich body of material interpreting WTO obligations.

The WTO system has had a reasonably good overall implementation record. As of September 1, 2001, panel and/or Appellate Body reports had been adopted in 52 cases (not including compliance proceedings). In 8 cases, no implementation was required; in 7 cases the period for implementation had occurred in 30, or approximately 75% of the cases. In some of these cases implementation was not completely accepted by the complaining party, but no further proceedings were initiated. In addition, implementation was not always timely; nonetheless it ultimately occurred in these cases. Of the seven remaining cases, four were in place. In the other three cases, where non-compliance had been found or admitted, retaliatory measures had been authorized. The three cases were ***EC Bananas,*** where a settlement had been provisionally announced and the retaliatory measures withdrawn in mid-2001 (European Communities-Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27); ***EC Hormones,*** where retaliatory measures were in place (European Comunities-Measures Affecting Livestock and Meat(Hormones), WT/DS26&48); and ***Brazil Aircraft Subsidies,*** where retaliatory measures had been authorized but not implemented (Brazil-Export Financing Programme for Aircraft,

WT/DS46). These cases were the exceptions to an otherwise strong record in compliance. The existence of these cases (and cases where complainants have not obtained timely or complete satisfaction) 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.

Chapter 3: Appellate Procedure under the WTO Dispute Settlement Understanding:

One of the most striking features of the current World Trade Organization (WTO) dispute settlement system is the Appellate Body. For the first time in the history of dispute settlement in the General Agreement on Tariffs and Trade (GATT) system, there is a review mechanism to provide recourse to the findings of a panel decision. Initially, the creation of the Appellate Body met with mixed reactions. Indeed, there were those who expressed concern that the design of the Appellate Body would not fit into the traditional GATT practice of settling disputes. It was feared that an Appellate Body might inject an overdose of legalism into a system that owed some of its past success to the use of diplomacy and pragmatism to resolve trade disputes. However, in light of the fact that the majority of experts have made positive comments on the Appellate Body's performance in its first three years, the widely shared perception seems to be that the Appellate Body's early critics have been proved wrong. (Shoyer & Forton (1998), p.737); These articles are part of the published proceedings of the American Bar Association symposium, The First Three Years of the WTO Dispute Settlement System, held at Georgetown University Law Center on February 20, 1998).

Fundamental questions, however, remain. If it is true that the dispute settlement system is now more *"legalized"* by the addition of appellate review, what precisely does that *"legalization"* stand for in the context of the Appellate Body? The mere fact that :

> ***"three persons of recognized authority with demonstrated expertise in law and international trade law"***

have been set in a position to pass judgment on the legal rulings of another panel composed of three panelists who are :

"well-qualified in international trade law and policy"

does not necessarily guarantee that the second decision will be of greater quality than the first. Arguably, an appeal under the Dispute Settlement Understanding (DSU) only implies the substitution of one body's view of the situation for that of another.

Yet there might be sound legal arguments in favor of the WTO appellate review mechanism beyond the political consideration that WTO members can now reassure their respective constituencies that panel reports can be reviewed. For example, if the DSU provides a reasonable opportunity to reduce the risk of perpetuating judicial error, and is thus similar to appellate procedures in domestic jurisdictions, the standing of the system would be enhanced. As a result, the primary virtue of appellate review would not be that the Appellate Body members are necessarily wiser, but that they are in a position to look in retrospect at the initial efforts to solve a dispute, to consider what mistakes may have been made, and to take them into account when they render their final decision.

This Chapter tries to take the Appellate Body by its name and to unpack DSU appellate procedure by comparing it to the basic features of appellate procedure in traditional domestic court systems. Furthermore, this Chapter will attempt to assess to what degree the rationale of an appeal in a domestic court system is mirrored in the WTO dispute resolution system. (Dombey (1998), p. 71).

Proposals calling for an appeals mechanism to allow rectification of *"fundamentally flawed"* panel decisions or review of reports that were *"erroneous" or "incomplete"* were opposed on the basis of fears that appellate review would cause further delays in rendering final decisions. This observation reflects the thinking of the drafters of the

DSU and helps to capture the context in which the DSU was drafted. Therefore, one could be inclined to reject the utility of measuring the Appellate Body against legal standards that tend to disregard the imperfections of the system.

Nevertheless, close scrutiny of Appellate Body procedures is unavoidable due to the fact that the current regime gives the Appellate Body a unique authority to implement and interpret the WTO agreements. If it is true that the new DSU suggests that the legal effect of an adopted panel report is an international obligation to comply with the recommendations of the panel report, then the importance of and the pressure on the Appellate Body is even greater, as it affords the WTO members a last resort against the imposition of a legally unfair obligation. With this in mind, the members have been closely monitoring the Appellate Body.

Section 1: Domestic Appellate Procedures:

A. The Purpose of an Appeal:

It is obvious that jurisdiction in different countries vary in its implementation of appellate procedures. For the purposes of this research, an appeal is a review by a higher court of a final judgment rendered by a court exercising original jurisdiction. Accordingly, the general structure of appellate procedure is that appeals go from the trial court (or court of first instance) to an intermediate appellate court and then to a higher or supreme court.

At first glance, the possibility of review by a higher court might simply encourage the first instance judge to deliberate carefully before rendering a decision, but this can only be part of the purpose of appellate review. It becomes clear that the rationale varies depending on whether a judicial system provides for a re-trial of a claimant's case, similar to the proceeding before the lower court, or only for a review on certain

legal or factual aspects of a decision! As procedural systems are also required to provide efficiency and finality through the decision-making process, the issue of appeal poses an ongoing conflict between competing goals, whether in a domestic judicial system or an international dispute settlement system. (Shreve & Hansen (1994), p.417).

1. A Second Chance for the Litigant

One theory is that appellate review affords the petitioning party a second chance for redress. There is a superior court to which it can resort for relief. If the original decision maker does not grant the relief requested, then the same request can be made to a higher-ranking body. Central to this concept is that the judgments of lower courts are examined from two perspectives: fact-finding and the application of law. What matters for the purpose of this analysis is the objective of limiting the admission of new evidence in order to discourage parties from holding back evidence or facts. When panels of judges review the findings of a single judge, the likelihood is greater that justice will be done with respect to the parties. An appeal helps overcome the adverse effects of any flaws of the lower court. Naturally, this argument loses some of its appeal if the number of well-trained basic decision-makers equals the number of competent appellate judges. (Martineau (1990), p. 5).

2. Error of Law, Uniformity, and Law Development

In contrast to the theory of a second fact-instance, other judicial systems prevent the parties from introducing new evidence before the appellate court. The function is not to provide for a second stage in the trial. Appellate procedure is not a second chance

for litigants to reopen the proceedings by providing a forum for the parties to introduce arguments and evidence that were not brought before the trial court. (Byrd & Barbier (2002), p.p. 158, 161-62).

The appeal is a safeguard to ensure fairness in the judicial process by a review of errors of law. The appellate court must ascertain whether the judge in the first instance made a mistake in a legal ruling by failing to follow some previously established substantive or procedural legal rule. The objective is not primarily to do justice with respect to the particular parties and to preserve their rights; the emphasis turns on the correctness of the lower court's legal dispositions.

The error of law concept is complemented by the idea of an institutional review. The application of the law by the higher courts promotes uniformity. It helps to ensure that the law will be interpreted and applied in a consistent manner and in accordance with similar procedures. Appellate courts are needed to announce, clarify, and harmonize the rules of decision. This function holds particularly true for higher or constitutional courts in judicial systems. More than reviewing decisions for their correctness, their task is, in a broader sense, to preserve the uniformity of law application by "expounding and stabilizing principles of law for the benefit of the country." The review becomes more focused by allowing appellate judges to select cases posing serious issues of constitutional importance, conflicts between the lower courts, or other special needs for appellate guidance. (Gesrtenmaier, West Germany (1990), p.902).

B. Appellate Procedure:

1. The Right to Appeal

In civil and common law countries, a party to an appeal generally must have been a party to the judgment from which the appeal is taken. Taking into account the problems caused by an increase in the number of appeals and by the length of appeal proceedings, it is not surprising that most domestic judicial systems make the availability of appeal conditional upon certain requirements.

Generally, under most judicial systems the first appeal is only permissible if the decision against which it is directed has completely or partially denied the relief the appellant sought. A party whose claim has been completely accepted by the trial court may not file an appeal. Another condition is the exclusion of certain categories of small claims decisions. These restrictions are justified by the need to limit the length and cost of proceedings, particularly where the claim concerns only a small sum, or to prevent the use of appeal for merely dilatory purposes. (Aldistert (1992), p. 55).

There is another reason that specifically derives its validity from appellate systems that employ a second fact-instance. If it were technically possible to benefit from the well-trained expertise of appellate judges in any claim, then it would save time and resources to constitute a system that has only one fact-instance, presided over by three well-trained judges and with no possibility of appeal. It could be inferred, then, that the basic premise of an appellate system is that there are some cases that cannot be appealed.

2. The Standard of Review

In light of the foregoing considerations, substantive claims of legal or factual error are subject to a different standard of review than claims of procedural error. This distinction goes to the heart of appellate review. What is common among appellate systems, however, is that errors at the lower court level must have materially contributed to the adverse judgment. A mere erroneous application of the law or a simple misapprehension of evidence by the lower court in a second fact-instance appeal does not warrant a successful appeal if other grounds ultimately justify the lower court's decision. The task of the appellate court is to determine whether the judgment will be allowed to stand despite the error, or should be reversed. As to the standard of review itself, it has to be distinguished between second fact instance appeals and appeals limited to issues of law only.

If the appeal is considered a re-trial (i.e. a second fact-instance), the appellate court has a broad review power. The entire record of factual, substantive and procedural issues before the trial judge are open to review. This broad power is contrasted with the power held by appellate courts where review is more limited.

Under a system allowing appeal on issues of law only, review is conducted de novo and no special deference is given to the legal interpretation of the trial court. Moreover, because the court will not search the record for error, the appellant is required to identify and present all issues in his brief. However, the appellate court is not necessarily limited to errors to which the parties expressly refer. If other errors of law are found, the court may take them into consideration as well, if it deems appropriate. (Childress & Davis (1996), p. 202-204).

Section 2:WTO Appellate Procedure:

A-The Purpose of Appellate Review:

The DSU limits every appeal to issues of law covered in the panel report and to legal interpretations developed by the panel. It does not permit review of the panel's findings of fact.

1. Error of Law and Law Interpretation

On its face, the authority given to the Appellate Body appears to correspond to the concept of an appeal in domestic jurisdictions that provide for a review of the errors of law. Thus, it is plain that the Appellate Body is not a second fact-instance and does not afford a second chance to the litigant. Like domestic appellate courts in common law countries and higher courts in civil law countries, **the Appellate Body engages only in the interpretation of law.** (Van Der Woude (1992-1993), p.p. 412-460).

However, it is evident that the WTO members did not vest the Appellate Body with the broad power of interpretation. The Appellate Body works in a different and, to a certain extent, more complex setting. The provisions of the WTO Agreement and the DSU more narrowly circumscribe the Appellate Body's powers. In this respect, it seems to be less relevant that the WTO members rarely exert their authority to adopt an interpretation, pursuant to Article IX: 2 of the WTO Agreement.

There is a substantial difference between the DSU system and domestic courts. Domestic courts ideally function within a system of checks and balances in balance with the executive and legislative branches, which have the ability to react to judicial rulings in due course. The current WTO Agreement, however, does not provide for a speedy decision-making process, due to the need to obtain the support of such a large number of member countries to either *"overrule"* the report (in response to a *"wrong"*

ruling) or approve of the report (in response to *a "right" ruling*).

Apparently, the Appellate Body adopts a cautious approach towards interpretative questions, pointing out that the panel practice under the DSU cannot add to or diminish the rights and obligations provided in the covered agreements.

However, given the Appellate Body's unique kind of power, it is perhaps more accurate to conclude that the Appellate Body must engage in broad and substantive law interpretation. Despite the reservations that the Appellate Body has expressed in some of its reports, the line between the mere application of the WTO Agreement and its interpretation is nonetheless blurred. A striking example of a far-reaching interpretation is the Appellate Body's ruling in European Communities--Regime for the Importation, Sale and Distribution of Bananas, simultaneously applying provisions of the GATT and the General Agreement on Trade in Services (GATS) to EC banana licensing procedures. The EC asserted that an overlap between the GATT and the GATS could lead to a clear conflict between the rights of one WTO member under one agreement and the rights of another member under the other agreement. The Appellate Body rejected this argument and stated that the measure in question could be scrutinized under both agreements. The impact of this ruling is considerable. The Appellate Body considered importers of bananas to be service suppliers as well, provided that they are engaged in supplying *"wholesale trade services."* Certainly, the simultaneous application of the GATT and the GATS has merit. Yet one can expect difficulties for future interpretation of commitments under the GATT and the GATS if the repercussions of a measure on trade in either goods or services are sufficient to trigger both agreements. (Brown & Kennedy (1994), p. 91).

2. Consistent and Uniform Law Application

The consistent application of law is one of the main purposes of appellate procedure. In line with this objective, the DSU is designed to provide security and predictability to the multilateral system. The Appellate Body tried to translate those requirements by establishing the principle of "collegiality" for its members. The seven members of the Appellate Body felt the need to guarantee an exchange of views among them on a permanent basis because they do not all sit as one panel and Article 17 does not provide a procedure to ensure the overall consistency of the Appellate Body's decisions. In essence, the relevant provision under the Working Procedures implies that the members of the Appellate Body must convene regularly to ensure consistency and coherence in decision-making. In addition, each member of the Appellate Body must receive all documents filed in an appeal, in order to allow the division responsible for deciding the case to exchange views with the other members before the division finalizes its Report. The Appellate Body stressed the importance of this issue in a letter to the chairman of the DSB upon the publication of its working procedure rules.

The Appellate Body relies on Articles 31 and 32 of the Vienna Convention, which prescribe that a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose. (Treaty establishing the European Community, Feb. 7 1992).

In **India--Patent Protection For Pharmaceutical and Agricultural Chemical Products**, (WTO Appellate Body Report, *TRIPS: India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, AB-1997-5, 16 January 1998, Adopted by Dispute Settlement Body, India, Appellant; United States, Appellee; European Communities; Third Participant, Division: Lacarte-Muró, Bacchus and Beeby), India argued that Article 70.9 of the TRIPS Agreement is part of the transitional arrangements of the TRIPS Agreement and does not, therefore, create an obligation to make a system for granting exclusive marketing rights generally available before the events listed in Article 70.9 have occurred. Given the wording and the context of Article 70.9, this reasoning is convincing. The Appellate Body, however, stated that India had the obligation to adopt legislation for the implementation of the provisions of Article 70.9 of the TRIPS as from the date of entry into force of the WTO Agreement (January 1, 1995) by referring to the meaning and effect of the rights and obligations under Article 70.9. (http://www.ejil.org/journal/Vol9/No1/sr1f.html).

The dispute that reached the WTO Appellate Body in this case arises from complaints by American companies that India failed to meet its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to provide appropriate patent protection (or, more precisely, to pave the way for eventual patent protection) for pharmaceutical and agricultural chemical products. This decision is important to the trade community as it embodies the first dispute resolution centering around TRIPS. TRIPS and the intellectual property rights it protects have become an integral part of cross-border trade of goods and services. The findings issued by the Appellate Body in this case lay an important foundation for future treatment and

interpretation of TRIPS. In addition, the Appellate Body's treatment of this case is of great interest to international lawyers beyond the realm of trade because the decision sheds light on aspects of public international law including the role expectations play in the interpretation of treaties under Article 31 of the Vienna Convention, the meaning of "good faith interpretation" under Article 31, the power of a dispute resolution body to hear claims that are brought before it, and the ability of a "foreign" tribunal to examine a country's laws.

The case law reveals that the Appellate Body has sometimes failed to achieve the desired degree of consistency in its analysis. But in the light of the complex nature of the WTO Agreement, one has to concede that it is also difficult for the Appellate Body to produce consistent legal conclusions all of the time.

B. WTO Appellate Procedure

1. The Right of Appeal

WTO panel reports may be appealed by any party to the dispute before they are adopted by the DSB. In contrast to appellate procedure before the European Court of Justice (ECJ), a third party cannot appeal, but is entitled to make written submissions and can be heard by the divisions of the Appellate Body. (Moyer (1993), p.p. 707-724).

Thus the Appellate Body addresses only the legal issues that it thinks necessary to resolve the dispute. There is no attempt to choose legal questions of interpretation on the basis of their importance to the functioning of the WTO Agreement. In particular, a losing government may face domestic political pressure to appeal a negative finding, striving to delay implementation. Therefore, an unlimited right of appeal would seem

to do more harm than good to the system due to the risk of overloading it with baseless and/or politically motivated appeals.

This argument, however, cuts both ways in a system that depends on the political support of its members and, not less importantly, on the voluntary compliance of its members. The acceptance of the more legalistic approach embodied in the addition of the Appellate Body might require frequent use of the right of appeal to make the system work. (Dillon (1995), p.p.349- 385).

2. The Standard of Review

As already mentioned, pursuant to Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. The Appellate Body Working Procedures do not elaborate on the distinction between findings of law and findings of fact.

Thus the Appellate Body considers not only the interpretation of a relevant treaty provision as a question of law, but also the application of the provision to the facts found in the case. This is consistent with the approach taken by many domestic appellate courts. Consequently, the Appellate Body sees fit to examine whether the panel has made an objective assessment of the facts as required by Article 11 of the DSU, as this involves a question of the consistency of a given set of facts with a provision. (Brand (1997), p.p.556-575).

3. Procedural Errors

No DSU provision explicitly empowers the Appellate Body to examine procedural errors before the panel. Article 17.13 of the DSU confers the power to the Appellate

Body to :

> ***"uphold, modify, or reverse the legal findings and conclusions of the panel."***

This language enables the Appellate Body to specify the number of legal issues not explicitly addressed in Article 17, such as lack of competence of a panel, breach of the procedure before a panel, which adversely affects the panel findings and incorrect application of WTO law. The approach of the Appellate Body is to look first at the provisions under the specific agreement or, if relevant, under the DSU, and the criteria that are given for decisions on procedural matters. (Petersmann (1994), p.p.1157-1217).

However, one might consider the consequences should the Appellate Body find a procedural error due to abuse of discretion by the panel. As it has no authority to remand the case to the panel, it is unlikely that the Appellate Body will reverse a panel decision on purely procedural grounds, but instead will decide the case on the merits. Therefore, the concept of a substantive procedural error does not have a place in DSU appellate procedure, because it does not provide for an effective review of procedural errors; any procedural error is likely to have no effect.

Another problem arises when there are grounds to question the integrity of the panel members. Whereas the DSU permits a party to oppose nominations for the panel on the grounds of *"compelling reasons,"* the DSU does not provide for a review mechanism for panel members or for the Appellate Body. It is difficult to predict how the Appellate Body would approach this issue. (Palmeter (1996), p.p. 337-350).

4. The Authority of the Appellate Body with Respect to the Panels

The DSU empowers the Appellate Body to uphold, modify, or reverse the legal findings and conclusions of the panel, thereby limiting the Appellate Body to the issues of law raised by the panel. Neither the DSU nor the Appellate Body's Working Procedures enable the Appellate Body to remand a case to a panel. The failure to provide the Appellate Body with this authority has already created difficulties in handling procedural errors. The difficulties will likely persist unless this power is granted to the Appellate Body. Failure to do so may undermine the security and predictability of Appellate Body reports that the DSU seeks to promote.

It is quite common for panels not to rule on every question raised by the parties if they can resolve a dispute on the basis of only some of the parties' claims. While the losing party appeals a panel's final conclusions, the prevailing party may also challenge panel findings with which it disagrees. Thus, an important question is whether the prevailing party must cross-appeal those findings or whether simply mentioning the issue in its submissions is sufficient to allow debate on grounds other than those cited in the losing party's appeal. (Pescatore (1997), p.p. 244).

On its value, this approach seems to be consistent with the Appellate Body's preference to address only issues that are in dispute between the parties and not to develop wide-ranging legal rulings. Following this reasoning, the Appellate Body should require the prevailing party to cross-appeal those conclusions that are not final, but with which that party does not agree and that it wishes to be considered for appeal. There is some merit to this argument. However, this ruling might create the risk of encouraging parties to draft appeals and cross-appeals in the broadest possible way to avoid losing any of their rights. Appellees would be well advised, therefore, to

consider what form of cross-appeal they should enter; otherwise a party could be deprived of arguments that it could have relied upon had it entered a cross-appeal. From a practical point of view, the Appellate Body's reasoning is understandable, as it gives itself the discretion to sift out arguments that would waste judicial resources in the absence of a cross-appeal. (EU/WTO: Commission Seeks Review of Dispute Panel Systems, European Report, Oct. 24, 1998).

Chapter 4: Effectiveness of the WTO:

*The Key Elements of the Dispute Settlement Understanding:

The DSU created a Dispute Settlement Body with the power to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." The DSU also regulates the DSB's exercise of these powers with considerable specificity. (This seminar was taught in the fall of 2001 by Professor John H. Jackson of Georgetown, Professor Chi Carmody of the Faculty of Law at the University of Western Ontario, and Christopher Parlin, Adjunct Professor of Law at Georgetown, with the participation of Professor Carlos M. Vazquez of Georgetown).

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* provides a mechanism for settling disputes that arise under any of the Uruguay Round Agreements, including the Agreement establishing the World Trade Organization and the DSU itself. The DSU is set out in Annex 2 to the WTO Agreement.

Under the WTO, there are strict time limits for each step in the dispute settlement process, the defending party cannot block findings unfavorable to it, and there is one comprehensive dispute settlement process covering all of the Uruguay Round Agreements. (Grier (1997), p.p. 35-39).

Section 1: Principles Guiding the Dispute Settlement Process:

Principles: Equity, Participation of Third Parties, Speed and Effectiveness, Mutual Acceptance, Sovereignty, and Transparency.

1-Equity:

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments.

2- Participation of Third Parties:

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

3- Speed and Effectiveness:

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreements introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year —

15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

Time frame requirements are set for each stage of the dispute resolution process, yet due to the complexity of some cases, appeals, non-compliance with DSB rulings, and loopholes in the judicial procedures, these time frames have been greatly exceeded as of late. While time frames can be constrictive on complex cases and possibly require loosening, the increase in real time frames requires increased pressure on resources.

4- Mutual Acceptance:

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Although much of the procedures does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages; consultation and mediation are still always possible.

5-Sovereignty:

The WTO allows countries to challenge each other's laws and regulations when violating WTO rules. Cases are decided by a panel of three trade officials. There are

no conflict of interest rules and the panelists often have little knowledge of domestic law or of government responsibility to protect workers, the environment or human rights. Dispute settlement at the WTO is obligatory, with losing governments urged to change offending trade regulations, or, if not, to agree on reparation, like tariff reductions. If that fails, trade sanctions can be put on the loser. That has not been tested because, thus far, losing countries have conformed to rulings.

Once a final WTO ruling is mandated, losing countries have determined period of time to implement one of three choices: change their law to match WTO requirements, pay permanent damages to the winning country, or face non-negotiated trade sanctions. To date, some 126 cases have been subjected to the organization's process, of consultations, hearings, panels and rulings. This is far more than its predecessor handled, mostly because losers could stonewall unfavorable rulings without facing sanctions.

6-Transparency:

Although ameliorated within the last few years, the degree to which dispute settlement proceedings are open to the public is still unsatisfactory to many parties. In order to obtain better results in the settlement of disputes and to foster more trust in the WTO, such measures have been suggested as to open access to DSB meetings to WTO members with interest, intergovernmental organizations, and third parties. Among others, the timing of the release of panel and appellate body reports and decisions as well as release of information concerning the implementation process have been raised as important transparency issues.

Section 2: Notes for Evaluating The Effectiveness of the WTO:

To evaluate the effectiveness of the DSU, we must first ascertain its purpose. Its title suggests that its purpose may be simply to afford a peaceful mechanism for settling individual disputes among the parties concerning compliance with the obligations in the covered agreements. If so, then the fact that members have not resorted to force in order to settle such disputes may count as success. Several articles in the DSU indicate that its purposes are indeed to facilitate the settlement of individual disputes. Article 3.3, for example, provides that :

> ***"the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."***

And Article 3.4 provides that :

> ***"recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."***

Other articles, however, indicate that the DSU's purpose is broader. Article 3.2, for example, provides that :

> ***"the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system,"***

and that it :

> ***"serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."***

The references to "security" and the preservation of "rights and obligations ... under the covered agreements" suggest that the purpose of the DSU is also to give a degree of efficacy to the primary obligations contained in such agreements. The reference to "predictability" and "clarification" of the provisions of the covered agreements suggests that one of the ways the DSU seeks to give efficacy to the primary obligations is by making it clearer to the parties, and to non-governmental actors, what the obligations of the members are. These DSU clauses recognize the importance of greater clarity and reliability to a trading system based on market principles and actions by millions of non-governmental entrepreneurs.

The conception of WTO obligations as relating merely to the overall balance of benefits and burdens might have been consistent with a regime whose purpose is simply to facilitate the resolution of individual disputes, but it seems incompatible with a regime that seeks to produce a measure of security and predictability to members.

Second, we note that, under the latter conception of WTO obligations, it makes little sense to ask whether the remedies provided for in the DSU are adequate to give efficacy to the primary obligations imposed by the covered agreements. In other words, because the DSU only provides for the prospective remedy of suspension of concessions, proponents of this view are indifferent as to whether members conform their laws to the individual provisions of the covered agreements or whether members suffer a suspension of concessions that restores the overall balance of benefit and burdens. (Jackson (1997), p.p. 60, 62-63).

Moreover, if the members had desired perfect compliance, they could have provided severe penalties for noncompliance and created the international equivalent of a police force to enforce such penalties. The members did not do so, nor is there any prospect

that they ever will. No doubt this reflects to some extent the fact that the members did not desire perfect compliance. But this does not mean that they wanted only the degree of compliance that the remedies they agreed to would produce. More likely, they preferred something closer to perfect compliance but were unwilling to pay the collateral costs in terms of sovereignty for a regime that would achieve that degree of compliance.

In the end, the extent to which the DSU can and will be amended to produce greater compliance with primary norms is as much a political question as a technical one. In part, it will turn on the degree of compliance the members would like to produce. They may well prefer to move in the direction of less intrusive remedies. On the other hand, the members may prefer something closer to perfect compliance, and now, several years of experience under the DSU may have served to allay some concerns about conferring significant power to achieve such compliance on the DSB. The members' willingness to confer such powers on the DSB might well also depend upon changes in the way it operates. Amendment of those primary obligations, or the failure to amend them, may well increase (or decrease) the members' interest in inducing better compliance with those obligations.

The DSU may well be succeeding at producing substantial compliance with the primary obligations even if a certain percentage of the rulings and recommendations of the DSB are not ultimately complied with. The DSB's rulings and recommendations are necessarily made in disputes that have arisen and that have eluded settlement despite attempts at consultation and mediation. Even if such rulings and recommendations are frequently violated, substantial compliance with primary obligations may well be occurring under the surface, influenced if not caused by the existence of a dispute settlement regime. The dispute settlement system may also be

encouraging members to litigate cases that they otherwise might not have bothered to bring because they were legally or politically marginal. (Hudec (2001), p.p.369, 400).

Finally, in assessing whether the DSU is effective or beneficial for members, or some subset of them, it is important to ask oneself what the alternative is. For example, it is often said that the DSU is much less effective for developing countries than for developed ones because the former lack the economic or political withdrawal to employ countermeasures in responding to noncompliance by the latter. Because equality in treatment of a legal system's subjects is an important measure of a legal system's legitimacy. The disparate ability of developing and developed states to employ the remedies afforded by the DSU is sometimes raised as a major weakness of the DSU. It is certainly true that developing countries have far less practical power to induce compliance by developed nations than vice versa. Proposals to alleviate this problem by, for example, establishing a mechanism to allow countermeasures to be imposed collectively deserve serious consideration. Nevertheless, the claim that the DSU is illegitimate because of this power disparity neglects the fact that, in the absence of the DSU, the power disparity would be even greater. This criticism should be understood, rather, as a claim that the DSU fails to go further than it does in correcting a power disparity that exists to an even greater extent in the international state of nature. Powerful nations will always have a greater raw power to violate their international obligations with impunity while requiring the less powerful nations to comply with theirs. Legal systems seek to diminish such power disparities, or at least to minimize their importance in the distribution and enforcement of legal rights and duties, although even in municipal systems the disparities are never fully neutralized. Whether powerful nations will regard it to be in their long-term self-interest to give up

some of their ability to get away with violations of their obligations will perhaps be the most important question in determining how far the DSU can and will be amended to bring the WTO closer to the ideal of a truly legal system. (Pauwelyn (2000), p. 335).

Section 3: WTO and Developing Countries:

The developing countries, in particular, had expected that the new dispute settlement process would help the weaker trading partners in enforcing the rights and obligations under the various WTO agreements. In fact, the supposed benefits of such an effective dispute settlement system were one of the main persuasive factors for several developing countries to agree to the Uruguay Round agreements. Though the DSU has brought about some degree of predictability and efficiency in the resolution of disputes, the utility of the system in actual operation has fallen far short of the initial expectations. Furthermore, in some respects, it has operated against the interests of the developing countries. ("India and Ongoing Review of WTO Dispute Settlement System", Economic and Political Weekly, 30 January, pp. 264-70).

The dispute settlement process is very costly for the developing countries. Most of the time, they have to call upon the assistance of the law firms of major developed countries, which charge heavy fees. The developing countries would therefore not be as prompt and willing to initiate the dispute settlement process to exercise their rights. Hence there is a basic imbalance in rights and obligations between a developing country and a developed country, because of a vast differential between the capacities of these two sets of countries to invoke the enforcement process.

There are several other handicaps for the developing countries in the system. The relief granted by the system is generally very much delayed; as it may take up to

about 30 months from the time the dispute settlement process was started. And this delay may be very detrimental to the developing countries. With weak trade linkages in their external economy; they are likely to suffer irreparable damage by the time they get full remedy. (1996, No. 3, Third World Network, Penang).

And in really difficult cases, the only remedy they may get is in the form of permission to retaliate against the erring country. Obviously, such a remedy is impractical, because a developing country will naturally hesitate to take retaliatory action against a developed country in view of the economic and political costs involved. (Hudoc (1998), pp. 101-16).

Moreover, even if the remedy is available, it is usually through corrective action by the erring country after approval of the panel report by the Dispute Settlement Body. There is no retrospective relief from the time the incorrect measure was applied by the erring country. In the case of a developing country, this gap in relief may be very costly and may prevent any remedy to this country for all the damages it went through.

Apart from all these systemic problems, a major new problem is emerging in the operation of the panel and appeal process. The panels and the Appellate Body (AB) very often engage in very substantial interpretations of the provisions of the WTO agreements. By coincidence, it has so happened that in a large number of cases, these interpretations have enhanced the obligations, which are mostly those of the developing countries and enhanced the rights, which are mostly exercised by the developed countries. In some cases, the panels and AB have gone to the extent of adjudicating as between two conflicting provisions of the agreements. One important case in point is the Indonesia car subsidy case. Indonesia had been granting some facilities for the use of domestic products, which was permissible under the

Agreement on Subsidies. But the panel came to a finding through a process of reasoning which held that the practice violated the Agreement on Trade-Related Investment Measures (TRIMs). The panel's final opinion was that even though the measure was permissible under one agreement, it could not be allowed as it violated another agreement. (1999, Strengthening Developing Countries in the WTO, Trade & Development Series No. 8, Third World Network, Penang).

- ***Proposals to Developing Countries:***

Several proposals can be suggested in order to help the developing countries protect their rights and defend their interests. Theses proposals are mentioned hereunder:

A- The developing countries should enhance their domestic legal capability to handle the dispute settlement process in the WTO on their own without having to call upon the assistance of lawyers of the major developed-country centers.

B- The developing countries should start initiatives in the General Council for improvements in the dispute settlement process for which no amendment to the DSU is required. For example, the following issues may be raised:

1- The General Council should give guidelines to the panels and AB in respect of the interpretations of the agreements. There should be specific instruction that the panels and AB should not undertake substantive interpretations. In particular, when a conflict between two provisions of the agreements is noticed, the panel/AB should refer the matter to the General Council for an authoritative interpretation rather than itself undertake the exercise of determining which provision is more binding.

2- When a developing country's stand has been found to be correct and the other party in the dispute is a developed country, the panel should be asked to determine the cost to be paid to the developing country by the developed one. The General Council should have a general provision for payment of such costs to the developing countries.

3- When the panel/AB has found that the action of a developed country has brought harm to a developing country, the erring developed country should give compensation to the developing one for the loss suffered by the latter from the time the offending action was initiated. The General Council should take a general decision to this effect. (1999), Some Suggestions for Improvements in the WTO Agreements, Third World Network, Penang).

C- The developing countries should place proposals in the General Council for improvement of the DSU. For example, the following issues may be initiated and pursued:

1- In case a developing country has to take retaliatory measures against a developed country, there should be a mechanism for joint retaliating action by all the Members.

2- There should be a review about the utility and desirability of having a standing Appellate Body. A continuing body of this type is bound to develop and perpetuate certain leanings and orientations, which may not be a healthy practice, given the fact that its recommendations are in the nature of final pronouncements on the issues in question. If a second look is necessary after a panel has given its recommendation, the task may be entrusted to yet another panel, which would give its findings as the standing AB does at present. The advantage of this approach is that there will be a second look and, at the same time, with no pre-fixed ideas and leanings as can be associated with a standing body.

D- The developing countries should move to undo the harm done so far by the substantive interpretations of the panels and AB. The General Council should be requested to pronounce that these interpretations will not guide the future work of the dispute settlement process.

Chapter 5: Case Study: Some Lessons from the Kodak-Fuji Dispute in 1995:

*** * Facts:*

Japan and the United States have disputed measures affecting photographic film and paper. The Kodak-Fuji film dispute centers on the distribution system in Japan. In May 1995, Eastman Kodak, Co. asked the U.S. Trade Representative (USTR) to investigate the Japanese photographic film and paper market.

Virtually, all domestically-made film moves through wholesale channels and most imported film is sold on a direct-to-retail basis. The net result is that imported film is found in only 40% of Japanese market.

In summary, the Fuji case dealt with the tightly interlocked relationship between Fuji and Japan's largest distributors of photographic film and paper, all of whom sold Fuji exclusively.

We can see that the facts represented by this case clearly satisfy the elements necessary to demonstrate non-violation nullification or impairment pursuant to Article XXIII: 1(b).

*** Legal Question:*

The dispute centered on the question of whether Japanese markets for camera film and paper for photographs were open to Eastman Kodak Company, a company headquartered in Rochester, New York. And also, whether the Japanese laws, governmental measures and administrative guidance, blocked access to its retail markets in the consumer photo film sector.

The problem is that Kodak really had little evidence to show that it was being frozen out by the Japanese government. There was the retail-stores law, and Kodak produced evidence of state intervention to restrict imports, but it was evidence from the 1960s and 1970s. Fuji pointed out that Kodak had a larger market share in some regions of Japan than in others, and that at different points in the last two decades Kodak's market share actually fluctuated quite sharply. If what we're dealing with is a monopoly situation, then it's an imperfect monopoly at best. Given the limits on the WTO's jurisdiction, it was probably unreasonable of Kodak to expect a real victory

Kodak charged that Fuji Photo Film, Co., Japan's biggest photographic film and paper producer, was involved in "anti-competitive trade practices" in Japan. Kodak asserted that Fuji, with the support of the Japanese government, tacitly dominated the consumer film market in Japan using unfair practices. According to Kodak, Japanese regulations implicitly favored Fuji by making it difficult for imported consumer photographic film and paper to be marketed in Japanese shops. Kodak also said that some shops in Japan were not allowed to carry Kodak's products because of back room deals with Fuji. According to Kodak, this explained why Fuji had a 75 percent market share in Japan while Kodak had only a 7 percent share in 1996. ("US to Seek to Panel Against Japan in Kodak Case," *The Reuter European business Report*, September 20, 1996). Kodak estimated its losses since the 1970s due to the unfair practices at $5.6 billion. (Serge Romensky, "US Shocked by WTO Ruling in Kodak-Fuji Dispute," *Agence France Presse*, December 5, 1996). Accordingly, Kodak requested that Japanese regulations be changed in order to break up Fuji's exclusive distribution system.

The United States contended that, for over thirty years, the Japanese government engaged in systematic and non-transparent measures designed to protect the two

principal Japanese producers of film and paper, Fuji Photo Film Ltd. and Konica Corporation, from international competition to keep Kodak out of the Japanese market and to counteract the tariff concessions that Japan made in several GATT rounds of multilateral negotiations.

* * * *Decision:*

Japan and the United States held consultations on July 11, 1996. The consultations failed to result in a resolution of the dispute. (Dillon (1999), p.p. 197, 199).

The United States, failing to reach an agreement with Japan, requested a dispute settlement panel on September 20, 1996. The panel was tasked to investigate Kodak's allegations that Japanese regulations had the effect of supporting anti-competitive practices by Fuji film. On December 5, 1997, the WTO Panel on Japan--Measures Affecting Consumer Photographic Film and Paper issued an Interim Report deciding in favor of Japan. The tribunal arbitration panelists were from Brazil, Switzerland, and New Zealand. They determined that the United States had not demonstrated that its WTO rights had been impaired.

It was the first case that the United States lost before a WTO panel. The Panel Report was finalized in January 1998, circulated to WTO members on March 31, 1998, and adopted by the WTO Dispute Settlement Body (DSB) on April 22, 1998. The US chose not to appeal, because the case turned completely on factual determinations that were beyond the scope of review by the Appellate Body.

Article 17.6 of the DSU limits review to "issues of law covered in the panel report and legal interpretations developed by the panel." The Appellate Body has stated that it will review only "an egregious error [of fact] that calls into question the good faith of a panel." (*EU–Beef Hormones* p. 133.)

*** ***Arguments:***

In the WTO proceeding, the United States argued that, over the course of several decades, Japan engaged in a broad range of protectionist activities intended to circumvent tariff concessions that Japan admitted in various GATT negotiating rounds. The activities can be classified into three categories: **(a)** *distribution countermeasures,* ***(b)*** *restrictions on large retail stores, and* ***(c)*** *promotion countermeasures.* The United States first argued that Japan engaged in distribution countermeasures to encourage and facilitate the creation of market structures for the distribution of film and photographic paper that caused the exclusion of imports from distribution channels in Japan. Second, the United States argued that the large retail stores in Japan, if permitted to grow in accordance with market forces, would diminish the monopoly power of wholesalers and provide increased opportunities for the import of foreign film and paper into Japan. Finally, the United States argued that Japan implemented restrictions on the offering of advertising promotions in a manner that impeded international competition by prohibiting financially strong international competitors from engaging in marketing strategies designed to penetrate the Japanese market. (Leigh (1999), p.234).

Among other things, the same Article prohibits nullification or impairment of WTO obligations by methods that do not expressly violate the WTO Agreement, but that evade basic WTO obligations. A claim before the DSB under Article XXIII:1(b) is called a "non-violation claim" because it asserts that a WTO member has nullified or impaired its concessions. It does not assert, however, any explicit violations of substantive WTO obligations. **The DSB found that Japan had not violated these provisions and that the United States failed to prove its case.**

The Kodak-Fuji case was the first post-Uruguay Round WTO dispute settlement panel case to consider a non-violation complaint under GATT Article XXIII:1(b).

The Kodak-Fuji case appears to have been a test case for the United States and, to some extent, for other WTO members. The European Community and Mexico expressed their interest in the case as third parties. (Goldsmith & Posner (1999), p.p.563-566).

Rather, a win for the United States would have been an important first move in a policy evolution game concerning the development of competition policy and dealing with the issue of transparency in the Japanese economy and in the economies of WTO members generally. (WTO Panel Report, Japan--Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, (Mar. 31, 1998).

Section 1: The Kodak-Fuji Proceedings:

Under U.S. law, private parties may request that the U.S. government, through the U.S. Trade Representative (USTR), its principal organ in WTO matters, impose unilateral sanctions on a country that maintains measures that block free trade. Parties may seek such unilateral remedies when a country has violated or evaded a WTO obligation. Parties may also seek unilateral remedies to open markets in which a country maintains protectionist measures even though the measure does not constitute a violation or evasion of WTO obligations.

Section 301 of the Trade Act of 1974, as amended, provides the principal unilateral remedy. (Roessler (1999), p.p. 413, 418).

Kodak filed a petition under Section 301 with the USTR on May 18, 1995. Kodak's petition alleged that prior to 1976, Japan violated the bilateral U.S.-Japan_Friendship Commerce and Navigation Treaty and the Organization for Economic Co-operation

and Development Code of Liberalization of Capital Movements with restrictions on inward foreign investment. Kodak's petition further alleged that Japan instituted liberalization countermeasures designed to maintain restrictions after they were removed under the WTO regime. The acting USTR initiated an investigation under Section 301 as of July 5, 1995.

On June 13, 1996, the acting USTR found the following:

> ***"Certain acts, policies, and practices of the Government of Japan with respect to the sale and distribution of consumer photographic materials in Japan are unreasonable and burden or restrict U.S. commerce."***

Specifically, the USTR found that the Government of Japan established and tolerated a market structure that impedes U.S. exports of consumer photographic materials to Japan, and in which practices occur that also impede U.S. exports of these products to Japan, thereby denying fair and equitable market opportunities. (Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper; Request for Public Comment, 1995, p.447).

A- Procedural Issues:

One of the principal issues in the Kodak-Fuji case was the level of detail the parties should be required to provide in the "pleading" or initial presentation of their claim before the Dispute Settlement Body. Article 6.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides in pertinent part that :

> ***"the request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly...."***

(Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 6.2).

Article 26 of the Rules and Procedures is a special provision for non-violation complaints. It states that, for non-violation complaints of the type described in Article XXIII:1(b), the complainant :

> ***"shall present a detailed justification in support of any complaint relating to a measure that does not conflict with the relevant covered agreement."***

In other words, if the complainant alleges that the measure taken by the respondent nullified or impaired a WTO obligation without explicitly violating a WTO agreement; the complainant must offer a detailed justification for its complaint. The panel report states that Article 26.1 and WTO jurisprudence :

> ***"confirm that this is an exceptional remedy for which the complaining part, bears the burden of providing a detailed justification to back its allegations."***

According to the panel, this detailed justification will establish a presumption that what is claimed is true, and that it would be for Japan to rebut any such presumption. (Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 1996, p.p.929-930)

1- General Considerations:

Article XXIII: 1(b) provides that a WTO member may seek dispute settlement in the following circumstances:

> ***"If any WTO Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired ... as the result of ... the application by another WTO Member of any measure, whether or not it conflicts with the provisions of this Agreement."***

This is known as a non-violation claim because the measures alleged to violate WTO obligations under this provision do not have to be an explicit breach of any provision in a WTO agreement or of any concessions made by the other WTO member. (Japan--Film Panel Report, see GATT Dispute Panel Report on Uruguay Recourse to Article XXIII, (Nov. 15, 1962).

2- The Elements of a Non-Violation Claim:

The panel report sets forth the following three elements of a claim under Article XXIII:1(b): ***(i)*** *application of a measure by a WTO Member,* ***(ii)*** *a benefit accruing under a WTO agreement, and* ***(iii)*** *nullification or impairment of the benefit as a result of the application of the measure.*

As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measure in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. (Joelson (1998), p. 34).

The panel explained, however, that the United States might have a very difficult case because it was based on expectations from rounds concluded eighteen and thirty years ago. A WTO member must "legitimately expect" to obtain a benefit as a result of tariff negotiations. One of the principal issues in making such a determination was what to do with measures that existed prior to a round. The panel report sets forth the following guidelines:

First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated

these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In my view, it is not sufficient to claim that a specific measure should have been anticipated because it is consistent with or a continuation of a past general government policy.

Second, in the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is my view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. I realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, I would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. (Dillon (1999), p.199).

B- The Combined Effects Analysis:

The panel rejected the U.S. argument that all of the above alleged countermeasures in combination i.e., as a whole resulted in a violation of Article XXIII:1(b). The panel summarized Japan's counter-argument as "nothing combined with nothing is still nothing." The panel articulated the following standard for assessing the U.S. claim:

It is not implausible that individual measures which do not impair benefits when considered in isolation, could nonetheless have an adverse impact on conditions of competition when considered collectively. However, for such a legal theory to be shown to have factual relevance in the present case, the United States must adduce relevant specific evidence and provide a detailed justification showing how this evidence supports the theory. In considering the U.S. allegations in relation to "combined effects", the panel recalls its discussion of the facts that **(i)** the various "measures" cited by the United States--distribution and promotion "measures" and restrictions on large stores--were introduced over a period of several decades, and **(ii)** a number of these "measures" are no longer in effect. (Iacobucci (1997), p.201).

The panel found that the United States failed to meet this standard. It addressed each type of countermeasure alleged by the United States and found **no proof** of combined effect. As explained above, the panel found that none of the distribution countermeasures alleged by the United States individually upset the competitive conditions for importing film and paper. The panel also noted a ***"timing problem"*** for each of the alleged distribution countermeasures because the vertical integration of the market into single-brand distribution occurred before the adoption of the measures asserted by the United States. The panel found that this timing problem applied to the distribution measures as a set of measures. The panel ruled that the United States failed to present additional arguments and evidence to prove that the alleged measures operated in combination to impair competitive market access for imported film and paper. (Hudoc (1980), p.p. 145-167).

The panel next rejected the U.S. claim that promotion countermeasures worked in combination to restrict the market for imported film and paper. The panel found that none of the alleged countermeasures individually restricted market access, and the

United States presented no additional evidence or argument that the combination of measures restricted market access. (Keohane (1984), p. 89).

In my point of view, today, there is no mechanism for private citizens to provide input in these trade disputes. I propose further that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file amicus briefs to help inform the panels in their deliberations. Today, the public must wait weeks to read the reports on these panels. I propose that the decisions of the trade panels be made available to the public as soon as they are issued.

Section 2: Conceptualizing the Constraints in the WTO System:

A- The WTO Policy Evolution Game:

No judicialized system of decision-making can operate without some degree of discretion vested in the decision-maker. The issue, however, is how that discretion is constrained by rules and institutions, in this context WTO rules and institutions.

In the WTO legal system, members of dispute settlement panels and the Appellate Body can be viewed as players in a policy evolution game. Although the WTO constitutional structure does not closely resemble the structure of typical domestic constitutional structures, with legislative, executive, and judicial functions more or less plainly carved out in the domestic constitution, there is a separation of powers within the WTO system. There are also conflicts of interest among institutions within the WTO system that facilitate principal-agent monitoring. Policy is formulated in negotiating rounds, in the Ministerial Conference, in the four Councils, and, to a more limited extent, in Committees. There is no discrete executive as in a domestic legal

order, but the WTO Secretariat serves a coordinating and administrative role. The DSB serves a judicial or judicialized role. (Krueger (1974), p. 291).

If a "decisive coalition" of WTO members disagrees with a panel report or Appellate Body report, they may overrule it in any number of ways. There are at least seven constraints on the DSB:

First, panel reports have no precedential value. As Jackson explains:

The ... DSU does not contain anything that would lead to a view that the legal effect ... of a panel report is different from that of the practice under GATT. This suggests that ... neither a stare decisis effect, nor any "definitive interpretation" effect (particularly given that there is an alternative procedure for a definitive interpretation) of a panel report exists. Nevertheless, the panel report remains persuasive, and presumably is part of the "practice" of the parties under the agreement.

Second, a Ministerial Conference and a General Council have exclusive authority to issue interpretations of the basic WTO treaties and the multilateral trade in goods agreements found in Annex 1 of the Uruguay Round Final Act. These constitute the bulk of the WTO texts. An interpretation requires a three-fourths vote by WTO members.

Third, GATT 1994 provides that the WTO may issue "decisions" on the basis of a majority vote if the WTO members cannot reach a consensus.

Fourth, the Ministerial Conference may grant waivers of WTO obligations on the basis of a three-fourths favorable vote of WTO members.

Fifth, WTO members may affect DSB panel reports by negotiating new obligations or by changing obligations in successive negotiating rounds of multilateral trade negotiations.

Sixth, WTO agreements may be amended. There are complex voting rules for amending a WTO agreement. They range from consensus requirements to actions by a Ministerial Conference without any vote. A two-thirds vote is required to amend most WTO obligations. It has been the GATT/WTO practice, however, to avoid amendments and to instead revise obligations through bargaining, in successive negotiating rounds.

Seventh, the Appellate Body serves as an additional constraint on dispute settlement panels. The Appellate Body, a permanent group comprised of a roster of seven experts, has issued very conservative appeals, possibly to preserve their credibility in the early years of the post-Uruguay Round period. Appellate Body members serve for four years, subject to one renewal for another four years. (Dunoff & Trachtman (1999), p.p.13-16).

B- Unilateral Remedies:

One of the more contentious disagreements in the world trading system is whether states may impose in unilateral remedies against other states. Can a domestic institution in state A (perhaps a political body such as a legislature or some body within the executive of state A) determine, on its own, that state B has violated its WTO obligations or some other international obligation relating to international trade liberalization, or has acted unfairly in protecting markets located in state B? With the promulgation of the Uruguay Round agreements, the question has been transformed from a normative one to a positive one--can states still undertake unilateral action despite the establishment of the Uruguay Round DSU?

The question is relevant to the policy evolution game described in the preceding section because WTO members that use unilateral remedies (most notably the United

States) may have an "out" from the policy evolution game, or may be playing a different game.

One of the fundamental problems with the DSU in its current state is that it may not effectively constrain parties from relying on unilateral approaches. (Baylis & Smith (1997), p.876).

The fundamental question is whether the DSU should be interpreted or amended to forbid WTO members from undertaking any unilateral action whatsoever in international trade matters.

The above analytical framework can be applied to understand the Kodak-Fuji dispute. Much of the discussion to date on Kodak-Fuji and related policy issues has focused on Japanese "structural" barriers to trade, and on whether the WTO should regulate competition policy or restrictive business practices.

The Panel Report is evidence of the different approaches of Japan and the United States to the role of law and regulation in the market-oriented economy. These differences have been well documented, prior to and independent of the dispute between the two countries on the openness of markets for film and photographic paper. Kodak-Fuji suggests an alternative explanation to the culture explanation. It illustrates the existence of significant domestic policy externalities that cross Japanese and U.S. borders. The case shows how property (or contract) rights exist in different forms in the United States and Japan, and how the differences affect international trade liberalization. (Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994).

This explanation seems to be confirmed by the Kodak-Fuji panel report. Examples from the panel report are set forth here.

The 1967 Cabinet Decision on Liberalization of Inward Direct Investment states the following three policies to direct measures on the regulation of foreign investment in Japan:

> ***"(1) prevent disorder that may arise from the advancement of foreign capital; (2) create the foundation to enable our enterprises to compete with foreign enterprises on equal terms; and (3) actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital."***(Hinick & Munger (1997), p.45).

There is a view and an impression that the industry of general use photographic film, based on an oligopoly of two domestic manufacturers Fuji and Konica, is superficially in a stable and normal state in which contract formation and documentation of transactions are progressing. The issue confronted in the WTO is how to deal with domestic policy externalities when they have international trade implications--when they negatively affect WTO obligations among WTO members. It is highly unlikely that any WTO agreement in the foreseeable future will explicitly deal with the problems addressed in this Article. Various future WTO agreements may touch upon specific areas that WTO members can agree upon as part of progressive liberalization, such as a competition policy. In some instances, these new agreements will deal with symptoms rather than causes. What the WTO members can develop to promote deeper liberalization is a norm-based system that relies on the DSB as an active player in a policy evolution game. WTO members can thus develop norms that can be amended in future negotiating rounds and in the WTO policy evolution process generally. (Merills (1998), p.67).

Chapter 6: The WTO Dispute Settlement Implementation Procedures:

When the World Trade Organization (WTO) Agreement was signed in Marrakesh in 1994, its new procedures for implementing dispute settlement rulings were widely praised as a decisive improvement over the procedures codified and practiced under the General Agreement on Tariffs and Trade (GATT). The U.S. Statement of Administrative Action (SAA) accompanying the transmittal of the Uruguay Round Agreements Act (URAA) to the U.S. Congress characterized those improvements as follows:

Countries that bring successful challenges will be authorized to withdraw Uruguay Round trade benefits from the offending country if, after a reasonable period following adoption of the panel or Appellate Body report, the matter cannot be settled in a mutually satisfactory manner. These changes mean that when the United States brings a successful challenge against another government under the DSU, the United States will have improved leverage to insist that the defending government remedy its violation. (World Trade Organization, Overview of the State-of-play of WTO Disputes: Implementation Status of Adopted Reports, last modified Feb. 1, 2000).

The disputes over non-compliance that have cast doubt on the system are principally those that have led to formal non-compliance action, which thus far have included **EC--Bananas, EC--Beef Hormones, Australia--Salmon, Australia--Leather, Brazil--Export Financing Programme for Aircraft, and Canada Measures Affecting the Export of Civilian Aircraft.** Because these more contentious cases have required fullest recourse to the new WTO implementation procedures, they offer

the best barometer of what has worked under that system and what has not. (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994).

Among the several lessons that can be derived from the noncompliance cases, one is that the existing DSU text contains obvious ambiguities and drafting oversights that need to be corrected. Another is that its implementation procedures, when used to their fullest extent, create an undesirably long timetable for the injured party.

This Chapter will review the implementation procedures that have given rise to debate and concern, discuss in detail the cases that have shaped that debate, and explore the systemic changes that would improve the existing implementation procedures and help reduce the incidence, or at least length, of WTO non-compliance.

Section 1: The DSU Implementation Procedures and the Concerns they have Raised:

The DSU rules governing the implementation of WTO rulings were intended to correct the most common criticism of the prior, ineffective GATT procedures--that losing GATT parties could permanently evade compliance without fear of adverse consequences. The rules have addressed that criticism through three discretely different procedures. The first are the procedures; and guidelines for establishing a compliance deadline, *or "reasonable period of time,"* for coming into compliance. The second are the *"compliance review"* procedures to be used when there is a disagreement over whether the losing member had complied with the DSU ruling. The third are the procedures for *the suspension of concessions* if the losing party failed to implement the WTO rulings or otherwise satisfy the winning party by its

implementation deadline. (EC Failure to Comply with WTO Rulings on EC Banana Regime: U.S. Position, at 2 (Jan. 1999).

In their application, all three procedures have encountered significant interpretive issues and concerns. The tensions over the "reasonable period of time" have centered on the length of that period and what is required of the losing party while it is underway. The compliance review controversy has related to all aspects of that review, from when it should be undertaken to what procedures it should entail. The procedures governing the suspension of concessions have sparked an interrelated controversy over when retaliation authority may be requested if there is a disagree merit over compliance. (WTO Arbitrator's Report, Japan--Taxes on Alcoholic Beverages, WT/DS8/15, WT/DS10/15, WT/DS11/13, (Feb. 14, 1997).

The evolution of the concerns surrounding each of the three implementation procedures, and the cases that have helped drive those concerns, are detailed below.

A. The "Reasonable Period of Time to Implement":

1. The Current Text:

In order to ensure that losing parties would not have the open-ended timeframe that they had under GATT to comply, the DSU has established procedures for fixing the losing party's deadline for implementing dispute settlement rulings and recommendations. Article 21 of the DSU governing those procedures opens with an ambitious statement of preference for "prompt compliance" on the part of the losing party, a preference it describes as "essential in order to ensure effective resolution of disputes to the benefit of all Members." It goes on to recognize, however, that immediate compliance may be impracticable. In those circumstances, Article 21 permits members to have a "reasonable period of time" to implement the rulings.

(WTO Arbitrator's Report, European Communities--Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27/15 (Jan. 7, 1998).

Under the terms of Article 21.3, the reasonable period can be set in one of three ways: **(1)** the losing party can propose a period that the DSB would thereafter approve; **(2)** the winning and losing parties can agree on an implementation period within forty-five days following adoption of the ruling; or **(3)** if neither of the first two methods are achievable, the period can be set by binding arbitration, to be completed within ninety days following adoption of the ruling.

> ***"Article 21 (3) (c) provides that "a guideline for the arbitrator should be that the reasonable period of time, should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances".***

Article 21 does not precisely define the phrase "reasonable period." Apart from stating that "prompt compliance" is essential, the only other interpretive guidance provided by that Article is the suggestion that the reasonable period should not exceed fifteen months from the date the ruling was adopted, but "may be shorter or longer, depending upon the particular circumstances."

Once the reasonable period is underway, the DSB is required to keep the losing party "under surveillance." To help the DSB fulfill that responsibility, Article 21 provides that six months into each losing member's implementation period, that member must begin providing regular "status reports" at all scheduled DSB meetings. Nothing more than these reports are required of the losing member during its compliance period. (WTO Arbitrator's Report, Japan--Taxes on Alcoholic Beverages, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 (Feb. 14, 1997).

2. The Establishment of the Reasonable Period:

In the early reasonable-period awards, the arbitrators uniformly established fifteen-month periods, fostering a widespread concern that losing parties were automatically entitled to a compliance period of fifteen months. This outcome struck many as contrary to the "prompt compliance" standard of Article 21 and an unfair extension of the dispute settlement process, which, even prior to the implementation period, could entail up to two years of litigation in complex cases.

The first of the fifteen-month rulings was issued in **Japan--Taxes on Alcohol.** On November 1, 1996, the DSB adopted (WT/DSB/H/25) the AB report and the panel report, as modified by the AB report, in Japan-Taxes on Alcoholic Beverages. As required by Article 21(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Japan informed the DSB on November 20, 1996 of its intentions in respect of the implementation of the DSB's recommendations and rulings. Japan indicated that it would not be able to implement immediately but only within a "reasonable period of time". Japan did not propose to the DSB "a reasonable period of time" for the latter's approval as provided for under Article 21(3)(a) of the Dispute Settlement Understanding. It indicated that it would initiate negotiations with the European Communities, the United States, and Canada, the other parties to the dispute, on what constitute a "reasonable period of time". These negotiations did not succeed, and no mutual agreement within the meaning of Article 21(3)(b) of the Dispute Settlement Understanding was reached. These negotiations with the European Communities did, however, lead to an agreement on an accelerated reduction of the tariff rates on whisky and brandy as compensation for delayed implementation, but this agreement does not prejudge their position on the issue of a "reasonable period of time".

The panel decided that, as stated in Article 3(2) of the Dispute Settlement Understanding, the Dispute Settlement System of the WTO is a central element in providing security and predictability to the multilateral trading system. Therefore, all WTO members have a strong interest in prompt compliance with and full implementation of the recommendations and rulings of the Dispute Settlement Body. This interest is clearly reflected in the provisions of the Dispute Settlement Understanding, and in particular, in Article 21(3)(c), which stipulates that a "reasonable period of time" for implementation does not exceed 15 months unless there are "particular circumstances" justifying a longer or shorter period. (Japan-Alcohol case, February 14, 1997).

In that case, the United States argued that Japan could fully comply within five months on the basis that compliance only entailed a simple tariff change, which could be effectuated under Japan's legal system within a minimum period of five month. Japan countered by requesting a five-year implementation period. The arbitrator summarily rejected the United States' request for the shortest period possible, setting the period instead at fifteen months. His only explanation was that he was "not persuaded that the `particular circumstances' advanced by Japan and the United States justified a departure from the fifteen-month `guideline'". (WTO Arbitrator's Report, European Communities--Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27/15 (Jan. 7, 1998).

Although the third arbitral decision in **EC--Beef Hormones** did not deviate from the fifteen-month guideline of Article 21, its reasoning began to establish the analytical framework for shorter periods in future awards. Contrary to the arbitral outcome in Japan--Taxes on Alcohol, the Hormone ruling established the principle that :

> ***"the reasonable period of time, as determined under Article 21.3 (c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."***

It further made clear that "the shortest period possible" cannot be used by the losing party as a second chance to develop additional justifications for its inconsistent measures.

The **EC-Beef Hormones Case** is when the European Communities banned the import of beef and beef products produced from animals to which certain hormones have been administered despite the facts that such products have been consumed safely for decades, and that no scientific basis exists for imposing such a ban. The effect of the EC ban is to prohibit the import of substantially all U.S. produced beef and beef products. WTO panels have confirmed that the EC has no scientific basis for banning imports of U.S. beef, and that the EC ban is inconsistent with the EC's WTO obligations.

Furthermore, WTO arbitrators have determined that the EC's import ban on U.S. beef and beef products has nullified or impaired US benefits under the WTO Agreement in the amount of $ 116.8 million each year.

As a result of the EC's failure to comply with the DSB recommendations and rulings concerning its beef import ban, on July 26, 1999, the Dispute Settlement Body authorized the US to suspend the application to the EC, and member States thereof, of WTO tariff concessions and related obligations covering trade in an amount of $ 116.8 million per year.

Since that time, the US and the EC have continued to consult in an effort to resolve this dispute. However, the EC has still failed to bring its measures governing the

import of US beef and beef products into compliance with the EC's obligations under the WTO Agreement.

The first of the arbitral decisions to award a reasonable period of less than fifteen months was the Indonesia--Automobiles case. There, the arbitrator established a reasonable period of twelve months by adjusting the "shortest period possible" standard to the special circumstances of Indonesia. Although Indonesia's internal procedures enabled it to conform within six months, the arbitrator placed heavy reliance on the instruction of DSU Article 21.2 to pay "particular attention ... to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." (WTO Arbitrator's Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/15, WT/DS48/13, 26, (May 29, 1998).

The shortest reasonable period awarded thus far in arbitration occurred in **Australia--Salmon**, where the arbitrator established an implementation period of eight months. Consistent with prior awards, the arbitrator sought to determine the shortest period required under the member's legal processes to effectuate compliance. Because Australia could lift the ban through "administrative procedures," the arbitrator was persuaded to set an implementation period of "significantly less" than fifteen months.

The most recent case to undergo reasonable-period arbitration was **Korea--Alcoholic Beverages**, which awarded a period of eleven months and two weeks. That arbitrator reaffirmed that "the shortest period possible" standard was "the most important factor in establishing the length of the reasonable period of time." In establishing the period, the arbitrator noted that the requirement to choose the "shortest period" within the legal system :

> ***"does not require a member ... to utilize an extraordinary legislative procedure, rather than the normal legislative procedure...."***

He added that "choosing the means of implementation is, and should be, the prerogative of the implementing member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements." (WTO Arbitrator's Report, Indonesia--Certain Measures Affecting the Automobile Industry, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (Dec. 7, 1998).

3. "Surveillance" During the Reasonable Period:

Under the current terms of DSU Article 21, between the time the losing member must:

> ***"inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB"***

and the time the member's reasonable period expires many months later, surprisingly few interim requirements are imposed upon that member. The member is not required to identify the measures it will seek to remove or implement, nor is it required to specify any sort of implementation schedule. It need not even consult with a winning party who may be concerned about whether the implementation period is being used in good faith. Apart from the ultimate requirement that the member come into full compliance at the conclusion of the reasonable period, the only intervening obligation of the losing member is that it provides a "status report" at regular intervals, beginning six months into the reasonable period. That report, which can be as specific or vague as the losing member elects to make it, is all the DSB can insist upon for purposes of fulfilling its obligation to :

> ***"keep under surveillance the implementation of adopted recommendations or rulings."*** (European Communities--Measures Affecting the Importation of Certain Poultry

Products, Communication from the European Communities and Brazil, WT/DS69/9 (Oct. 23, 1998).

The two WTO cases that have thus far been brought against the EC best illustrate the permissiveness of the current rules in this area.

In **EC--Bananas,** the EC, from the outset, refused to be specific about its implementation plans when called upon to state its implementation intentions. Moreover, it repeatedly showed a reluctance to correct the violations identified in the report. Four months into its reasonable period, after refusing several entreaties by the complaining parties to consult, the EC issued a new banana proposal that, in obvious ways, perpetuated the discrimination of the original regime. Thereafter, despite repeated representations by the complaining parties that the new proposal would not constitute compliance, the EC insisted that no substantive changes could be made to that proposal. Six months before its reasonable period had expired, the Commission succeeded in pushing its proposal through to adoption over the strong objection of the original complaining parties to that WTO action. While all of this was underway, the EC's status reports to the DSB noted simply that "significant progress" was being made towards implementation. (European Communities--Regime for the Importation, Sale and Distribution of Bananas, Status Report by the European Communities, WT/DS27/17, July 13, 1998).

Similarly, in EC--Beef Hormones, the EC showed, from the very start of its reasonable period, a clear reluctance to lift its ban. The reasonable period arbitrator appeared to anticipate that resistance when it cautioned "it would not be in keeping with the requirement of prompt compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the consistency of a measure already judged to be inconsistent." (European Communities--Measures

Concerning Meat and Meat Products, Status Report by the European Communities, WT/DS26/17, WT/DS48/15, Jan. 14, 1999).

Thus, as these non-compliance cases make clear, irrespective of whether the implementation period is being used in good faith, the losing party is free to use its grace period with little in the way of DSB oversight and no interim recourse available to the winning party. This is so even if there is strong evidence of non-compliance well before the expiration of the reasonable period.

A- EC-Bananas Case:

The EC's regime governing the importation, sale, and distribution of bananas is discriminatory and has harmed the economic interests of the US by denying to US companies a major portion of their banana distribution business. WTO dispute settlement panels have confirmed that the EC's banana regime is inconsistent with the EC's obligations under the WTO Agreement.

Furthermore, the WTO arbitrators have determined that the EC's banana regime has nullified or impaired US benefits under WTO Agreement in the amount of $ 191.4 million per year. As a result of the EC's failure to comply with recommendations and rulings of the WTO Dispute Settlement Body to bring its discriminatory banana regime into compliance with WTO obligations, on April 19, 1999, the Dispute Settlement Body authorized the US to suspend their application to the EC, and member States thereof, of WTO tariff concessions and related obligations covering trade in an amount of $ 191.4 million per year.

Since that time, the United States and the EC have continued to consult in an effort to resolve this dispute. However, the EC has still failed to bring its banana regime into compliance with the EC's obligations under the WTO Agreement.

The WTO ruling in EC--Bananas was seen by many as the first test of whether the EC was prepared to begin honoring agricultural dispute settlement rulings under the WTO. Hence, when the EC approved WTO-inconsistent banana "reforms" six months before its reasonable period expired, the United States was concerned about what that non-compliance would imply for the system and moved quickly to try to prevent the new EC measures from taking effect. (EC--Bananas was the first adverse ruling against the EC under the WTO and the first to find against the EC's Common Agricultural Policy).

In an effort to work within Article 21.5, the United States proposed that the parties resolve their disagreement over the WTO-compatibility of the new measures by returning immediately to the original panel under Article 21.5 procedures. For several months, the EC rejected that request and others like it, insisting that an Article 21.5 compliance review could not be undertaken until the EC's reasonable period had fully expired. It further suggested that, even upon expiration of the reasonable period, Article 21.5 would require the United States to recommence normal WTO dispute settlement procedures in order to challenge the new measures (i.e., consultations, request for a panel, a ninety-day panel review consistent with the one specific requirement of Article 21.5, an Appellate Body review, and another reasonable period).

In an effort to undermine the United States' anticipated Article 22 request, the EC made several procedural efforts to force its interpretation of Article 21.5. Because Ecuador, one of the original complaining parties in EC--Bananas, had broken from the other complainants and filed a request for a compliance review of the new EC banana policy under Article 21.5. The EC filed a motion with the panel asking that it require

the remaining complaining parties to join in that action. When that effort met with resistance from both the panel and the parties, the EC took the further extraordinary step of requesting an Article 21.5 non-compliance review of its own measures and petitioned the panel to force the participation of the complaining parties in that proceeding. (Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale and Distribution of Bananas, 1998, p.p.56).

The United States countered that, under the clear language of Article 22, the only legally guaranteed way for the United States to receive authorization to suspend concessions under the negative-consensus rule was if it made that suspension request within twenty days following the end of the compliance period. It argued further that the EC's interpretation, if accepted, could lead to another compliance period after the first review was concluded, followed by additional minor changes and yet another review, another compliance period, and so on, ad infinitum. That was a formula, it said, for an absurd, "endless loop" of litigation that would undermine respect for the WTO. It insisted that, having already engaged in nearly three years of WTO procedures, it should not have to wait any longer to exercise its right to suspend concessions. (European Communities--Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU, WT/DS27/41, Dec. 18, 1998).

When the U.S. authorization request came before the DSB in early 1999, the interpretive dispute had become so polarized that the EC resorted to blocking approval for several days of the DSB agenda, effectively shutting down the operation of the DSB. With the DSB in a state of near-crisis, the EC ultimately agreed under multilateral pressure to release the agenda for approval. It immediately thereafter

requested Article 22 arbitration of the requested suspension amount and, together with the United States, acceded to the DSB Chairman's statement that Ecuador's Article 21.5 panel and the Article 22 arbitrators, being the same individuals, would "find a logical way forward." (European Communities--Regime for the Importation, Sale and Distribution of Bananas, Request for the Establishment of a Panel by the European Communities, WT/DS27/40, Dec. 15, 1998).

***Subsequent Applications of the Non-compliance Provisions**:

Because the DSU Review remained unfinished throughout 1999, other cases that became ripe for formal non-compliance action during the balance of that year were forced to find equally improvised procedural solutions for moving forward. As of this writing, all of those non-compliance proceedings are still underway.

In the first case, **Australia--Salmon**, the parties agreed to initiate concurrent procedures under Article 21.5 and Article 22.6. Since then, the arbitrators have indicated that their review will not produce a ruling until seven months after the expiration of the reasonable period of time. Thus, if Canada (the complaining party) prevails, and a satisfactory settlement has not separately been reached by that time, Canada will have accepted, at least for the purposes of this case, a delay in its right to suspend concessions well beyond the timetable currently laid down in Article 22. (Australia--Measures Affecting the Importation of Salmon, Recourse to Article 21.5 of the DSU by Canada, Communication from the Chairman of the Panel, WT/DS18/17, Dec. 13, 1999).

In three other instances, the parties have voluntarily agreed to undertake an Article 21.5 review prior to initiating procedures to suspend concessions, thereby entirely waiving the Article 22 timetable for negative-consensus approval. A condition of

those understandings was that, if non-compliance were found, the losing party would not object to a suspension request, but could reserve its right to contest the level of that suspension. EC--Beef Hormones was the only non-compliance case thus far that involved an admission on the part of the losing party that it had failed to come into compliance. That admission enabled the United States to proceed directly to Article 22, following the expiration of the reasonable period of time. (Australia--Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU, WT/DS126/8, Oct. 4, 1999).

As the foregoing cases make clear, the current non-compliance procedures can only be applied without fear of conflict or recourse to self-help arrangements in that rare situation where the winning and losing parties are in full agreement that the DSB rulings and recommendations have not been implemented. Few, if any, consider acceptable this degree of unpredictability surrounding the WTO's primary implementation procedures.

Section 2: The Need For Reform:

Given the WTO cases now pending or on the horizon, the occasion for disagreement over issues of implementation will, if anything, accelerate in the months and years ahead.

In the case of disputes against the EC, Europe has done nothing thus far to generate confidence that it will begin to implement properly future adverse rulings. To the contrary, after several months of substantial U.S. retaliation in Beef Hormones and EC--Bananas, the EC continues to resist compliance in both of those cases. If the current implementation procedures cannot induce EC compliance in these relatively modest commercial disputes, many doubt whether the system will succeed in

resolving the more challenging trade disputes that looms over issues such as genetically modified foods.

Although the United States, by contrast, has consistently come into compliance with adverse WTO rulings, most of its more challenging implementation obligations still lie ahead. Among other disputes, the **U.S.-Foreign Sales Corporation case** and several pending challenges to U.S. import relief laws have the potential of marring the United States' impressive record of compliance thus far. (WTO Appellate Body Report, United States--Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Apr. 29, 1996).

The reforms needed to fortify these procedures can be broadly organized into two: **first,** the ambiguities between Articles 21.5 and 22 need to be clarified, and; **second,** the procedural tools for scrutinizing, inducing, and hastening compliance need to be strengthened. While the still-ongoing DSU Review is expected to resolve the former, it shows little prospect of materially affecting the latter.

* Improving the Tools to Scrutinize, Induce, and Hasten Compliance:

The second of the large implementation problems--i.e. inadequate safety checks, incentives, or sanctions to encourage the promptest-possible, good-faith implementation--is at least as important as the first problem for purposes of ensuring an effective WTO system, but has received curiously little attention in the DSU Review.

Examples of the second problem run throughout the implementation procedures. As demonstrated in **Beef Hormones and EC--Bananas**, the losing party under the current DSU may be entitled to an extended implementation grace period (be it for fifteen months or something less), even if it is virtually certain from the start of that period that the losing party does not intend to comply. Moreover, because Article 22

suspension rights are only accorded on a prospective basis following the expiration of the reasonable period, the losing party has every incentive to seek the longest possible grace period permitted under the system. During that grace period, the winning party has no right to initiate a compliance review, even if it becomes obvious well before the expiration of the reasonable period that the losing party will be out of compliance by its deadline. When that deadline arrives, and the losing party is subsequently found to be out of compliance, the DSU applies no penalty for that party's bad-faith application of the grace period, even though that period was intended to be used exclusively to ensure full implementation. Hence, in fundamental ways, the system works in conflict with the stated Article 21.1 objective of "prompt compliance" by facilitating, rather than discouraging, prolonged periods of noncompliance. (Amendment to the Understanding, paragraphs 4-6. The proposed DSU amendments to the "normal" panel procedures (i.e., a shortened consultation period, the establishment of a panel upon request, the consolidation of the panel's "descriptive portion" with the interim report, and the elimination of the panel hearing on the interim report) are only anticipated to save on average about 30 days, and thus are not likely to offset the timeline extensions to the implementation procedures that are called for under these amendments).

Despite the clear need for reforms, the proposed DSU Review amendments do not contemplate significant improvements in this area. To the contrary, the system, in some ways, may become more generous towards the losing party if those amendments are approved. (Frechette (1998), p.p. 747-750); Lichtenbaum (1998), p.p. 1195-1259). The draft amendments would do nothing, for example, to alter the DSU's stated reasonable period "guideline" of fifteen months, and would thereafter require the winning party to wait up to an additional five months to withdraw concessions in

cases of non-compliance (as opposed to the two month wait now reflected in Article 22). Because Article 22 recourse would continue to apply prospectively upon the conclusion of this long period, the losing party would be under no improved incentive to comply faster than required by this newly extended timeline. Although the amendments would give the complaining party a clarified right to seek consultations during the implementation period, they would, at the same time, explicitly deprive that party of any right to a compliance review prior to the expiration of the reasonable period. Moreover, while the losing party under the draft amendments would now need to state specifically its intention to implement the DSB rulings to avoid immediate recourse to Article 22, it would still be at liberty to renege on that intention at the end of its long implementation period without fear of penalty. (GATT Panel Report, United States--Measures Affecting Imports of Softwood Lumber from Canada, p.358, 1993).

To ease the way even further for the losing party, the draft amendments would accord to members subject to WTO-sanctioned retaliation a new right to invoke the proposed Article 21.5 accelerated review procedures (rather than pursue normal procedures) in order to try to discontinue those sanctions. Because there is a reasonable risk that losing parties that have resisted compliance to the point of retaliation may continue to try to circumvent their compliance obligations, that new right to accelerated procedures may prove especially prejudicial to the winning party. Certain losing parties (having become smarter by virtue of the WTO ruling) may be inclined to put into effect new non-compliant measures that are more subtle and complex than the original ones that were found to be out of compliance. The detailed evidence needed to demonstrate that those new, more subtle measures continued to be WTO-inconsistent may not be available to the complaining party in the compressed

timetable of an accelerated review. Thus, the proposed amendment has the potential of enabling a losing party, who, time would show, remained out of compliance, to walk free. Moreover, as that amendment is now drafted, even if evidence of non-compliance were to become available shortly after the accelerated review was concluded, the winning party would have no recourse at that point, other than to restart normal dispute settlement procedures.

If the losing party insists on an implementation period, but fails to use that period for purposes of full implementation or compensation, that party should be subject to double or triple damages for at least the first year in which concessions are withdrawn. This would discourage the use of the reasonable period for purposes other than full implementation and would help rebalance that additional year or more of needless injury that the losing member had elected to inflict upon the winning party. Because these several changes would not unduly modify the architecture of the current DSU, but would help ensure that the reasonable period is applied, as intended, to effectuate promptest-possible and full compliance, these are changes that should be achievable. (North American Free Trade Agreement, Doc. No. 103-159, p.1274, 1993).

Finally, as the costs and benefits, of the WTO are subjected to growing scrutiny, WTO advocates will find themselves constrained in their ability to defend the benefits of that system if one of its principal features--the dispute settlement implementation procedures--is perceived to be flawed or ineffective. Thus far, those procedures have induced compliance more often than not, but the incidence of noncompliance is on the rise and gaining in public attention. In short, the implementation reforms discussed above deserve more comprehensive attention and priority than they have been given to date.

Chapter 7: Several Case Studies: Critical Issues in the WTO Settlement:

In this chapter, we will consider a number of critical issues that have arisen in respect of WTO Dispute Settlement. The six issues we will examine are: **(i)** the concept of nullification or impairment in GATT Article XXIII in violation cases, **(ii)** the appropriate standard of review to be applied by panels to government measures, **(iii)** implementation procedures, **(iv)** the problem of providing for effective remedies, **(v)** resolving conflicts of norms within the WTO system and between the WTO and other international legal systems, and **(vi)** transparency and participation by non-members.
It appeared that in the main WTO, members were generally satisfied with the operation of the dispute settlement system. In any event, no agreement was reached on implementing changes and the review ended with the system described above remaining in effect and unchanged. (Jackson (1969), p.p.167-169).

Section 1: Nullification or Impairment in Violation Cases:

By far the most common claim raised in GATT and WTO Dispute Settlement is that one party has violated its GATT/WTO obligations. The evolution of the nullification or impairment concept in violation cases is quite interesting. As noted above, Article XXIII, in a violation case, requires both a violation ("failure to carry out its obligations) and that a "benefit accruing to the complaining party directly or indirectly under the Agreement is being nullified or impaired". For example, in **Italian Discrimination Against Imported Agricultural Machinery**, the panel noted that it :

> ***"considered whether the violation had caused injury to the United Kingdom's commercial interests, and whether such an injury represented an impairment of benefits.*** (7th Supp. BISD 60-65, Panel Report adopted on October 23, 1958).

UNITED STATES-TAXES ON PETROLEUM AND CERTAIN IMPORTED SUBSTANCES

Panel Report adopted June 17, 1987

Facts:

Certain U.S. legislation, known as the Superfund Act, deals with the cleanup of hazardous waste sites. The US Superfund Amendments Reauthorization Act of 1986 was signed into law on October 17, 1986. The Superfund Act reauthorized a programme to clean up hazaedous waste sites and deal with public health programmes caused by her hazardous waste. It provided for excise and corporate income taxes and appropriations to pay for the cost of these programmes.

The Act imposed a tax of 8.2 cents per barrel on domestic crude oil received at a U.S. refinery and a tax of 11.7 cents per barrel for petroleum products entered into the U.S. for consumption, use or warehousing. It was effectively conceded by the U.S. that the tax violated the national treatment requirement of GATT Article III:2. Instead, the main U.S. contention was that the tax differential was so small that its trade effects were minimal or nil and that the tax differential-whether it conformed to Article III:2, first sentence or not, did not nullify or impair benefits accruing to Canada, the EEC and Mexico under the General Agreement. Canada, the EEC and Mexico considered this defense to be neither legally valid nor factually correct.

The legal question raised in this case is whether *the presumption that a measure inconsistent with the General Agreement causes a nullification or impairment of benefits accruing under that Agreement is an absolute or a rebuttable presumption*

and, if rebuttable, whether a demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects on trade is a sufficient rebuttal.

This means that there is normally a presumption that a breach of the rules has an adverse impact on other members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

The Panel examined how the CONTRACTING PARTIES have reacted in previous cases to claims that a measure inconsistent with the General Agreement had no adverse impact and therefore did not nullify or impair benefits accruing under the General Agreement to the contracting party that had brought the complaint. The Panel noted such claims had been made in a number of cases but there was no case in the history of the GATT in which a contracting party had successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment.

The Panel concluded from its review of the above and other cases that, while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption.

The Panel then examined whether, even assuming that the presumption could be regarded as rebuttable in the present case, a demonstration, that the trade effects of the tax differential were insignificant, would constitute a proof that the benefits accruing to Canada, the EEC and Mexico under Article III:2, first sentence, had not been nullified or impaired. (Jackson (2001), p.p. 273-274).

The Panel concluded that an acceptance of the argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits

accruing under Article III:2, first sentence, does not imply that the basic rationale of this provision and the benefit it generates for the contracting parties, is to protect expectations on export volumes. However, it obliges the contracting parties to establish certain competitive conditions for imported products in relation to domestic products. The majority of the members of the Working Party on the "Brazilian Internal Taxes" therefore correctly concluded that the provisions of Article III:2, first sentence, "were equally applicable, whether imports from other contracting parties were substantial, small or non-existent". Also "a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitments in respect of the goods concerned, in other words, the benefits accruing under Article III are independent of whether there is negotiated expectation of market access or not. (Jackson (2001), p.p.274-275).

Finally, the panel concluded that the tax on petroleum was inconsistent with Article III:2, first sentence, and consequently constituted a prima faciae case of nullification and impairment and that an evaluation of the trade impact of the tax was not relevant for this finding. The panel, therefore, suggests that the CONTRACTING PARTIES recommend that the US bring the tax on petroleum in conformity with its obligations under the General Agreement. (US-Tax on Petroleum, June 17, 1987).

In my opinion, this case illustrates the following point: the United States could bring the tax on petroleum in conformity with Article III:2, first sentence, by raising the tax on domestic products, by lowering the tax on imported products or by fixing a new common tax rate for both imported and domestic products. Each of these solutions would have different trade results, and it is therefore logically not possible to determine the difference in trade impact between the present tax and one consistent with Article III:2, first sentence, and hence to determine the trade impact resulting

from the non-observance of that provision. For these reasons, Article III;2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded, ipso facto, as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.

Section 2: Standards of Review:

One of the more difficult problems faced in recent years by the WTO Dispute Settlement System is the choice of appropriate standards of review. The issue arises when the panel must review a national statute or administrative action where the issue is whether a specified standard contained in the WTO rules has been met.

In each of the cases, the basic question is whether the panel may (or should) reassess the facts presented to the national decision maker to determine if the panel agrees that they meet the WTO rule. Similar issues arise in national court review of administrative agency action. (Croley (2000), p. 111)

A- WTO Rules on Standard of Review:

This problem had already arisen frequently in antidumping cases considered by panels established under the 1979 Antidumping Code. In large part as a result of concerns raised by the United States, the WTO Antidumping Agreement provides in article 17.6 that:

(i) in its assessment of the facts of the matter, the panel shall determine whether the national antidumping authorities established 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 Antidumping 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. (Jackson (2001), p. 290).

It is worth noting that in the national context, respecting administrative discretion on the interpretation of a rule does not necessarily lead to inconsistent application of a rule, as long as the agency acts on a consistent basis. But on the international level, allowing different interpretations of a WTO agreement by national authorities means that there is no consistency because there is no longer one international rule. What other standards might be used to control panel discretion?

On the general issue of the standard of review in WTO cases, the Appellate Body had the following to say in the *Hormones case.*

The first point that must be made in this connection is that the SPS Agreement itself is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. Nor are there provisions in the DSU or any of the covered agreement prescribing a particular standard of review. (Article 17.6 of the Anti-Dumping Agreement).

The standard of review appropriately applicable in proceeding under the SPS Agreement, of course, must reflect the balance established in that Agreement between the jurisdictional competences by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.

We do not mean, however, to suggest that there is at present no standard of review applicable to the determination and assessment of the facts in proceedings under the Agreement or under other covered agreements. In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. Article 11 read thus:

> ***A panel should 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 covered agreements, underlying by the Appellate Body.***

In so far as legal questions are concerned, that is consistency or inconsistency of a Member's measure with the provisions of the applicable agreement –a standard not found in the text of the Agreement itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law.

We consider, therefore, that the issue of failure to apply an appropriate standard of review, raised by the European Community, resolves itself into the issue of whether or not the Panel, in making the above and other findings referred to and appealed by the European Communities, had made an :

> ***"objective assessment of the matter before it, including an objective assessment of the facts....."***. *(Panel Report, US-Underwear, adopted on February 25, 1997, WT/DS24/R, para 7.10).*

B- Techniques of Judicial Restraint:

Over time, courts have developed a variety of such techniques to dispose of cases or issues within cases where a decision seems unnecessary, inappropriate or perhaps simply too controversial. Among those techniques used are:

- Limitations on the parties who may bring an action (e.g., "standing" or legal interest requirements);
- Restrictions limiting the time at which an action may be brought (e.g., categorizing actions as too late (mootness) or too early (ripeness or failure to exhaust other remedies);
- Categorization of actions as inappropriate for judicial consideration (e.g., political questions, *non liquet);* and
- Exercise of judicial economy so as avoid considering issues (e.g., strict interpretation of terms of reference; resolution of only necessary issues). (Journal of International Economic Law 79, 2001, p.p. 96-110).

Readers familiar with WTO/GATT Dispute Settlement case-law will recognize that panels and the Appellate Body have considered all of these issues: **(i)** standing-*Bananas;* **(ii)** mootness-*Indonesia Autos;* **(iii)** ripeness-*Section 301;* **(iv)** exhaustion-*US Salmon* (GATT Antidumping Code); **(v)** political-judicial balance-*india QR;* **(vi)** non-liquet-*Coconuts, EEC Wheat Flour Export Subsidies* (Tokyo Round Subsidies Code); **(vii)** terms of reference-*Bananas, India Patents I, Korea Dairy;* and **(viii)** judicial economy-*Wool Shirts, Salmon.* (Dunoff (1999), p.p.757-760).

C- *Standard of Review and its Impact on Potential Imbalances in Political and Judicial Power:*

DECISION BY THE APPELLATE BODY CONCERNING AMICUS CURIAE BRIEFS

Statement by Uruguay at the General Council On 22 November 2000, WT/GC/38 (Dec. 12, 2000)

The Dispute Settlement system of this Organization has been described as the "jewel" of the achievements of the Uruguay Round. If the Members cease to have confidence in this Dispute Settlement System-which is unique at the international level-they will lose a fundamental tool for the defense of their interests and will find themselves worse off than before.

The WTO is an agreement of a contractual nature that is qualitatively different from other international agreements in the sense that the obligations that flow from this contract include the strict fulfillment of the decisions of the Dispute Settlement Body to the extent of diminishing the decision-making capacity of the Members. Insofar as the Members are mainly States, the political effect of this situation is of no little consequences. It is for this reason that any decision by the bodies that make up the system cannot be taken lightly, but must be firmly based on the provisions of the Agreements that were duly signed and ratified by the respective governments and parliaments. (Jackson (2001), p.303).

In view of this particular outcome, we do not agree that it is a matter of procedure, but rather, in our opinion, a matter of substance which affects the working procedures and which should at least be subject to consultation with the Chairman of the DSB and the Director-General, in accordance with DSU Article 17.9.

As for the substance, we believe that the practical effect has been to grant individuals and institutions outside the WTO a right that the Members themselves do not possess. In fact, this procedure allows such institutions to present their points of view and possibly even influence a purely legal and interpretative decision of the rules in a specific case, while that right is reserved solely to the parties and third parties to a dispute, even being refused to the other Members of the WTO. We consider this to be highly inappropriate because it alters an Agreement negotiated and adopted multilaterally and, in particular, because this subject was discussed during the negotiations of the Uruguay Round, but was not incorporated into the DSU. Furthermore, the procedure limits the rights of the parties and third parties. The decisions give the parties and third parties a full and adequate opportunity to comment on and respond to the submissions. However, the fact is that it is not possible within the short and mandatory time limits, which the Appellate Body has to meet in its work.

In conclusion, the preceding analysis has been necessary to justify the following positive conclusions:

(a) The decision of the Division of the Appellate Body in this case, despite its praise-worthy intentions, has had the practical effect of altering the agreements, which it is not in its terms of reference to do.

(b) The Appellate Body must restrict itself to establishing whether a Panel has correctly applied or interpreted the rules in a specific case. Thus, we believe that in the ***US-Shrimp case,*** when the Appellate Body decided to reject the Panel's interpretation of its powers under Article 13 of the DSU, it should have informed the General Council of this situation so as to obtain an interpretation that could be applied in other cases.

(c) The General Council has begun its consideration of the ***amicus curiae briefs*** sent to the Panels and the Appellate Body. This is a matter of interpretation having systemic effects that is the responsibility of the General Council. Consequently, we request that this matter be placed on the regular agenda of the General Council and that the Chairman take the appropriate measures in the case so that this Council can adopt an interpretation of general application.

(d) Panels and the Appellate Body should refrain from acting in this matter until the General Council has given its interpretation. (Jackson (2001), p.p.304-305).

EUROPEAN COMMUNITIES - MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS (16 November 2000):

In this case, my primary interest concerns the bearing of the instant case on future disputes that involve the application and admissibility of trade related measures necessary to protect human, animal or plant life or health in a non-arbitrary and justifiable manner under paragraph (b) of Article XX of the General Agreement on Tariffs and Trade of 1994)

Facts: In particular, the Applicant has, through its members, engaged in significant research relating to, amongst other things, the synergies and tensions between GATT/WTO trade disciplines and the General Exceptions contained in Article XX of the GATT 1994. The Applicant has, through its members, provided advice to all levels of Australian government, as well as Australian and international NGOs, on trade related measures that may be necessary to protect human, animal or plant life or health in a non-arbitrary and justifiable manner under GATT 1994. In the interests of achieving a satisfactory settlement of the instant appeal, it is desirable for the Appellate Body to grant the Applicant leave to appeal because the

Applicant has considerable expertise in the application and interpretation of Article XX, including paragraph (b), of the GATT 1994.

Arguments :

Moreover, it is desirable to grant the Application for Leave because the Applicant is a non-partisan, academic institution and will provide a dispassionate and objective treatment of the issues. Further, the Applicant represents a region of the world likely to be significantly under-represented by civil society actors in the participation of this unique opportunity to provide written briefs to the Appellate Body. Finally, the Applicant, as an Australian institution, will bring a perspective to the dispute, which will build on the recent contribution by Australia to WTO informal consultations on external transparency.

The Applicant has no relationship, direct or indirect, with any party or any third party to this dispute. The Applicant has not and will not receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its Application for Leave or its written brief.

For the forgoing reasons, the Applicant respectfully requests that its Application for Leave to File a Written Amicus Curiae Brief in this appeal be granted. (http://www.elaw.org/resources/text.asp?id=706).

Section 3: Implementation and Retaliation Procedures:

NORWAY-PROCUREMENT OF TOLL COLLECTION EQUIPMENT FOR THE CITY OF TRONDHEIM

Panel Report adopted on May 13, 1992 by the Committee On Government Procurement

Facts: In March 1991, the Norwegian Public Roads Administration announced that the toll ring planned for the city in Trondheim would be based on an electronic and mainly unmanned toll collection system, forming part of an integrated payment system for the city, and that a contract had been concluded with a Norwegian company, Micro Design A.S. (Micro Design), relating to parts of this system (referred to hereinafter as "the contract"). This contract was characterised as a "research and development" contract. The Public Roads Administration also announced that Trondheim had been designated as a national test area for Advanced Transport Telematics (ATT).

The contract with Micro Design, which is the subject of the present dispute, was in three parts:

(i) The design of a toll system involving unmanned toll stations, the possibility of payment in municipal car parks, priority for public transport, low investment and operating costs, miniaturisation of hardware, use of an ISDN network (Integrated Services Digital Network), and compatibility with existing and future payment systems and with future European/international standards. This part was referred to in the contract as "research and development services".

(ii) The supply of ten toll stations for unmanned operation, an ISDN server, two control units for integration of the toll ring and car park fees, and one bus priority unit. These pieces of equipment were referred to in the contract as "prototypes".

(iii) The supply of some 60,000 tags to be fitted in individual vehicles to enable them to be electronically identified at toll stations.

The contract forms part of the Trondheim toll ring project, which had an estimated value of NOK 47.5 million. Responsibilities for the implementation of the parts of the project not covered by the contract with Micro Design were divided as follows:

- The Norwegian Public Roads Administration was itself responsible for the functional requirements for the toll ring project, installation of the toll ring system, engineering and project management;
- Trondheim Telecom was responsible for the installation and trial testing of the ISDN, internal education and equipment for temporary solutions;
- The Trondheim Toll Collection Company was responsible for developing computer programs for administrative routines.

No tender notice was issued for the contract that was awarded to Micro Design and no tenders or offers were invited from companies other than Micro Design.

Arguments:

On the above grounds, the United States requested the Panel to find that Norway had violated its obligations under the Agreement in the conduct of the procurement of toll collection equipment for the city of Trondheim and to recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement with regard to this procurement. The United States further requested the Panel to recommend that Norway negotiate a mutually satisfactory solution with the United

States that took into account the lost opportunities in the procurement of United States companies, including Amtech, a company which had been willing and eager to bid for the contract.

In the Norwegian view, the only part of the procurement that was covered by the Agreement was the part concerning the procurement of prototypes. The remainder was for research and development, a service, which was not covered by the Agreement. In regard to the procurement of the prototypes.

Norway requested the Panel to reject the United States' complaints as unfounded and find that Norway had not violated its obligations under the Agreement in its conduct of the procurement of prototypes for the Trondheim toll ring project. Norway also requested the Panel to reject the United States' suggestion that the Panel recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities of United States' companies, including Amtech, in the Trondheim procurement, both because Norway has acted consistently with its obligations under the Agreement and because such a recommendation would not fall within the mandate of the Panel.

Decision :

The Panel concluded that Norway had violated the Code because the City of Trondheim had not instituted an open bidding procedure in respect of its procurement of certain highway toll collection equipment. The following part of the decision deals with the appropriate remedy for this violation.

The Panel then turned its attention to the recommendations that the United States had requested it to make. In regard to the United States' request that the Panel recommend that Norway take the necessary measures to bring its practices into compliance with

the Agreement with regard to the Trondheim procurement, the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel's proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in Dispute Settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendation be within the task assigned to panels under standard of reference. Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage the interests of third parties.

The United States had further requested the Panel to recommend that Norway negotiates a mutually satisfactory solution with the United States that too into account the lost opportunities in the procurement of United States' companies. Finally, the United States had requested the Panel to recommend that, in the event the proposed negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorize the United States to withdraw benefits under the Agreement from Norway with respect to opportunities of equal value to the Trondheim contract.

Beyond noting that the US was somewhat inconsistent in its requests to the Panel, the Panel observed that, under the GATT, it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity from the time that the recommendation was adopted. The provision of compensation had been resorted to only if the immediate withdrawal of the measure

was impracticable and as a temporary measure pending the withdrawal of the measures, which were inconsistent with the General Agreement.

The Panel also believed that, in cases concerning a particular past action, a panel finding of non-compliance would be of significance for the successful party: where the interpretation of the Agreement was in dispute, panel findings, once adopted by the Committee, would constitute guidance for future implementation of the Agreement by Parties.

In the light of the above, the Panel did not consider that it would be appropriate for it to make the recommendation requested by the United States.

I think that the Panel was not aware of any basis in the Agreement on Government Procurement for panels to adopt, with regard to the issues under consideration, a practice different from that customary under the General Agreement, at least in the absence of special terms of reference from the Committee.

On the basis of the findings set out above, the Panel concluded that Norway had not complied with its obligations under the Agreement on Government Procurement in its conduct of the procurement of toll collection equipment for the city of Trondheim in that the single tendering of this procurement could not be justified under Article V:16(e) or under other provisions of the Agreement.

The Panel recommends that the Committee request Norway to take the measures necessary to ensure that the entities listed in the Norwegian Annex to the Agreement conduct government procurement in accordance with the above findings.(http://www.sice.oas.org/dispute/gatt/91TROND2.asp).

***The Efficacy of Retaliation as a Solution to Trade Disputes:**

Suspension of concessions was only authorized once in GATT's history and that occasion was in the 1950s. Under the DSU, suspension of concessions has been authorized in three cases (***Bananas, Hormones, and Brazil Aircraft Subsidies)***, but as of September 1, 2001, was in effect only one (***Hormones)***. (Fordham (1987), p.p.101-102).

In my personal opinion, I consider that there are good reasons why GATT should authorize retaliation more regularly. **First**, the novelty of retaliation will decrease with use and it will eventually be accepted as the normal consequences of an inability to resolve a dispute. This will lessen the poisonous effects that retaliation entails. **Second**, retaliation would improve the efficiency of the GATT Dispute Settlement System by encouraging speedy conflict resolution. **Third**, retaliation is fair because it reestablishes the balance of concessions between the two parties, a balance that is thrown into disequilibrium when one party has violated GATT's rules. **Fourth**, and most important, retaliation will often occur anyway if disputes are not resolved. Given that this is the case, it would be desirable for GATT to exercise greater control over retaliation when it occurs. Indeed, it is possible that retaliation will become more common, in the future, because of its proven effectiveness in recent U.S.-EC trade disputes. With GATT supervision some control can be exercised, particularly as to the amount of retaliation, which reduces the likelihood that a massive trade war would erupt.

A-Conflicts of Norms:

Given the wide scope of the WTO agreements, it seems inevitable that there may be overlapping or even conflicting obligations in some cases. While the agreements

themselves provide some means for resolving potential conflicts, other potential conflicts are not dealt with at all.

Under the general rules of public international law on conflicts, a treaty interpreter should attempt to interpret the relevant agreements so that there is no conflict, and that the agreements are compatible. However, as regards treaties having incompatible provisions, the relation of treaties between the same parties and with overlapping provisions is primarily a matter of interpretation, aided by presumptions. First, it is to be presumed that the last treaty prevails over an earlier one concerning the same subject matter. Second, a treaty may provide expressly that it is to prevail over subsequent incompatible treaties. These principles are not very pertinent to resolving the relationship between GATT, GATS, and the TRIPS Agreement or between the various Annex 1A agreements. All agreements within the WTO framework have been concluded as a single treaty and at the same time-including GATT 1994-which renders the later-in-time rule inapposite. To some extent, the principle of effective treaty interpretation may be useful in avoiding incompatibilities between obligations provided for in the various WTO agreements. (Werner (2000), p. 313).

The relationship of GATT and GATS has been explored in the two cases-***Canada-Periodicals and EC-Bananas***. The panel and the Appellate Body in ***Canada-Periodicals*** held that the creation of GATS did not carve out part of the pre-existing coverage of GATT 1947 or 1994. Therefore, the fact that Canada had not committed itself to grant market access or national treatment in a certain service sector (e.g., advertising services) did not exempt a measure directly affecting this service sector e.g., an excise tax on products) from the potential coverage of the GATT national treatment clause. In *EC-Bananas,* the Appellate Body distinguished between three different situations: **(1)** measures that only affect trade in goods, **(2)** measures that

only affect trade in services, and **(3)** measures that affect trade in goods as well as trade in services such as measures involving a service relating to a particular good. It noted that while a measure falling in category (3) could be scrutinized under both GATT and GATS, the specific aspects of the measure examined under each agreement could be different. Under GATT, the focus would be on how the measure affects the goods involved, whereas under GATS the focus would be on how the same measure affects the supply of the service or the service supplier involved. (European Communities-Regime for the Importation Sale and Distribution of Bananas WT/DS271/AB/R, p.p.217-222, adopted by the DSB on September 25, 1997).

B- Transparency and Participation of Non-Members:

One of the more controversial issues faced by the WTO Dispute Settlement System is how to deal with complaints by non-governmental organizations (NGOs) and others that the system lacks transparency and does not permit sufficient access for non-members.

1-Transparency:

Currently, panel and Appellate Body proceedings are closed to the public. Only the parties and, to a limited extent, third parties may attend the proceedings. The parties and third parties may make public their own submissions to a panel or the Appellate Body, but they are not required to do so. For parties who do not make their submissions public, the DSU requires them, on request, to provide a non-confidential summary that could be made public (article 18.2). In practice, such summaries are often very brief and prepared only after considerable delay. The arguments of the parties and third parties are described in great detail in (or even attached to) panel reports and are summarized relatively concisely in Appellate Body reports. Since

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 on the same day as their distribution to WTO members, the parties' arguments become known in due course.

The United States has proposed that Dispute Settlement Proceedings be open to the public and that submissions be made public when filed with the WTO. (Jackson (2001), p. 316).

2-Participation of Non-Members:

Even more controversial than transparency, is the proposal by the United States that non-parties should be permitted to make amicus ("friend-of-the-court") submissions to panels and the Appellate Body. When the US proposals were discussed in the review of the DSU conducted in 1989-1999, there was considerable opposition to them. Many developing country Members view the WTO system as exclusively intergovernmental in nature and hesitate to open it in any way to non-governments. In their view, if an 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. Others argue that the credibility of the system would be much enhanced if it were more open and that openness would have no significant disadvantages. (U.S.-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, p.p.99-110, adopted on November 6, 1998).

While the DSU review was ongoing, the Appellate Body ruled that panels have the right to accept non-requested submissions from non-parties (such as NGOs). It reversed a panel report that had concluded that while panels had the right to "seek"

information under DSU article 13.1, they did not have the power to accept information that had not been sought.

The Appellate Body also ruled, however, that the panel's decision in that case to call the submissions to the attention of the parties and ask if the parties wished to adopt all or part of them was an appropriate exercise of its discretion. Notwithstanding considerable criticism of the foregoing decision, the Appellate Body later ruled that it has also had the power to accept amicus submissions, even though its working procedures and the DSU provisions applicable to it contained no provision like article 13. (United-States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, paras. 139-142, Appellate Body Report adopted by the DSB on June 7, 2000).

Conclusion:

The World Trade Organization is having a profound impact on world economic relations. Probably the most significant characteristic and evolution of the WTO is the nature of its dispute settlement system. Building on the GATT and its remarkable dispute settlement procedures shaped by over 40 years of practice and experimentation, the WTO has corrected some of the GATT defects, and created a stronger, more rule-oriented, dispute settlement process, including automatic adoption of reports that have binding international law force, in addition to an appellate process that has increased the rigor and careful reasoning of panel, along with appeal reports that govern questions of the international trade system. Profoundly important and elaborately reasoned decisions such as those in the ***Shrimp Turtle and the Beef Hormones*** **cases** are clearly landmark tribunal opinions for international law generally.

It is not surprising that the Uruguay Round Treaty has many gaps and ambiguities, since it was negotiated with over 120 national participants and diplomatic needs to come to closure, which often dictates differences. A key question facing the dispute settlement system is whether it is appropriate or feasible to pass to it the responsibility of correcting these gaps and problems. Many of these cases would demand that the panels and appellate body undertake tasks that would appear to be law making rather than law applying arguably more appropriate for a legislature, which does not exist, or negotiations, which substitute for legislation. Yet the WTO rules regarding decision making and negotiation were purposely designed by the Uruguay Round negotiators to preserve so-called "sovereignty" for the nation-states, and thus impose a number of constraints on the exercise of national and international power. In such cases the

temptation will be stronger to overburden the dispute settlement process, despite treaty clauses that aimed at constraining the authority in that process.

These processes must be understood in the context, not only of international law and practice but also of the very great influence of national constitutions and diverse legal systems. The nation-states personality is still very important. There is continuing tension between the role of nation-state and the needs for international institutions to facilitate cooperative mechanisms to enhance the efficient and just operation of international markets, especially as they become more globalized.

Moreover, I would like to add that the procedures should maximize the opportunity of government officials to receive all relevant information, arguments, and perspectives. It should enhance the perception of all parties who will be affected by a decision that they have had their opportunity to present information and arguments. This is an important policy objective, particularly for democratic societies. Affected parties must have some confidence in the decision-making process, even when the decision goes against them. The procedure should be perceived by the citizens at large as fair and tending to maximize the chances for a correct decision. A sense of fairness will include a desire that even weaker interests in a society be fairly treated, i.e., that the ability to get a favorable decision will not depend only on money, political power, status, or other elements deemed unfair. It should be reasonably efficient, that is, it should allow reasonably quick government decisions and minimize the cost both to government and to private parties when arriving at those decisions. It should tend to maximize the likelihood that a decision will be made on a general national basis (or international basis), not catering particularly to special interests. In other words, the procedure should be designed so that the government officials can realistically be assisted in "fending off" special interests that conflict with the general good of the

nation. Predictability and stability of decisions are important values. Predictability of decisions, whether based on precedent, statutory formulas, or something else, enables private parties and their counselors to calculate generally the potential or lack of potential for a favorable decision under each of a variety of different regulatory schemes. The greater the predictability, the more likely the cases will be brought only if they have a good chance to succeed.

I would like to suggest several propositions for the improvement and effectiveness of the WTO dispute settlement system. The proposal is particularly aimed at giving parties to a dispute more control over the process and greater flexibility to settle disputes. Under the present dispute settlement system, parties are encouraged to resolve their disputes, but do not always have all the tools with which to do so. Today, my proposal contains specific options aiming at giving parties greater flexibility and more control over the process. In particular:

-Parties to a dispute currently have a right to see and comment on a draft of the panel report before the panel finalizes it, but there is no such corresponding right at the appeal stage. I suggest that parties to a dispute would for the first time have the right to see and comment on an Appellate Body report before it is made final. This would help ensure the best possible final report since parties would have the chance to provide useful clarifications on the facts and the law prior to the issuance of the final report.

- At present, dispute settlement reports are a "take it or leave it" proposition where WTO countries must accept or reject dispute settlement reports in their entirety, without modification. I think that countries would also get the ability to reject specific aspects of reports that hinder settlement or do not accurately reflect the obligations that were agreed on by the negotiators.

-Countries currently have a limited ability to suspend dispute settlement proceedings once they have begun. Panel proceedings can be suspended only if the panel accepts a request from a complaining party; appeal proceedings cannot be suspended. Now, parties would get the ability to suspend appeal proceedings, and they would get an enhanced ability to suspend panel proceedings. The additional time can be important to allow parties to continue progress to reach a solution. The United States has often used additional time at the consultation phase to settle disputes (such as in the recent dispute with Argentina over its protection of intellectual property), but the current rules make it more difficult to do so once panel proceedings have begun.

- Experience to date shows that it can be helpful for the panelists to have the appropriate expertise concerning the particular issues in a dispute, although the current agreement does not speak to this issue. This would ensure that panelists have appropriate expertise.

- Some WTO Members have expressed concern that panels and the Appellate Body could benefit from additional guidance on the scope and nature of the tasks entrusted to them, and on the rules of interpretation of the specific WTO agreements. I think this calls for providing such guidance.

I also suggest that the transparency in WTO dispute settlement proceedings should be improved. That would open WTO dispute settlement proceedings and provide greater public access to briefs and panel reports, and calls on WTO members to consider rules for "amicus curiae" submissions.

Finally, this leads us to notice that one of the major structural problems of the WTO is clearly its constitutional constraints on decision making. The constraints, designed to protect "sovereignty" have resulted in major impasse situations, and in the attempt to

achieve some reforms of the dispute settlement process, including reforms to promote greater transparency and participation.

One thing that is sure is that if you encounter a problem abroad, something can really be done about it. Your government can bring a case and this case will be judged. If you win, the loser will have to comply or pay the consequences

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have

accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V

Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII

Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and

(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII

Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[1] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[2] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[3]

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that

---

[1]The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[2]The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

[3]Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

any such decision shall be taken by three fourths[4] of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths[4] of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X

Amendments

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

---

[4]A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XIII

Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

Article XIV

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

LIST OF ANNEXES

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

- General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX 2

Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 3

Trade Policy Review Mechanism

ANNEX 4

Plurilateral Trade Agreements

- Agreement on Trade in Civil Aircraft
- Agreement on Government Procurement
- International Dairy Agreement
- International Bovine Meat Agreement

ANNEX 2

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby *agree* as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[1]

Article 3

General Provisions

1. 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.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The 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 covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, 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. The provision of compensation should be resorted to only if the immediate withdrawal of the measure

---

[1]The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[2]

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

[2]This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4], such Member

---

[3]Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

[4]The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14;

may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[5]

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8

Composition of Panels

1. 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.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

---

[5]If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

---

[6] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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 covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country

Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

---

[7]If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18

Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

---

[8]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[9]The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[10]With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

---

[11]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[12]If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[13]The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

---

[14]The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to

---

[15]The expression"arbitrator" shall be interpreted as referring either to an individual or a group.

[16]The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

Article 23

Strengthening of the Multilateral System

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 a 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;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel

[17]Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A:	Multilateral Agreements on Trade in Goods
Annex 1B:	General Agreement on Trade in Services
Annex 1C:	Agreement on Trade-Related Aspects of Intellectual Property Rights
Annex 2:	Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4:	Agreement on Trade in Civil Aircraft
	Agreement on Government Procurement
	International Dairy Agreement
	International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES
CONTAINED IN THE COVERED AGREEMENTS

Agreement	*Rules and Procedures*
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:3
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

APPENDIX 3

WORKING PROCEDURES

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a)	Receipt of first written submissions of the parties:		
	(1) complaining Party:	_____	3-6 weeks
	(2) Party complained against:	_____	2-3 weeks
(b)	Date, time and place of first substantive meeting with the parties; third party session:	_____	1-2 weeks
(c)	Receipt of written rebuttals of the parties:	_____	2-3 weeks
(d)	Date, time and place of second substantive meeting with the parties:	_____	1-2 weeks
(e)	Issuance of descriptive part of the report to the parties:	_____	2-4 weeks
(f)	Receipt of comments by the parties on the descriptive part of the report:	_____	2 weeks
(g)	Issuance of the interim report, including the findings and conclusions, to the parties:	_____	2-4 weeks
(h)	Deadline for party to request review of part(s) of report:	_____	1 week
(i)	Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j)	Issuance of final report to parties to dispute:	_____	2 weeks
(k)	Circulation of the final report to the Members:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

APPENDIX 4

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

Table of Cases

The principal cases are indicated hereunder:

Bibliography:

- *"A complicated ruling on a complicated banana regime"*, SUNS #3948, 21 March, 1997.
- *"Arbitrators set US banana 'damage' at $191 million"*, SUNS #4410, 8April,1999.
- *"Dispute settlement system and WTO secretariat roles"*, SUNS #4414, 14 April, 1999.
- *"WTO Appellate body extending its jurisdiction?"* SUNS #4537, 26 October, 1999.
- *"Appellate Body faulted for lack of clarity"*, SUNS #4560, 26 November, 1999.
- *"DSB adopts Appellate body ruling"*, SUNS #3988, 27 May, 1997.
- UNCTAD (United Nations Conference on Trade and Development) (1999), Trade and Development Report, 1999, United Nations, New York and Geneva.
- *"A New Trade Order in a World of Disorder?"*, in JM Griesgraber and BG Gunter (eds.), World Trade: Toward Fair and Free Trade in the Twenty-First Century (Rethinking Bretton Woods, Vol V), Pluto Press, London and Chicago, 1997.
- Baylis, John & Smith, Steve, *"Globalization in World Politics"*, 1997.
- Byrd, Robert & Barbier, Marion, *Civil Procedures in France, in Civil Appeal Procedures Worldwide*, 2002.
- Davey William, *The WTO Dispute Settlement System, Trade*, 119-142, United Nations Press 1999, 2nd edition, 2001.
- Dunoff, Jeffrey & Trachtman, Joel, *Economic Analysis of International Law*, 1999.
- Hinick, Melvin & Munger, Michael, *Analytical Politics*, 1997.
- Hudoc, Robert, *"The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Proceedings"*, 1998.
- Lichtenbaum, Peter, *Procedural Issues in WTO Dispute Resolution*, 1998.
- Schott, Jeffrey & Jayashree, Watal, *Decision-making in the WTO*, March 2000.
- *The WTO Agreements: Deficiencies, Imbalances and Required Changes*,Third World Network, 1998.
- *"WTO establishes Appellate Body ... finally"*, Third World Economics #127, 16-31 December, pp. 9-10, 1995.
- Brand, Ronald, *Direct Effect of International Economic Law in the United States and the European Union,* 17 Nw.J. International law, 1997.
- Brown, Neville & Kennedy, Tom, *The Court OF Justice of The European Communities,* 1994.

- Childress, Steven & Davis, Martha, *Federal Standards of Review*, 1996.
- Corr, Christopher, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures,* 18 Nw.J.International Law 60, 1997.
- Cottier, Thomas, *The WTO Dispute Settlement System*,1998.
- Das, Bhagirath Lal, *Some Key Issues Relating to the WTO, Trade & Development* Series No. 3, Third World Network, 1996.
- Dillon, Sara, *Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies,* 1999.
- Dillon, Thomas, *The World Trade Organization: A New Legal Order For World Trade,* 1995.
- Dombey, Daniel, *EU and US Claim Beef Victory,* FIN. TIMES, Jan. 16, 1998; Daniel Dombey & Francis Williams, Consumer Seen as Victor in Beef Row, FIN. TIMES, Jan. 17, 1998; Trade Disputes Big Beef, Economist, Jan. 24, 1998.
- Dunoff Jeffrey, *The Death of the Trade Regime,* European Journal of International Law, vol. 10, n° 4.
- Frechette, Serge, Comments: Performance of the System III: Appellate Body, 1998).
- Gesrtenmaier, Klaus-Albrecht, *West Germany, World Litigation Law & Practice*, 1990.
- Goldsmith, Jack & Posner, Eric, *A Theory of Customary International Law*, 1999.
- Homer E. Moyer, Jr., Chapter 19 of the NAFTA, 1993.
- Hudec, Robert, *Broadening the Scope of Remedies in WTO Dispute Settlement, in improving WTO Dispute Settlement Procedures: Issues and Lessons from the practice of other International Courts and Tribunals*, Friedl Weiss ed., 2001.
- Iacobucci, Edward, *The Interdependence of Trade & Comp. Policies*, p.201, Dec. 1997.
- Jackson, John, *The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation,* 91 AM.J. Interanational Law , 1997.
- Joelson, Marc, *The Kodak-Fuji Trade Dispute*, 1998.
- Keohane, Robert, *After Hegemony, Cooperation and Discord in the World Political Economy,* p.1984.
- Krueger, Anne, *The Political Economy of the Rent-Seeking So*ciety, 1974.
- Marceau Gabrielle, *Rules on Ethics for the new WTO Dispute Settlement Mechanism,* Journal of World Trade, vol.32, n° 3, June 1998.

- Martineau, Robert, *Appellate Justice in England And The United States: A Comparative Analysis,* December 5, 1990.
- Palmeter, David and Petros, Mavroidis, *Dispute Settlement in the WTO Practice and Procedure,* 1999.
- Pauwelyn, Joost, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 2000.
- Pescatore, Pierre, *Handbook of WTO/GATT Dispute Settlement*, 1997.
- Petersmann, Ernest-Ulrich, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 1994.
- Qureshi, Asif, *The World Trade Organizatio*n, *Implementing International Trade Norms 99,* 1996).
- Reitz, Curtis, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U.PA.J. International Economy,1996.
- Roessler, Frieder, *Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints*, 1999.
- Romensky, Serge,*"US Shocked by WTO Ruling in Kodak-Fuji Dispute," Agence France Presse*, December 5, 1996.
- Rubenstein, Kim, & Schultz, Jenny, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948.*
- Ruggero, Aldistert, *Winning on Appeal*: Better Briefs and Oral Argument, 1992.
- Shoyer, Andrew & Forton, Heather, *Performance of the System II:* Panel Adjudication, Comments, 1998.
- Shreve, Gene & Raven-Hansen, Peter, *Understanding Civil Procedure*, 1994.
- Some Suggestions for Improvements in the WTO Agreements, Third World Network, 1999.
- *Strengthening Developing Countries in the WTO*, Trade & Development Series No. 8, Third World Network, 1999.
- Steven, Croley, *WTO Dispute Procedures, Standard of Review*, 2000.
- Van Der Woude, Marc, *The Court of First Instance: The First Three Years,* 1992-1993.
- Zdouc Werner, *Competition and Sustainable Development,* 2002.

Also See:

- The Agreement establishing the World Trade Organization.
- EC-Bananas Arbitrator's Report, note 77, paragraph 8.1.
- European Communities Regime for the Importation, Sale, and Distribution of Bananas, Request for the Establishment of a Panel by the European Communities, WT/DS27/40(Dec.15, 1998).
- European Community, U.S. Threat of Unilateral Action on Bananas puts Multilateral Dispute Settlement System at Risk (Oct.29, 1995).
- Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale, and Distribution of Bananas (proposed Oct. 22, 1998).
- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R/ (Oct.12, 1998).
- Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization.
- United States-Safeguard Measure on Imports of Lamb Meat from Australia, WT/DS178.

Internet Sites:

-http://www.globalpolicy.org/socecon/bwi-wto/indexwto.htm.

-http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm