

DISPUTE SETTLEMENT IN THE WTO

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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INTRODUCTION

Multilateral dispute settlement provisions in the context of international trade are mainly contained in the GATT system, including the General Agreement itself and the various MTN agreements, such as the Agreement on Technical Barriers to Trade (TBT) or the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). The GATT dispute settlement mechanism is generally considered as one of the cornerstones of the GATT system, and "*a central element in providing security and predictability to the multilateral trading system*"¹. This mechanism has recently been modified with the completion of the Uruguay Round negotiations, notably through the creation of a new institutional framework, the World Trade Organisation (WTO) and the adoption of a new Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the Dispute Settlement Understanding or DSU).

With the expansion of environmental policies and ongoing trade liberalization, there is a growing interaction between environmental and trade disciplines. A number of environmental issues have arisen in the context of trade dispute settlement, as GATT contracting parties have argued that certain environmental measures taken by other parties have affected the operation of the multilateral trading system, including their application in a manner that violates certain basic trade principles such as non-discrimination. Since the first trade dispute with environmental aspects in 1980, the GATT dispute settlement procedures have been used for the settlement of international disputes on the trade impacts of national environmental measures more frequently than the dispute settlement procedures of any other world-wide organisation². On the other hand, none of the several hundred international environmental agreements, nor any of the almost 300 national environmental regulations, which have been notified to the GATT in the context of the 1979 Agreement on Technical Barriers to Trade, have been challenged in a GATT panel proceeding.

The purpose of this background paper is to present an overview of the procedural rules for the settlement of trade disputes as established in the GATT system. As an overview, nothing in this document should be construed as offering a definitive interpretation of the international agreements described. It does not, however, provide any information on the substantive rules governing such disputes³. Whenever reference is made to specific dispute settlement provisions as they stood before the conclusion of the Uruguay Round negotiations, or as amended subsequently, the terms "GATT 1947" and "the WTO" respectively are used .

I. General Overview of the Dispute Settlement System in the GATT 1947 and the WTO

Dispute resolution in GATT 1947 is governed primarily, but not exclusively, by Articles XXII and XXIII of the General Agreement⁴. Procedures relating to dispute settlement in the framework of the GATT were further clarified in a series of provisions adopted subsequently by the contracting parties. Dispute settlement mechanisms were in fact the subject of extensive discussions in the Tokyo Round and led to the adoption of an Understanding on Dispute Settlement⁵ (hereafter the 1979 Understanding). This Understanding summarised and confirmed the dispute settlement procedures that had been used to that date and remained a major reference for panel procedures. In 1982, a Ministerial Declaration⁶ (hereafter the 1982 Ministerial Declaration), followed by the 1984 Action by contracting parties⁷ (hereafter the 1984 Decision), reiterated a number of points of the 1979 Understanding, although their scope was much narrower. The basic structure and operating procedures of the GATT 1947 dispute settlement system have not changed greatly since the early 1950s.

The issue of dispute settlement was included in the agenda of the Uruguay Round⁸. Several reforms were put into operation on an interim basis by the 1989 Improvements Decision⁹. The 1994 Dispute Settlement Understanding (DSU) which sets forth the new rules and procedures, establishes a unified dispute settlement mechanism and applies to the Agreements listed in Appendix 1 of the DSU. These Agreements include the new subject matters of intellectual property and services. The DSU

elaborates rules and procedures that, subject to specific exceptions, govern the process for consideration of disputes. The DSU makes significant improvements on the GATT 1947 dispute settlement system. Special or additional rules are also contained in several of the covered Agreements¹⁰, and in particular Article 11 of the SPS Agreement and Article 14 and Annex 2 of the TBT Agreement.

A. The importance of negotiated solutions

The GATT dispute settlement system abides by the same two-step procedure as is generally applied when trying to settle international litigations (i.e. consensual means, such as negotiations, mediation and conciliation, are applied before undertaking, if need be, any adjudicative type of dispute settlement). Most of the relevant GATT provisions provide initially, and sometimes exclusively, for consultations between the contending parties, described in language which avoids any reference to confrontation (GATT Articles VII:1, VIII:2, XII:4, XIII:4, XIX:2, XXII, XXIII:1). The DSU explicitly notes that "*a solution mutually acceptable to the parties to the dispute and consistent with the covered agreements is clearly to be preferred*". It further underlines that "*requests for conciliation and the use of dispute settlement procedures should not be intended or considered as contentious acts ..*".

Under GATT 1947, if the parties were unable to settle their differences through negotiations they could, under certain circumstances, attempt the conciliation of such differences using the good offices of appropriate bodies or individuals¹¹. They could furthermore resort to Article XXIII:2, under which an investigation was to be undertaken by the GATT Council and subsequent recommendations formulated on the issue of the dispute. In terms of subsequent practice, this recourse occurred mainly through the establishment of a dispute settlement panel. In the framework of the WTO, the right of complaining governments to have a panel process initiated has been reaffirmed .

B. The dual character of the GATT system

However, it would be imprecise to perceive the GATT system as exclusively consensual and lacking compulsory elements. In fact, the GATT dispute settlement system takes on a dual character with both judicial and political elements. Although it is recognised that the GATT dispute settlement system assumes a judicial function since 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*"¹², it contains several elements of a political and diplomatic mechanism.

The GATT 1947 does not actually establish a specialised institution to rule on disputes, but entrusts this task to the contracting parties, acting by consensus through the Council, a political body which takes political decisions. Although the panels deliberate through a judicial-like procedure, their reports represents solely the opinion of the panel members and have no legal force of their own before being adopted by the Council on behalf of the contracting parties.

In contrast, in the framework of the WTO, a specialised institution, the Dispute Settlement Body, has been created to administer the dispute settlement mechanism. Despite the change in name, the Dispute Settlement Body is the General Council of the WTO, convened to discharge dispute settlement responsibilities¹³. It thus remains the main political organ of the organisation which takes dispute settlement decisions. Furthermore, Article 3.2 of the DSU clearly reflects the view that international trading rights and obligations could be created, modified or diminished only through negotiations among WTO Members and not through judicial interpretation. Thus, the Dispute Settlement Body is linked in the performance of its judicial functions by authoritative interpretations of GATT provisions through negotiations and political decision-making.

On the other hand, the judicial character of GATT panel procedures is obvious in view of: a) the practice of written submissions by each side, accompanied by documentary annexes, and usually reply

submissions; b) the oral hearings at which the parties respond to each other and to questions from the panel; and c) the independence and impartiality of the panel members. This judicial character has been considerably strengthened in the DSU, in particular through the establishment of stricter timetables governing dispute settlement procedure and through the institution of an Appellate Body to hear appeals on points of law in panel rulings.

C. The nature of panel reports

There is no doctrine of legally binding precedents in the GATT. Adopted panel reports are not considered authoritative interpretations of the GATT; they are thus legally binding only on the parties to the dispute and not on other GATT contracting parties. Yet their adoption by consensus decision of the GATT Council and their subsequent confirmation by the annual plenary conference of the GATT contracting parties promotes them to the rank of GATT treaty practice¹⁴. Panels are not bound to follow prior adopted panel arguments on applicable legal rules¹⁵. However, abiding by the general rule of interpretation of international treaties¹⁶, dispute settlement panels have very often relied on the reasoning in previous rulings. Many of the clarifications of GATT rules brought forward in dispute settlement reports have subsequently been incorporated into MTN agreements or decisions of the contracting parties (such as the above-mentioned decisions on improvements in GATT dispute settlement procedures) so as to ensure a uniform application of what have then become agreed interpretations. Certainty on questions of law and relevant interpretations will be further enhanced in the framework of the WTO by the existence of the Appellate Body.

D. The fundamental goal of the system

The question was broached in the early 1970s whether the principal role of this system should be the elaboration of judicial-like decisions or the promotion of negotiated settlements through conciliation. Criticisms were directed at judicial solutions to problems that could only really be resolved through negotiation; critics of an adjudicative approach argue that the nature and basic philosophy of the GATT is that of a commitment by the contracting parties to work out mutually acceptable solutions to disagreements¹⁷. On the other hand, it was argued that the GATT is a set of legally binding rules, embodying a balance of concessions to be preserved; its judicial character should thus be strengthened so as to promote more precise decisions on the merits of the disputes and a more effective implementation of those decisions¹⁸. The approach recently put in place for the WTO is more oriented towards a rules-based dispute settlement system, even if this approach has to be viewed in light of the long-standing objective of seeking results generally acceptable to the parties and, thus, more likely to be effectively implemented.

E. Salient issues

The peculiar character of GATT dispute resolution entailed a number of consequences which have often been severely criticized. One of the main objectives of the amendments in the framework of the Uruguay Round was to address such criticisms. The most noteworthy criticisms and the remedies brought forward in the framework of the WTO are set out in the following paragraphs.

In the framework of GATT 1947, the fact that panel reports were subject to formal adoption by the Council on a consensus basis implied that the "losing" party could hold up the adoption of a report. However, given that all contracting parties have a potential interest in the smooth operation of the dispute settlement mechanism, an outright veto was unlikely. Disagreement with the specific aspects of the entire report could nevertheless lead to temporisation, and often several years elapsed before a panel ruling was implemented. While delays occurred before adoption of the report by the Council, in fact the time lapse between the introduction of a case and the adoption of the panel report was short relative to what prevails in most national legal systems. On the other hand delays were caused subsequently, as negotiations were undertaken between interested parties over how the adopted decision would be implemented. Although

panels may make suggestions in this direction, they cannot mandate specific actions, the offending party being the best judge on how to achieve conformity most efficiently.

The WTO Agreements introduce strict timetables handling a dispute and a new mechanism for the adoption of panel reports. Indeed, the DSU provides for the establishment of a panel within two months after a request for consultations if the dispute has not been settled, while the period from the composition of the panel until the circulation of the final report is not to exceed six months (three months for urgent cases). Panel reports are adopted within sixty days of their being issued, unless the Dispute Settlement Body decides by consensus not to adopt a report or a contending party decides to make an appeal. Henceforth, therefore, a consensus is needed to reject a report (a so-called "negative consensus") and not, as formerly, to adopt it, thus making blocking no longer possible. The DSU also contains strengthened procedures on the implementation of a panel report.

It has often been argued that in the framework of GATT 1947, the knowledge by the panel members that a report was subject to review in a political body, comprising not only the states' parties to the controversy but other states that may have adopted trade measures similar to those condemned in the report, tended to make reports narrower and more focused on particular facts of a case. Since parties were governments, panels seemed to be more lenient in their demand for documents, enforcement of deadlines, and conduct of proceedings in general. Panels did not usually go beyond stating that a given practice was unjustified and should be terminated. The possibility has been recognized to authorize retaliation by the contracting parties if a party to a dispute failed to implement an approved report, although such action was to be taken only as a last resort¹⁹. However, in only one case was retaliation approved by the contracting parties²⁰.

Finally, in the framework of the WTO, a strict time-frame for the implementation of an adopted panel report is specified. Rules are introduced to determine a reasonable time-period for compliance if immediate compliance is impracticable. Compensation or the suspension of concessions are to be resorted to only if such compliance is impracticable and no other mutually satisfactory solution has been reached by the concerned parties. However, even in this case, such compensation or suspension of concessions may be applied only until the measures found to be inconsistent are removed. In order to strengthen this obligation of compliance, the DSU clearly regulates the right to retaliation in case of failure to comply.

F. Specific concerns relating to trade disputes with environmental aspects

As far as disputes over the trade impacts of environmental measures are concerned, a number of specific questions arise. It should be noted that environmental issues are raised in the GATT dispute settlement mechanism only in the context of a trade dispute : this can happen when a party believes an environmental measure violates trade rules or nullifies or impairs resulting benefits. In examining such disputes, panels address matters in the light of applicable trade provisions; they are not bound by provisions outside the multilateral trading system. As the GATT/WTO is a contract on trade matters, a panel is asked to rule on the compatibility of a trade measure with the multilaterally agreed trade rules and has no role to judge the goal or objective behind such a trade measure. A number of environmental NGOs and academics have thus criticised the GATT dispute settlement mechanism as being unable to give due consideration to environmental objectives when dealing with trade disputes over the use and impact of environmental measures. They claim that reasoning and rulings in specific trade disputes with environmental aspects have largely disregarded relevant environmental policy objectives, as well as particular environmental needs and ecological conditions.

What can be noted in general terms with respect to these criticisms is that it seems possible to meet most, although not all of them, on the basis of the provisions of GATT 1947 or the amendments introduced in the framework of the WTO. Existing structures and procedural rules now allow to a considerable extent environmental concerns to be taken into account, when they arise in the context of trade disputes. Taking full advantage of the new opportunities offered would therefore be important.

The WTO being a trade organisation, environmental disciplines are not part of the terms of reference of panels. However, the importance accorded to solutions which are not only consistent with trade rules but also mutually acceptable to the parties involved seems to leave room for relevant objectives, including those related to the environment, to be taken into account as appropriate. Furthermore, as a result of the consolidation of a number of dispute settlement mechanisms contained in the WTO system, panels now have the ability to look at all relevant rights and obligations of concerned parties arising from the covered Agreements. This ability to consider all covered agreements, gives the panels a more comprehensive and balanced overview of the varying, and eventually competing, provisions of the system.

Similarly, applicable dispute settlement procedures have evolved so as to allow for all types of expertise, in addition to specific trade expertise, to be sought. More specifically, panels may receive specialised outside advice with respect to factual issues concerning scientific or other technical matters, in the form of written advisory reports from an *expert review group*²¹. In addition to the general provisions contained in the DSU, special rules in this respect are contained in some of the covered agreements. In particular, the TBT Agreement allows for the establishment of technical expert groups to assist in questions of a technical nature, requiring detailed consideration by experts, while the SPS Agreement calls for the establishment of such advisory groups, or the consultation of relevant international organisations in disputes involving scientific or technical issues. These procedures may now be used to obtain advice on any environmental aspect of a trade dispute and thus improve the understanding of such aspects in the assessing and ruling on specific trade disputes.

The timetables governing dispute settlement procedures have been another issue of concern to achieving of environmental policy objectives, since delays in the implementation of adopted panel reports could prove particularly preoccupying with respect to environmental matters of urgency. These delays are now considerably limited under the WTO provisions and specific provisions for urgent cases have also been adopted, although the relevant amendments were not introduced for environmental purposes, but simply to improve the operation of the mechanism as such.

This search for mutually acceptable solutions in the GATT framework has so far implied a certain degree of confidentiality, which continues to be a major characteristic of dispute settlement procedures. Assessing a case may often necessitate the provision of confidential information and it is important to guarantee the protection of such information to the concerned persons, bodies or authorities, in order to ensure its availability. Confidentiality is thus provided for by various provisions but this runs counter to demands for transparency of proceedings and involvement of non-governmental interests. The DSU has in several respects increased the transparency of procedures. Under the system as it currently operates, the main responsibility for involving non-governmental interests and sharing information with concerned audiences lies with governments²². National governments are allowed to disclose to the public their own arguments before a panel. In addition, when parties to the dispute submit confidential information or arguments, they have to provide, upon request, a non-confidential summary of their submissions that can be released to the public²³.

II. Dispute Management Procedures

A. Scope of dispute management procedures

In Article XXII, the General Agreement has a general provision for the management of disputes through consultations between contracting parties at the request of one of the concerned countries on any issue that may be raised with respect to the operation of the Agreement. The merit of this provision is to provide a large scope for consultations between GATT members on issues of concern or merely of interest. It thus illustrates the importance for international trade of working out solutions as widely acceptable as possible to trading partners. It has been stated that such procedures are not deemed to be confrontational

in character and, although consultations should not be initiated on purely hypothetical grounds or mere apprehensions, establishing actual damage is not necessary²⁴.

On the other hand, dispute settlement provisions *stricto sensu* may be invoked when a contracting party claims that a benefit accruing to it under the General Agreement (or other covered agreements in the framework of the WTO) has been nullified or impaired, or that the attainment of any objective of the Agreement is being impeded by another member (Article XXIII:1). It is important to note that, in terms of the GATT, nullification, impairment or impediment of GATT objectives may result not only from another contracting party's violation of the Agreements but also, under certain circumstances, from any measure taken by another party, whether or not such a measure conflicts with the provisions of the Agreements. The central concept is thus not the violation of particular provisions or obligations, but the undermining of the Agreement's objectives and benefits flowing from it. The main value to be protected is the balance between the various trade benefits and obligations as well as the integrity of GATT objectives. However, provisions on "non-violation" complaints are not applicable in the framework of all covered agreements. For instance they do not apply in the framework of the Agreement on Trade-Related Aspects of Intellectual Property Rights for a period of five years during which time specific provisions may be elaborated by the Council for TRIPS; nor in the framework of the General Agreement on Trade in Services Annex on Air Transport Services, under which dispute settlement procedures may be invoked only where obligations or specific commitments have been assumed by the concerned Members.

Three criteria relevant to the above mentioned "non-violation" complaint are: i) the existence of a concession under the Agreement; ii) a subsequent action which could not reasonably have been anticipated by the recipient of the concession at the time when it was negotiated (for example, the introduction of a non-actionable subsidy rendering a tariff concession meaningless); and iii) the fact that such action upsets the competitive relationship between products and nullifies or impairs the benefit accruing from the concession under the Agreement. Burden of proof constitutes one of the main points distinguishing a "violation" from a "non-violation" complaint. In allegations of violations of the General Agreement, or other covered agreements, nullification or impairment of benefits is presumed and the defending party must rebut that presumption. In disputes alleging "non-violation" nullification or impairment, the complaining party must establish the three elements mentioned above²⁵. Another important difference is that the defending party is not required to modify or withdraw a measure that is consistent with the Agreements but nonetheless nullifies or impairs benefits. The requirement is to reach a mutually satisfactory adjustment of the matter with the complaining party, which may include compensation.

B. Notification

Transparency of national trade and trade-related measures constitutes one important aspect of dispute management, in the sense of dispute prevention, in the GATT system. To this end, GATT Article X calls for the prompt **publication** of domestic and international trade regulations made effective by any contracting party, in order to enable governments and traders to become acquainted with them. The TBT Agreement requires the publication and notification of proposed standards and technical regulations not substantially based on relevant international standards. **Notification** requirements are also contained in several other GATT articles (including Articles XVI:1, XVII:4, XIX:1 and XXV:5) and WTO Agreements.

The 1979 Understanding reconfirmed the importance of these provisions, underlining that the notification of trade measures affecting the operation of the General Agreement applies irrespective of views on their consistency with it. Contracting parties having a reason to believe that such measures have been adopted may seek information on them bilaterally. The objective of greater transparency and a better understanding of the trade policies and practices of contracting parties is furthermore reinforced by the establishment in 1989 of a Trade Policy Review Mechanism²⁶, which has been confirmed in the framework of the WTO. The 1994 Marrakesh Ministerial Conference also adopted a Decision on

Notification Procedures in order to improve the operation of notification procedures under the WTO Agreements and thereby to contribute to the transparency of Members' trade policies.

C. Consultations

Consultations constitute a dispute settlement means in its own right and are considered as a prerequisite for the subsequent stages of conciliation and dispute settlement *stricto sensu*. According to Article XXII:1

Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

Consultations are essentially bilateral, although Article XXII:2 provides for multilateral consultations if the bilateral ones fail to work out a satisfactory solution²⁷. Article XXIII:1 provides also for bilateral consultations, but here with a specific list of the types of claims that may be considered, as indicated above in the section on Scope of dispute management procedures.

Contracting parties requesting consultations are expected to indicate the reasons for their concern. GATT members are committed to respond to such requests promptly and in good faith and other GATT members are informed of the request. Strict time limits for a response are established under the DSU, where it is recognised that emergency situations call for considerably shorter delays of response. Even in the framework of bilateral consultations, third contracting parties may be involved, provided that the consulting countries recognize their substantial trade interest in the matter under consideration. The outcome of the bilateral or multilateral consultations is communicated to the other GATT members.

D. Good offices, conciliation, mediation²⁸

With a view to a more efficient settlement of the dispute, the contending parties can seek the good offices of the Director General or of an individual or group of persons nominated by him in order to conciliate the outstanding differences²⁹. The failure of bilateral consultations is no longer required in order to resort to good offices, while the Director General can *ex officio* offer his good offices to assist the parties. Conciliation proceedings, and especially the position taken by the parties, are confidential and without prejudice to the rights of either party in any further proceedings. Mandatory provisions for conciliation are also contained in several of the Tokyo Round codes³⁰.

E. Arbitration

The possibility to resort to arbitration as an alternative means of dispute settlement, including recourse to the International Court of Justice, has always been open to GATT members in terms of the general rules of international law and never been precluded or otherwise limited by the GATT system³¹. The possibility of arbitration is now explicitly stated by the DSU. Any resort to arbitration must be preceded by a mutual agreement in which the arbitral procedure is agreed upon and notified to other WTO members. Arbitral awards are binding upon the contending parties, but do not affect other WTO members. Provisions concerning the implementation of dispute settlement recommendations and rulings and provisions on compensation and the suspension of concessions are applicable *mutatis mutandis* to arbitration awards.

F. Formation of panels

In the absence of satisfactory solutions worked out through any of the above-mentioned means, the authority for settling disputes in the framework of the GATT was the entirety of the contracting parties. In the WTO, such authority belongs to the Dispute Settlement Body, which is composed of the entirety of

the WTO Members. The contracting parties (formerly) or the Dispute Settlement Body (currently) shall, according to Article XXIII:2,

... promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

The creation of panels is not expressly provided for in Article XXIII:2, but has developed as a customary practice in connection with the implementation of that article and was codified in the 1979 Understanding and confirmed by the DSU. It is understood that "*the function of the panels is to assist the Dispute Settlement Body in discharging its responsibilities ...*" and "*to 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 .. agreements*"³². Panel members were appointed by consensual decision of the Council. In the WTO, a panel of three, or exceptionally five, experts is established at the request of the complaining party, unless the Dispute Settlement Body decides by consensus not to establish the panel. This establishment on request constitutes an important improvement over previous practice because it is no longer possible to obstruct the dispute settlement procedure by delaying the establishment of a panel.

In the framework of the WTO, the Secretariat proposes panel members for approval of the parties to the dispute. Concerned parties are not to oppose the appointment of a member of the panel other than for compelling reasons. One source of proposed panelists is the indicative list of governmental and non-governmental persons meeting DSU selection criteria. In case of disagreement or undue delay, panel members will be appointed upon proposal of the Director General, after consulting with the Chairman of the Dispute Settlement Body and the Chairman of the relevant council or committee. Prior to 1989, there was an apparent preference for use of governmental experts responsible for GATT affairs over private individuals³³, but in recent years there has been a substantial increase in the use of private individuals on panels, namely to meet criticisms concerning the lack of expertise of certain panelists and to improve the quality of reports. The practice of naming qualified non-governmental experts is now codified in the DSU.

Panel members act in their individual capacities and independently of the interests of their government, receiving no instructions from them. Generally panel members have been nationals of contracting parties not involved in the dispute and considered having a neutral position towards the contending parties. However, with the introduction of private experts in the panels, it has been possible to appoint panel members familiar with the laws and procedures of the country whose measure is challenged.

G. Working procedures³⁴

Panel proceedings include written submissions and oral presentations by the parties, as well as questions and requests for documents and expert opinions by the panel. Panels have the right to seek information and technical advice from any individual or body they deem appropriate. Before resorting to individuals or bodies within the jurisdiction of a State, panels have to inform the government of that State³⁵. Third parties have the right to be heard by the panel and to make written submissions if they have indicated their interest in so doing when the panel was constituted. Any oral or written representations by third parties are reflected in the report.

Panels meet in closed sessions and their deliberations take place informally and confidentially throughout the proceedings. The period of examination and adoption of a case generally lasts from between six to nine months. While by virtue of GATT 1947, panels examined "*in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES*"³⁶ by the parties involved in the dispute, the DSU provides that "*panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute*". The panel first prepares the "descriptive" part of the report,

which is submitted as an advance draft to the parties for comments and corrections. The complete report is also presented to the parties in advance of its full circulation in order to allow them to request review of portions of the report and to work out a voluntary settlement rendering the presentation of the report to the Council superfluous.

H. Adoption of panel reports

The panel report is circulated to all contracting parties or to the Dispute Settlement Body, allowing a period of time for consideration of the report before its discussion. Contracting parties with objections to a report circulate written explanations of their objections prior to the discussion. Contracting parties have the possibility of expressing particular opinions during the discussion in the Council. Nonetheless, final consent is normally unqualified. On several occasions, panel reports have been adopted subject to understandings of the contracting parties, but any such understandings are equally approved by consensus.

According to standing practice in the framework of GATT 1947, panel reports were approved by consensus. One of the major changes in the WTO is the automatic adoption of the panel report within 60 days after the date of its circulation, unless a party to the dispute formally gives notification of its decision to appeal, or the Dispute Settlement Body decides by consensus not to adopt the report. Third parties cannot appeal a panel report, although they may participate in the appellate review proceedings, as for the examination of the case by the panel.

I. Appellate review

Appeals are heard by a standing Appellate Body, established by the Dispute Settlement Body and comprising persons of recognized authority and expertise in law and international trade. An appeal is heard by three out of the seven persons appointed for designated terms of office. Experts in the Appellate Body are independent of any government connections. Appeals are limited to points of law covered in the panel report and legal interpretations developed by the panel, and cannot cover factual issues. The Appellate Body report, which may uphold, modify or reverse the legal findings and conclusions of the panel, is automatically adopted within 30 days following its circulation, unless the Dispute Settlement Body decides by consensus not to adopt it. Members have nonetheless the right to express their views on an Appellate Body report.

J. Enforcement

a. Surveillance and monitoring

In the framework of the WTO, the enforcement mechanisms have been significantly improved. The importance for all Members of a prompt compliance with recommendations or rulings of the Dispute Settlement Body has been reaffirmed. In the DSU, a strict time-frame is provided for the implementation of the adopted panel report. The country concerned reports to the Dispute Settlement Body on the steps taken or planned in order to implement the dispute settlement ruling. If it is impracticable to comply immediately, the country will be given a reasonable period of time to do so³⁷. Dispute settlement procedures described above are also applicable to disagreements as to the existence or the conformity of any implementation measures proposed by the concerned country. Such disagreements are to be solved before the original panel, if possible. The issue of the proper implementation of dispute settlement rulings may be raised by any Member and at any time following their adoption. Discussion of the issue of implementation stays on the agenda of the Dispute Settlement Body until the issue is resolved.

b. Compensation and the suspension of concessions

It is generally believed that sanctions against a contracting party are not the best solution, because they would run against the general objective of liberalisation of trade and because their effectiveness may

often be limited. Thus, the recommendations of the contracting parties, or the Dispute Settlement Body on the matter under dispute generally aim at restoring the balance by securing the removal of measures not consistent with the Agreements. If such removal was impracticable, other temporary measures for restoring balance would have to be found, such as the provision of compensation or the suspension of concessions³⁸. This possibility is provided for when the contracting party in question has failed to comply within the reasonable period of time determined for it. The DSU stresses the voluntary character of compensation, which is negotiated and mutually agreed between the concerned parties and, in addition, is to be consistent with the covered agreements. If the determined period of time has expired and no satisfactory compensation has been agreed, the affected country may request authorization from the Dispute Settlement Body to suspend the application of concessions or other obligations under the covered agreements.

Article XXIII:2 provides in this respect that

.. if .. the circumstances are serious enough to justify such an action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.

The DSU introduces a number of principles intended to guide the complaining party in suspending concessions or other obligations. In particular, any suspension should be equivalent to the nullification or impairment suffered. Suspension should preferably bear upon concessions or other obligations in the same sector as affected by the violation or the nullification, or, if this is not practicable or effective, in other sectors under the same agreement. Only if a suspension in the framework of the same agreement is considered not practicable or effective and the circumstances are serious enough, should the complaining party envisage suspending concessions or other obligations under other covered agreements. However, no suspension may be authorized in the framework of agreements prohibiting such suspension. Procedures governing the authorization by the Dispute Settlement Body to suspend concessions are sensibly the same as applied for the adoption of panel reports. It should be stressed again that neither compensation nor the suspension of concessions is to be preferred to any actions bringing inconsistent measures into conformity with the agreements. They constitute interim solutions, applied only until the measures found to be inconsistent are changed.

NOTES

1. Decision by the contracting parties of 12 April 1989 on "Improvements to the GATT Dispute Settlement Rules and Procedures" (BISD 36S/61) (hereafter the 1989 Improvements Decision), Part A.1. and 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, Art.3.2.
2. The dispute settlement procedures under GATT Article XXIII concerning the use of trade restrictions introduced on environmental or health and safety grounds which have led to panel reports to date concern: the U.S. prohibitions of imports of tuna and tuna products from Canada (Panel report adopted on 22 February 1982, BISD 29S/91); the U.S. taxes on petroleum and certain imported substances (Panel report adopted on 17 June 1987, BISD 34S/136); Canada's restrictions on exports of unprocessed herring and salmon (Panel report adopted on 22 March 1988, BISD 35S/98); Thailand's restrictions on importation and internal taxes on cigarettes (Panel report adopted on 7 November 1990, BISD 37/200); U.S. restrictions on imports of tuna, on which two complaints have been introduced, one from Mexico and the other from the EEC. (The "Mexican" panel report - GATT document DS 21/R of 3 September 1991 - is in abeyance, neither party having requested its adoption); the "EEC" Panel report - DS 29/R of 16 June 1994 has not yet been adopted); and U.S. taxes on automobiles (DS 31/R of 11 October 1994, not yet adopted). A few additional complaints did not lead to formal dispute settlement rulings: Canada's complaint against the EEC's ban on importation of skins of certain seal pups and related products (1985) led to bilateral consultations under GATT Article XXIII:1. As for the EEC's import restrictions on beef produced from hormone-fed animals, challenged by the U.S. under the provisions of the TBT Agreement concerning the scientific justification of the measures (1987), the establishment of a dispute settlement panel was never requested. Another dispute concerns a Venezuelan claim over U.S. standards for reformulated and conventional gasoline (DS 47). Pending in 1995 before a *GATT* panel, it was withdrawn from the GATT procedures and re-introduced in order to be handled under the new procedures of the *WTO* Dispute Settlement Understanding.
3. Information on the substantive rules governing such disputes are addressed in the document on Trade Principles and Concepts [GD.....].
4. Specific provisions are also contained in Articles VI:7, VII:1, VIII:2, XII:4, XIII:4, XVI:1, XIX:2 and 3, XXV:7 and 10, XXV:5, XXVIII:4 of the General Agreement and in the 1973 Arrangement Regarding International Trade in Textiles (Articles 1:6 and 11:4-10), the 1979 Agreement on Technical Barriers to Trade (Article 14 and Annexes 2 and 3), the 1979 Agreement on Government Procurement (Article VII:6-14), the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Articles 12, 13, 17 and 18), the 1979 International Dairy Agreement (Article IV:5 and 6), the 1979 Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Articles 19, 20 and Annex III), the 1979 Agreement on Import Licensing Procedures (Article 4), the 1979 Agreement on Trade in Civil Aircraft (Article 8) and the 1979 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Article 15).
5. "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", adopted on 28 November 1979, including an "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement" (BISD 26S/210).

6. Ministerial Declaration adopted on 29 November 1982 (BISD 29S/9), Decision on "Dispute Settlement Procedures" (BISD 29S/13).
7. Decision on "Dispute Settlement Procedures", Action taken on 30 November 1984 (BISD 31S/9).
8. The Punta del Este Ministerial Declaration stated that "*in order to ensure prompt and effective resolution of disputes to the benefit of all parties, negotiations shall aim to improve and strengthen the rules and the 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.*"
9. This Decision has been in force for a definite period of time (initially until the end of the Uruguay Round, while the Uruguay Round Decision on improvements to the GATT dispute settlement rules and procedures extended its application until the entry into force of the DSU). It applied only to complaints brought after the 1 May 1989, whether consultations were still underway or the constitution of a panel had been requested.
10. For a complete list see DSU, Appendix 2.
11. Namely, when a dispute opposes a developed and a less-developed contracting party. This possibility has been introduced by the Decision of 5 April 1966 on Procedures under Article XXIII (BISD 14S/18) and reiterated under the 1979 Understanding (point 8) and the DSU (Article 5).
12. 1989 Improvements Decision, Part A.1. and DSU, Art.3.2.
13. See Article IV, paragraph 3 of the Agreement establishing the WTO.
14. See in particular the statement of the United States Representative during the discussion of the 1981 Panel Report on "Spain - Measures concerning domestic sale of soybean oil" (C/M/152, page 8).
15. The Panel Report on EEC Restrictions on Imports of Dessert Apples from Chile (adopted on 22 June 1989, BISD 36S/93) noted that, after having considered "*the arguments ... concerning the precedent value of ... previous Panel's recommendations, and ... on the legitimate expectations of contracting parties arising out of the adoption of Panel reports ... (it) did not feel it was legally bound by all the details and the legal reasoning of (such reports)*". See also the Panel Report on Section 337 of the U.S. Tariff Act of 1930 (adopted on 7 November 1989, BISD 36S/345).
16. 1969 Vienna Convention on the Law of Treaties, Art. 31.
17. This approach was described by the former Director General of GATT Olivier Long as follows: "*GATT's aim, as perceived by the contracting parties, is to preserve the balance of concessions and the balance of advantages and obligations between member countries, and not to resort to sanctions whenever a country is in breach of the rules*" (Olivier Long "Law and its Limitations in the GATT Multilateral Trade System", Dordrecht: Kluwer, 1985, pp. 65-66). See also the communication of the EEC delegation to the Negotiating Group on Dispute Settlement: "*... parties concerned ... seek first and foremost a negotiated settlement that also takes account of the legal aspects, without the latter necessarily becoming the key element. ... The machinery cannot and must not be used to create, through a process of deductive interpretation, new obligations for contracting parties, or to replace the negotiating process.*" (MTN.GNG/NG13/W/12).

18. This approach is generally viewed as promoting compliance with the rules, preventing the stronger party from "negotiating" an unfair solution and allowing for deflection of domestic political pressure. As former Director General Arthur Dunkel indicated, "*international economic policy commitments, in the form of agreed rules, ... form the basis from which the government can arbitrate and secure an equitable and efficient balance between the diverse domestic interest: producers v.consumers, export industries v.import-competing industries ...*" (GATT/1312, 5 March 1982). See also W.J.Davey, "Dispute Settlement in GATT", *Fordham International Law Journal*, Vol. 11, N°1, Fall 1987.
19. The issue of retaliation has been examined in 1954-55 by a Review Working Party on Organizational and Functional Questions, which stressed that retaliatory action should be limited "*to cases where endeavors to solve the problem through the withdrawal of the measures causing the damage, the substitution of other concessions, or some other appropriate action have not proved to be possible, and where there is considered to be a substantial justification for retaliatory action, as in cases in which such authorization appears to be the only means either of preventing serious economic consequences to the country for which a benefit has been nullified or impaired, or the only means of restoring the original situation*". (L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 251, para. 63.)
20. The Netherlands' action under Article XXIII:2 to suspend obligations to the United States, adopted by the contracting parties on November 8, 1952, BISD 1S/62.
21. DSU, Art. 13, para. 2 and Appendix 4, introducing rules for the establishment of such a group and its procedures (giving special emphasis to the professional standing of the experts, their scientific expertise and their independence vis-à-vis the governments which are parties to the dispute).
22. See DSU, Appendix 3.3 and 4.5 and TBT, Annex 2.5.
23. The OECD Procedural Guidelines established jointly by the Trade and Environment Policy Committees and endorsed by the OECD Council at Ministerial Level in 1993 [OCDE/GD(93)99] also address dispute settlement. The fourth guideline reads: "When pursuant to an agreement among countries, a country is party to a trade dispute which has an environmental dimension, or to an environmental dispute which has a trade dimension, the government, in developing its national approach, should recognise the importance of taking into account, as appropriate, environmental, trade, scientific and other relevant expertise and should therefore work further to develop, as necessary, appropriate means to achieve transparency."
24. See, in particular, the Summary Record of the Thirteenth Session, SR. 13/15, p. 140.
25. See 1979 Understanding, Annex, point 5 and DSU, Articles 3.8 and 26.
26. Decision of 12 April 1989 arising from action taken by the Uruguay Round Trade Negotiations Committee (L/6490), BISD 36S/403. The TPRM enables, *inter alia*, "*the regular collective appreciation and evaluation by the contracting parties of the full range of individual contracting parties' trade policies and practices and their impact on the functioning of the multilateral trading system*", although it is not "*intended to serve as a basis ... for dispute settlement procedures*".
27. In practice, however, failure of the bilateral consultations led more often to the establishment of a panel under Article XXIII:2. This practice is now reflected in the DSU, as mentioned above.

28. The terms "good offices, conciliation and mediation" used in GATT texts do not represent distinct procedures as understood in general international law, but essentially the same procedure, which could in fact be assimilated to mediation. See, in particular, E.U. Petersmann, "Proposals for Improvements in the GATT Dispute Settlement System. A Survey and Comparative Analysis", in D.C. Dicke and E.U. Petersmann (ed) "Foreign Trade in the Present and New International Economic Order", Fribourg 1988, pp. 346 et seq.
29. See in particular the 1982 Ministerial Declaration, point (i) and the 1989 Improvement Decision, point D.
30. Subsidies Code, Art.13:1 and 17; Antidumping Code, Art.15:3; Customs Valuation Code, Art.20:1-3; TBT Code, Art. 14:4-8.
31. See, however, the statements by the Chairman in the Third Session in 1949 (GATT/CP.3/SR.37, p. 2, p. 5), noting that GATT contracting parties *acting jointly* were precluded by the Statute of the Court from requesting an advisory opinion, as U.N. specialized agencies were entitled to do.
32. DSU, Article 11, reiterating to a large extent the 1979 Understanding, para. 16 and Annex, para. 3.
33. 1979 Understanding, para. 11, amended by the 1989 Decision, para. F(c)2.
34. The working procedures generally applied by the panels are described in detail in the "Suggested Working Procedures" prepared by the GATT Office of Legal Affairs in 1985 and revised in 1989. Working procedures under the WTO are to be found in Appendix 3 of the DSU.
35. 1979 Understanding, para. 15, and DSU, Article 13.
36. 1989 Improvements Decision, F(b) 1. (See section entitled "Standard terms of reference".)
37. Such a reasonable period of time will be determined by mutual agreement between the concerned country and the Dispute Settlement Body, or between the parties to the dispute. In the absence of an agreement, the question will be solved through binding arbitration. See DSU, Art. 21.3.
38. See the Report of the Review Session Working Party on "Organizational and Functional Questions", L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 251, para. 64, as well as the 1979 Understanding, Annex, para. 4 and the DSU, Art. 22:1.