ARE STATES RELINQUISHING THEIR SOVEREIGN RIGHTS? THE GATT DISPUTE SETTLEMENT PROCESS IN A GLOBALIZED ECONOMY

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I. INTRODUCTION

On December 15, 1993, after more than seven years since its opening at Punta del Este, Uruguay, in September 1986,[1] the Uruguay Round of Trade Negotiations (Uruguay Round) concluded with the approval of a Final Act,[2] signed at Marrakesh, Morocco, on April 15, 1994. The Final Act introduced various innovations to the General Agreement on Tariffs and Trade (GATT),[3] strengthened its structure with the creation of the World Trade Organization (WTO),[4] and opened the

1. Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, 33 GATT Basic Instruments and Selected Documents (GATT BISD) 19.

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 2-3 (1994).

3. General Agreement on Tariffs and Trade (GATT), Oct. 30 1947, 55 U.N.T.S. 187. For publications on GATT, see generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY (1986); OLIVIER LONG, LAW AND IT'S LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985); KENNETH W. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); JOHN H. JACKSON, WORLD TRADE AND LAW OF THE GATT (1969).

4. On the WTO, see generally Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995); Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

GATT to new areas such as intellectual property, foreign investments and services.

Parties to the Uruguay Round addressed dispute settlement procedure, deeply committed to innovation. This led finally to the approval of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding),[5] which is part of the Final Act and legally binding for all the Member States of the newborn WTO.

The Understanding contains the most detailed regulation of the dispute settlement procedures in the history of the GATT,[6] and it introduces various and important changes to the GATT system. The changes address the various problems which have arisen in the fifty years of international disputes under the GATT.

This Article examines the most important innovations in the dispute settlement system which have been introduced by the Uruguay Round, describing in some detail the current system of dispute resolution.

II. TOWARD THE URUGUAY ROUND

In the period which led to the launching of the Uruguay Round,[7] it became increasingly urgent to revisit the applicable rules governing dispute settlement.[8]

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5. GATT Document, MTN/FA II-A2 (Dec. 15, 1993), 33 I.L.M. 112 (1994) [hereinafter Understanding].

6. GATT, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

7. For publications on this matter, see generally Ronald A. Brand, *Private Parties and GATT Dispute Resolution Implications of the Panel Report on Section 337 of the U.S. Tariff Act of 1930*, 24 J. WORLD TRADE 5 (1990); Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lesson of the DISC Case*, 72 MINN. L. REV. 1443 (1988); Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (1987); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987); Massimo Coccia, *Settlement of Disputes in GATT under the Subsidies Code: Two Panel Reports on E.E.C. Export Subsidies*, 16 GA. J. INT'L & COMP. L. 1 (1986) [hereinafter *Dispute Settlement in GATT*]; Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980) [hereinafter *GATT Dispute Settlement*]; ROBERT E. HUDEC, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES (1978); JACKSON, WORLD TRADE AND THE LAW OF GATT, *supra* note 3.

8. For a detailed analysis of the situation after the Tokyo Round, see generally Robert H. Hudec, *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1 (1993); Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lesson of the DISC Case*, *supra* note 7; J.C. BLISS, GATT DISPUTE SETTLEMENT REFORM IN THE URUGUAY ROUND: PROBLEMS AND PROSPECTS 23 (1987); William J. Davey, *Dispute Settlement in GATT*, *supra* note 7; Massimo Coccia, *Settlement of Disputes in GATT Under the Subsidies Code: Two*

The first serious attempt at comprehensive regulation of all aspects of the dispute settlement procedure was made during the Tokyo Round,[9] which ended in 1979. The Member States approved the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,[10] and the Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement.[11] Additionally, there were minor adjustments introduced later in the Ministerial Declaration of 1982[12] and the Decision of 1984.[13]

The improvements introduced during the Tokyo Round left many problems unresolved. In particular, the Tokyo Round agreements failed to address the lack of automatic access to the Panel, the delays in appointing the Panel, the inadequacy of the process of selection of the members of the Panel, the absence of strict time limits for the various stages of the procedure, the possibility for the losing party to veto the adoption of decisions and the delays in the implementation process. These problems continued to undermine the credibility and effectiveness of the whole system.[14] Other problems were created by the different dispute resolution procedures provided in the Tokyo Round codes, which gave rise to different interpretations regarding the appropriate forum and applicable procedures.[15]

Gathering in Punta del Este in 1986, the representatives of the GATT Member States were particularly aware of these problems when they declared the goal of the negotiations to be the improvement and strengthening of the dispute settlement system. The system needed "more

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Panel Reports on E.E.C. Export Subsidies, *supra* note 7; LONG, *supra* note 3; Hudec, *supra* note 3; HUDEC, INTERNATIONAL TRADE DISPUTES, *supra* note 3; Plank, *supra* note 7.

9. For an exhaustive study on the origin, negotiations, and results of the Tokyo Round, see G.R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION (1986).

10. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, 26 GATT BISD 210.

11. Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, Nov. 28, 1979, 26 GATT BISD 210.

12. Ministerial Declaration, Nov. 29, 1982, 29 GATT BISD 9; *see* HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, *supra* note 3, at 164.

13. Dispute Settlement Procedures, Nov. 30, 1984, 31 GATT BISD 9.

14. *See* SEYMOUR RUBIN & MARK JONES, CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 111 (1989).

15. John J. Jackson, *A New Constitution for World Trade? Reforming the GATT System*, *in* THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE 503, 511 (Robert M. Stern ed., 1993). For further discussion, see generally JEFFREY J. SCHOTT, THE GLOBAL TRADE NEGOTIATIONS: WHAT CAN BE ACHIEVED? 35 (1990).

effective and enforceable GATT rules and disciplines," and the development of "adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."[16]

III. THE URUGUAY ROUND: TOWARD THE FINAL UNDERSTANDING

Two main stages characterize the process that led to the approval of the Understanding in 1993.[17] In the first stage, the Mid-Term Review Conference of the Uruguay Round, which met in December of 1988 in Montreal, introduced important measures adopted in a wide-ranging text called Improvements of the GATT Controversies, Settlement Rules and Procedures (Montreal Reform).[18] This text became applicable on April 12, 1989,[19] and was the basis for the Negotiation Group on the Dispute Settlement in the first two years of the Uruguay Round.[20] The Montreal Reform measures were meant to be temporary, being applicable from May 1, 1989, up to the conclusion of the Uruguay Round; nevertheless, many of the provisions set forth in the Montreal Reform have been almost completely reproduced in the Understanding.

In the second stage, further improvements were introduced by the Dunkel Text, written by the General Director of the GATT, Arthur Dunkel, on December 20, 1991.[21] The Dunkel Text contains specific provisions for dispute settlement, including the Understanding on Rules and Procedures Governing the settlement of Disputes Under Articles XXII and XXIII of the GATT[22] and the Elements of an Integrated Dispute Settlement System.[23] The Dunkel Text absorbs all of the earlier GATT agreements on dispute settlement, setting forth provisions for

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16. Ministerial Declaration on the Uruguay Round, *supra* note 1, at 25.

17. For a detailed history of the Uruguay Round, see TERENCE P. STEWART, THE GATT URUGUAY ROUND, A NEGOTIATION HISTORY (1986-1992) 1 (1993).

18. Ernst-Ulrich Petersmann, *The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Resolution Settlement Procedures*, 32 GERMAN Y.B. INT'L L. 280, 300 (1989).

19. *Id.*

20. Ernst-Ulrich Petersmann, *Improvements to the Functioning of the GATT System including Dispute Settlement*, *in* THE NEW GATT FOR THE NINETIES AND EUROPE '92, 111 (Thomas Opperman & Josef Molsberger eds., 1991).

21. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc., MTN.TNC/W/FA (Dec. 20, 1991), *reprinted in* THE INSTITUTE FOR INTERNATIONAL LEGAL INFORMATION, "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT (1992).

22. *Id.* at S.1-S.23.

23. *Id.* at T.1-T.6.

previously unaddressed issues.[24] Both the Dunkel Text and the Montreal Reform played an important role in the transitional period and both may be considered the basis of the Understanding.

The Understanding is now the main source of regulation of dispute resolution, together with the principles laid down in Articles XXII and XXIII of the GATT,[25] which remain the central articles on GATT dispute settlement, as expressed in Article 3.1 of the Understanding.[26]

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24. *See* HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, *supra* note 3, at 235.

25. GATT, *supra* note 6, arts. XXII-XXIII. Articles XXII and XXIII set forth:

> Article XXII CONSULTATION
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> 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.
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> 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.
>
> Article XXIII NULLIFICATION OR IMPAIRMENT
>
> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being imposed as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
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> 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall 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 CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary.
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> If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise 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. If the application to any contracting

IV. IMPROVEMENTS OF THE URUGUAY ROUND

The major improvements introduced by the Uruguay Round to the dispute resolution system can be summarized as follows:

1. The creation of an "integrated" system which allows Member States to apply the rules and procedures of the Understanding to disputes which may arise in relation with one of the multilateral agreements listed in Appendix 1 of the Understanding.[27]
2. The creation of a "right to the Panel" with the introduction of the rule of "negative consensus" for the rejection of the request for the establishment of a panel and with the provision of precise time limits for the establishment of the panel.[28]
3. The establishment of a Dispute Settlement Body (DSB), responsible for administration of the rules and procedures of dispute settlement, for the establishment of panels, for the adoption of panel reports and appellate body reports, for the implementation of rulings and recommendations, and for disciplinary action against Member States which do not comply with the rulings and recommendations.[29]

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party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.
Id.

26. Understanding, *supra* note 5, art. 3.1. Several GATT provisions refer to the settlement of disputes. *See, e.g.*, GATT, *supra* note 6, arts. XIX, XXII, XXIII, & XXVII; *see also* J.G. Castel, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, 38 INT'L & COMP. L.Q. 834, 835 (1988). For a complete list of the 19 GATT clauses which compel the parties to resort to consultations, see JACKSON, WORLD TRADE AND THE LAW OF THE GATT, *supra* note 3, at 164-65.

27. Understanding, *supra* note 5, art. 1 & app. 1.

28. *See id.* arts. 11-12.

29. *See id.* art. 2.

4. The provision of a precise timetable for all procedural phases of dispute settlement.[30]
5. The possibility for the parties to the dispute to participate in the reporting process and to ask for a revision of the interim report prior to circulation of the final report to the Member States (more commonly known as the Interim Review Stage).[31]
6. The possibility of appellate review and the provision of a standing appellate body.[32]
7. The introduction of the principle of "negative" consensus of all DSB Member States for the rejection of a panel or appellate body report.[33] This represents a substantial modification of the former consensus rule, which required consensus to adopt a report.[34] The modification of the consensus rule represents the main success and the most radical innovation introduced in the GATT dispute settlement system by the Uruguay Round.
8. The introduction of a detailed regulation of the implementation stage, with specific procedures to be followed after a persistent lack of implementation.[35]
9. The introduction of the possibility to resort to arbitration as an alternative means of dispute settlement at both the decision and implementation stages.[36]

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30. *Id.* art. 2.2.
31. *See id.* art. 15.
32. *See id.* art. 17.
33. *Id.* arts. 16.4 & 17.14.
34. *See* HUDEC, ENFORCING INTERNATIONAL TRADE LAW, *supra* note 3, at 231-32. In the previous system, since the adoption of panel report was made by consensus of all member states, the losing party could block the adoption by vote. The matter has been the object of discussion on whether the practice of adopting panel reports by consensus should be modified. In particular, the introduction of a new rule of "consensus minus one" or "consensus minus 2" has been proposed, but this solution has not been adopted. *Id.*
35. Understanding, *supra* note 5, art. 21.
36. *Id.* art. 25.

V. APPLICATION OF THE GATT DISPUTE SETTLEMENT PROCEDURES

One of the most important innovations to the dispute settlement system is that, in response to the diversification of procedures after the Tokyo Round, the Understanding established an integrated dispute settlement system that provides for the application of the rules and procedures of the Understanding to all claims which may be brought by Member States, including claims relating to the multilateral agreements of the WTO.[37] Therefore, the GATT procedures on dispute settlement will be applicable to new areas, like services and intellectual property, which were subject to negotiations during the Uruguay Round.[38] This will hopefully make it easier to determine the applicable procedure,[39] and will also contribute to the elimination of the highly criticized phenomenon of forum shopping.[40]

A further innovation of the new regulation is that the rules and procedures of the Understanding, as it is expressly stated in Article 26, will also be applied in relation to disputes on trade measures which are not in violation of the GATT (nonviolation complaints) but which may nullify or impair benefits accruing to Member States under the rules of GATT. This is perfectly consistent with the true essence of GATT which is aimed at the establishment of equal rights and duties among its members.

VI. THE DISPUTE SETTLEMENT SYSTEM

The dispute settlement system is composed of several bodies: the dispute settlement body, the panels, the appellate body, and the secretariat, each of which have specific characteristics.

A. The Dispute Settlement Body

Article IV.3 of the Agreement Establishing the WTO states that the GATT General Council, consisting of Member State representatives, will have the responsibility to establish a permanent body, with a separate President, a separate staff, and specific rules, that will be in charge of all

37. *See id.* art. 1.

38. AMERIGO BEVIGLIA ZAMPETTI, L'URUGUAY ROUND: UNA PANORAMICA DEI RISULTATI, DIRITTO DEL COMMERCIO INTERNAZIONALE 825, 827 (1994).

39. Dillon, *supra* note 4, at 375.

40. Shell, *supra* note 4, at 848.

activities which were previously carried out by the General Council in relation to the settlement of disputes.[41]

In particular, according to Article 2.1 of the Understanding, the DSB will be responsible for: (i) administering the rules and procedures of dispute settlement; (ii) establishing panels; (iii) adopting panel reports and appellate body reports; (iv) supervising implementation of rulings and recommendations; and (v) authorizing retaliation against Member States which do not comply with rulings and recommendations.[42]

B. Panels

The panels will have the function of assisting the DSB in discharging its responsibilities, without formal decisive powers.[43] The panels will make "objective assessments" on the matter before them, including an objective assessment of the facts of the case and the conformity of the disputed measures with the relevant agreement.[44] The panels will also make any additional findings that will assist the DSB in rendering its final decision.[45]

Attention must be drawn to the fact that the Panels are not formally responsible for final decisions; they will only assist the DSB in this respect. Conversely, with the adoption of the new rule that requires a consensus of all Member States before the DSB can reject panel reports, the final decision of the Member States will, in practice, generally be that proposed by each panel.[46]

Each panel will be made up of three panelists, unless the parties to the dispute agree to a panel of five members.[47] The Understanding sets out the selection criteria for panelists, in an attempt to safeguard the prestige and the independence of the institution. [48]

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41. Agreement Establishing the WTO, Dec. 15, 1993, GATT Document MTN/FA II., art. IV.3.

42. Understanding, *supra* note 5, art. 2.1.

43. *Id.* art. 11.1.

44. *Id.*

45. *Id.*

46. Understanding, *supra* note 5, art. 11.1.

47. *Id.* art. 8.5.

48. *Id.* arts. 8.1-8.5. In particular, art. 8.1 states that the panels will be composed of well qualified governmental and/or nongovernmental individuals, and sets out the requirements of eligibility to the panel. *Id.* art. 8.1. It may be noticed that, with the exception of international trade law scholars, specific expertise in law is not required and that, unlike the provisions in the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement, the Understanding

C. Appellate Body

The Understanding promulgates the rules for the establishment by the DSB of a standing appellate body in charge of reviewing panel reports with regard to issues of law and legal interpretation.[49] The Understanding provides the appellate body with the authority to uphold, modify, or reverse the legal findings and conclusions of the panel.[50]

The Appellate Body will be made up of seven persons who will serve for four years, with the exception of the members appointed immediately after the entry into force of the Understanding.[51] Each member may be re-elected once.[52] Specific rules and requirements are set out for the selection of members of the Appellate Body in Article 17.3 of the Understanding.[53]

D. The Secretariat

The role and responsibilities of the Secretariat are indicated in Article 27 of the Understanding where it is expressly stated that the WTO

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provides that a person can be a member of the panel without nomination by governments. *Id.* arts. 8.1-8.9.

Art. 8.3 of the Understanding states that citizens of member states which are parties to the dispute will not be allowed to serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise. *Id.* art. 8.3. "That rule makes perfect sense when panelists are government officials. It is less persuasive when the panelists are private individuals. On the contrary, in some cases it would be essential to have a panel member able to understand the legal and administrative system of the State party to the disputes. It has been proposed to include rather than to exclude citizens of parties." Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 483 (1994).

The Understanding, in order to remedy the traditional difficulty in finding persons suited to serve as panelists, provides that the Secretariat is to maintain a list of qualified persons. Understanding, *supra* note 5, art. 8.4. This list will replace the roster of nongovernmental panelists that was established by the Decision of 30 November 1984. *See* Action Taken on 30 November 1984, Nov. 30, 1984, 31 GATT BISD 8, 9-10.

The Understanding states that, if the parties have failed to agree on the composition of the panel within 20 days, the panel will be established by the Director General. Understanding, *supra* note 5, art. 8.7.

49. *Id.* arts. 17.1-17.8.

50. *Id.* art. 17.13.

51. *Id.* art. 17.1.

52. *Id.*

53. Understanding, *supra* note 5, art. 17.3. The Appellate Body will have to be broadly representative of membership to the MTO and will have to be composed of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, unaffiliated with any government and with no interest in the matter. *Id.*

Secretariat will have the responsibility of assisting the panelists, especially on the legal, historical and procedural aspects of the matter, and to provide technical assistance, including, if necessary, external experts.[54]

VII. PROCEDURAL ASPECTS OF THE DISPUTE RESOLUTION SYSTEM

According to the principles set forth in Articles XXII and XXIII of the GATT, the dispute settlement procedure is now divided into extrajudicial and judicial stages.[55]

A. Consultations, Good Offices, and Mediation

The current provisions on dispute settlement clearly emphasize the role of negotiation and conciliation in all phases of the dispute settlement procedure.

Article 4.1 expresses the central role of the dispute settlement procedure: "the Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members" with the introduction of precise time limits and procedures for conciliation.[56]

In particular, the procedure of preventative consultation has been strengthened. In the case of a formal request for consultation, the Member State to which the request was made must reply within ten days after its receipt and the Member State must enter into consultations within a period of no more than thirty days from the date of the request.[57] Consultations must be initiated within ten days from the date of the request in cases of urgency, including those cases which concern perishable goods.[58] The Understanding also requires that all such requests for consultation be submitted in writing to the DSB, giving the reasons for the request and identifying the measures at issue and the legal basis for the complaint.[59]

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54. *Id.* arts. 27.1-27.2. Until now, the Secretariat has played an important role. GATT staff members drawn from economic and from legal offices have served alongside the panelists, prepared drafts of findings and, in some instances, drafted the dispositive parts of the panel report. *See* Lowenfeld, *supra* note 48, at 485. Legal advice may be provided to developing countries by the Technical Cooperation Division. Understanding, *supra* note 5, art. 27.2.

55. GATT, *supra* note 6, arts. XXII-XXIII.

56. Understanding, *supra* note 5, art. 4.1.

57. *Id.* art. 4.1.

58. *Id.* art. 4.8.

59. *Id.* art. 4.4.

Any Member State which has a substantial trade interest in the consultations being held between two Member States may participate in the consultations by notifying the parties and the DSB of their intent, within ten days after the request for consultation.[60] These Member States may be joined in the consultations, provided that the Member State to which the request for consultations was addressed agrees that the claim of a substantial interest is well founded.[61]

In addition to the formal consultation procedure, it is also possible to follow other voluntary procedures for the settlement of disputes. Indeed, parties may try to reach a conciliation through the good offices of third parties, in accordance with the procedures set out by the Understanding.[62] In particular, it is stated that the Director-General may, acting ex officio, offer his personal services to assist the contracting parties in settling the dispute.[63]

B. Starting the Proceeding before the Panel

1. Request for the Establishment of the Panel

As mentioned above, the panel is the body in charge of the collection of information and with the preparation of the final decision of the DSB. The establishment of the panel may be requested in two different circumstances.

First, establishment may be sought by the party who has made a request for consultation when the opposing party has failed to reply to such a request within ten days, or when the opposing party has failed to enter into consultation within thirty days or within the period otherwise mutually agreed upon.[64]

Second, it may also be sought by the party requesting consultation if the consultation fails to settle a dispute within sixty days from the request of consultation,[65] within twenty days in case of urgency, or whenever the parties jointly consider that consultations have failed to settle the dispute.[66]

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60. *Id.* art. 4.11.
61. Understanding, *supra* note 5, art. 4.11.
62. *Id.* art. 5.
63. *Id.* art. 5.3.
64. Understanding, *supra* note 5, art. 4.3.
65. *Id.* art. 4.7.
66. *Id.* art. 4.8.

In both cases, the request for the establishment of a panel shall be made in writing indicating whether consultations were held, identify the specific measures at issue, and provide a summary of the legal basis of the complaint and the specific request that is made (information identified collectively as the "terms of reference").[67]

2. Terms of Reference

The terms of reference are expressly required by the Understanding in order "[t]o examine, in the light of the relevant provisions . . . the matter referred to the DSB . . . 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."[68] The terms of reference must be provided within twenty days from the establishment of the panel, unless the parties to the dispute agree otherwise.[69] If the applicant requests the establishment of a panel with terms of reference other than those indicated above, the written request shall include the proposed text of the special terms of reference.[70]

3. Establishment of the Panel

The DSB is responsible for the formation of a Panel. The DSB must, at latest, select the Panel members at the meeting following the meeting at which the request for the establishment of the Panel first appeared on its agenda.[71] It must be noted that, while the DSB is formally free to decide whether or not to establish the Panel, the DSB may now decide against establishment only with the consensus of all Member States[72]—a change from the former system where the consensus of all Member States was required for setting up the Panel. Consequently, the establishment of the Panel may now be considered automatic as it will be almost impossible to obtain the consensus of all

67. *Id.* art. 6.2.

68. The same terms of reference have been utilized during the last 20 years. Plank, *supra* note 7, at 64.

69. Understanding, *supra* note 5, art. 7.1.

70. *Id.* art. 6.2.

71. *Id.* art. 6.1.

72. The Understanding states that "[w]here the rules and procedures of this Understanding provide for the DSB to make a decision, it shall do so by consensus." *Id.* art. 2.4. "Consensus has a specific meaning used in the Understanding which will be discussed *infra*." *Id.* Art. 6.1 of the Understanding sets forth an exception to the above rule, introducing the principle of negative consensus.

members for rejection of the Panel.[73] Note that the same rule applies to the adoption of panel and appellate body reports.[74]

By setting out the above provisions, the parties to the negotiations intended to explicitly recognize a right to a panel within all Member States, a right that was already recognized in the procedure of some of the codes adopted during the Tokyo Round.[75] This change represents an improvement of paramount importance as it indicates a trend toward an organization with judicial character, a more adjudicative approach,[76] automatic applicable rules, and a true coercive power.

The new rules may, in some cases, overcome the delays in the establishment of the panel which were exacerbated by the former absence of a specific recognition of the above discussed right.[77]

C. Multiple Complaints and Third Parties

More than one Member State may request the establishment of a Panel in relation to the same matter. When such multiple complaints are brought, a single Panel may be established, if possible, to examine all complaints, governed by procedures and rules designed to preserve the rights of all parties.[78]

Additionally, third parties who have a substantial interest in the matter may ask to be heard and to make written submissions to the panel.[79] Many provisions of the Understanding deal specifically with the participation of third parties to the procedure before the Panel.[80] This does not mean that third parties have the same rights and duties as the parties to the dispute.[81]

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73. ZAMPETTI, *supra* note 38, at 828.

74. *See id.*

75. *See, e.g.*, Anti-Dumping Code, GATT Document MTN/FA II-13, Dec. 15, 1993, art. 18.1; Agreement on Technical Barriers to Trade, GATT Document MTN/FA II-A1A-8, Dec. 15, 1993, art. 15.5; Code of Government Procurement, GATT Document MTN/FA II-A1A-6, art. 7.7.

76. *See generally* Giorgio Sacerdoti, *Controversie Commerciali e Regole del GATT*, *in* CARLO SECCHI & GIORGIO SACERDOTI, L'URUGUAY ROUND DEL GATT 42 (1987).

77. Miguel Montañà i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 105, 147 (1993).

78. Understanding, *supra* note 5, art. 9.1.

79. *Id.* art. 10.2.

80. *See, e.g.*, *id.* arts. 10.3, 17.4.

81. Edwin Vermulst & Bart Driessen, *An Overview of WTO Dispute Settlement and its Relationship with the Uruguay Round Agreement*, 29 J. WORLD TRADE 138, 155-59 (1995).

D. The Procedure Before the Panel

1. Timetable

The timetable for the Panel process is fixed by the Panel itself after consultation with the parties to the dispute, providing that sufficient time is given for the parties to prepare their written submissions and that precise deadlines are set for the presentation of such submissions.[82]

Even if the timetable is determined by the Panel to be variable, the Understanding provides a general timetable for all phases of the dispute with a final deadline of six months (three months in case of urgency) from the time of composition of the Panel and the terms of reference have been agreed upon to the time when the final report is given.[83] When the Panel believes that it cannot provide its report within these time limits, it will then have to inform the DSB of the reasons for the delay, together with an estimate of the period within which it will submit its report.[84] In no case shall the period exceed nine months;[85] but the Panel, at the request of the complaining party, may suspend its work at any time for a period not to exceed twelve months.[86]

2. Right of the Panel to Seek Information

Specified powers are conferred upon the Panel in order to enable it to achieve an adequate understanding of the matter at stake.[87] In particular, the Panel will have the right to seek information and technical advice from any bodies and institutions which it deems appropriate, giving previous information to the authorities of the Member State having jurisdiction over the institutions. All Member States have the duty to promptly and fully respond to all requests for information made by the Panel. Moreover, experts on certain aspects of the matter may be consulted by the Panel. The parties to the dispute will have the right to submit documents to help the Panel in its activity.[88] The complaining party will generally submit its documents first.[89]

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82. Understanding, *supra* note 5, arts. 12.4-12.5.
83. *Id.* art. 12.8.
84. *Id.* art. 12.9.
85. *Id.* art. 12.9.
86. *Id.* art. 12.12.
87. *Id.* art. 13.
88. *Id.* art. 13.1. The canons of interpretations of the panel are those of the Vienna Convention on Law of the Treaties, 23 May 1969, *in* JOHN H. JACKSON & WILLIAM J. DAVEY,

3. Interim Review Stage

Following a proposal of the Canadian delegation, and in order to balance the automatic adoption of the Panel report after the modification of the consensus rule, an interim review stage, has been introduced by the Understanding.[90] This is based on a similar dispute settlement procedure in the Canadian-U.S. free trade agreement. Accordingly, the Panel will first submit its factual considerations to the parties and, after having examined their written comments, it will then submit an interim report including its factual and legal findings and conclusions.[91]

Within a period of time set by the Panel, a party may submit a written request for the Panel to review specific aspects of the interim report prior to circulation of the final report to the Member States.[92] The Panel may than modify its interim report in accordance with the comments made by the parties.[93] At the request of a party, the Panel will hold a further meeting with the parties on the issues identified in the written comments.[94] However, if no comments are received from any party within the specified period, the interim report will be considered the final Panel report and it will be promptly circulated to the Member States.[95]

LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 263-64 (2d ed. 1986). Accordingly, such interpretations should be guided by the plain meaning of legal text, the policy underlying it, the original intent of the parties and any practical applications of the law reflecting an interpretative agreement among the parties. *Id.* GATT panels have consistently adhered to these principles. *See, e.g.*, Imposition of Anti-Dumping Duties on Import of Seamless Stainless Steel Hollow Products from Sweden, Aug. 20, 1990, Swe.-U.S., GATT Document ADP/47, arts. 5.9-5.10, 5.20 (1990).

The principle of stare decisis is not generally a binding one as far as GATT dispute settlement is concerned. *See* Andrew W. Stuart, *"I Tell Ya I Don't Get No Respect!": The Polices Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals*, 23 LAW & POL'Y INT'L BUS. 749, 757 (1992). Nevertheless, GATT panels are, as a practical matter, "very influenced by 'precedents' and often mention precedents in some detail . . . ." JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, *supra* note 3, at 101-02; *see also* New Zealand - Imports of Electrical Transformers from Finland, July 18, 1985, 32 GATT BISD 55, 67-68. *But see* JACKSON & DAVEY, *supra*, at 101-02.

89. Understanding, *supra* note 5, art. 12.6.
90. Petersmann, *supra* note 20, at 114.
91. Understanding, *supra* note 5, art. 12.6.
92. *Id.* art. 15.2.
93. *Id.*
94. *Id.*
95. *Id.* art. 15.2.

4. Panel Final Report

The work of the Panel ends with the submission of the final report to the Member States for approval by the DSB. When the parties to the dispute have failed to develop a mutually satisfactory solution, the submission made by the Panel will be in writing and will contain all the necessary factual and legal considerations.[96] However, where a settlement of the matter among the parties has been found, the Panel report will be confined to a brief description of the case and the solution reached.[97]

E. The Appeal Against the Panel Report

1. The Possibility of Revising the Panel Report

The Understanding grants all Member States, and only Member States, the right to appeal against the Panel report with a specific request to the appellate body.[98] If a party gives notice of its intention to appeal, the report will not be considered for adoption by the DSB until after completion of the appeal.[99]

The creation of an appellate body and of procedures for review of panel reports is a central innovation of the Uruguay Round. It represents "perhaps the system's most significant step toward the creation of an international legal tribunal on trade,"[100] and was intentionally introduced in order to counterbalance the automatic adoption of Panel reports following the modification of the consensus rule.[101] Yet, on the other hand, the introduction of the possibility to appeal the reports could raise various problems by inducing the parties to systematically appeal, with no substantive reasons, the reports of the panel so as to delay the adoption of the report.[102] This could even lead to paralyzing the Appellate Body, as it will be impossible for a body of seven members to hear all appeals.[103]

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96. *Id.* art. 12.7.
97. *Id.*
98. *Id.* art. 17.4.
99. *Id.* art. 16.4.
100. Dillon, *supra* note 4, at 379.
101. Lowenfeld, *supra* note 48, at 483-84.
102. Petersmann, *supra* note 20, at 115.
103. Lei Wang, *Some Observations on the Dispute Settlement System in the World Trade Organization*, 29 J. WORLD TRADE 173, 178 (1995).

2. Competence of the Appellate Body

It is important to notice that the competence of the appellate body will be limited to issues of law,[104] and that only in that respect will the appellate body have the power to uphold, modify, or reverse the legal findings and conclusions of the panel.[105] The limitation of competence of the appellate body to matters of law, inspired by common law systems,[106] will probably raise interpretation problems since it is sometimes difficult to determine whether a matter is factual or legal.[107]

3. Procedure for Appellate Review

For appellate review, the Understanding sets forth precise time limits which, as a general rule, may not exceed sixty days from the date of the formal notification of the intention to appeal to the date the Appellate Body issues its decision.[108] The Understanding also provides that, when the appellate body believes that it cannot provide its report within sixty days, it will have to inform the parties and the DSB in writing of the reasons for the delay, giving an estimate of the period within which it will submit its report.[109] However, in no case shall the time limit of 90 days be exceeded by the appellate body.[110]

4. Appellate Body Report

Having made all its considerations, the appellate body must submit a written report, following the same rules and procedures applicable to the panel report.[111] The appellate body report will have to 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 report within thirty days following its issuance to the Member States.[112]

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104. Understanding, *supra* note 5, art. 17.6.
105. *Id.* art. 17.13.
106. Montañà i Mora, *supra* note 77, at 150.
107. Lowenfeld, *supra* note 48, at 484.
108. Understanding, *supra* note 5, art. 17.5.
109. *Id.*
110. *Id.*
111. *Id.* art. 17.
112. *Id.* art. 17.14.

F. Adoption of the Report and Decision by the DSB

The final report of the panel (and, in case of appeal, the appellate body final report) will be submitted to the DSB for its decision adopting or rejecting the final report.[113] The function of the DSB as a decisive body is to insure compliance of Member States with the decision. This is based on the assumption that Member States are the ultimate depository of the contractual will of the GATT. For example, Art. 16.1 states that the report is not to be considered for adoption by the DSB until twenty days after it has been issued to the Member States, in order to provide sufficient time for the Member States to consider the report and to give written reasons explaining their objections. These objections shall be circulated at least ten days prior to the DSB meeting at which the panel report is to be considered.[114]

On the other hand, the decisive power of the DSB has been de facto restricted by the introduction of the new rule which requires that the report submitted to the DSB be adopted at a DSB meeting within sixty days of its issuance to the Member States, unless one of the parties to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report.[115]

The introduction of the principle of unanimity for the *rejection* of the decisions (i.e., the "negative consensus" rule) is considered to be the most important innovation of the Understanding, as it eradicated one of the major pitfalls in the whole procedure—the possibility that the "consensus" rule[116] gave the parties to the dispute the power to block the adoption of the reports by simply voting against them.

G. Implementation

If the DSB considers that a measure is consistent with the GATT, the procedure will end with the rejection of the complaint.[117] In this case, the losing party will not have the possibility to unilaterally adopt any measures of retaliation.[118] However, when the DSB concludes that a measure is inconsistent with the GATT or with a covered agreement, it

113. Understanding, *supra* note 5, art. 17.4.
114. *Id.* art. 16.2.
115. *Id.* art. 16.4.
116. The "consensus" rule is the principle of a unanimous vote for the *approval* of decisions.
117. Understanding, *supra* note 5, art. 3.
118. *Id.*

will recommend that the Member State concerned bring the measure in conformity with that agreement.[119]

Scholars agree that implementation difficulties have been the major pitfall in the GATT system of dispute settlement in recent years.[120] To solve these problems, and to provide the whole system of dispute settlement with effective power,[121] the Understanding sets forth a detailed regulation of the implementation stage, with specific procedures to be followed if there is a persistent failure to implement the measure.[122]

The implementation of a DSB decision will now be obtained as follows:

1. In addition to its recommendations to the losing party to bring the measure into conformity with the GATT, the panel and the appellate body may now suggest ways in which the Member State concerned may implement the recommendations.[123]
2. The Member States are obligated to give notice of their intentions with respect to implementation of the recommendations and decisions of the DSB.[124]
3. Member States are granted a "reasonable period of time" (within a maximum time limit which should not exceed 15 months) to comply when it is impracticable to do so immediately.[125] Only

119. *Id.* art. 19.1. It is interesting to notice that the word "judgment" has been carefully avoided, perhaps with a view toward bypassing the traditional reluctance of states to international adjudication. Instead, panels express "advisory opinions." *See* Guy Ladreit de Lacharriére, *The Settlement of Disputes Between Contracting Parties to the General Agreements*, *in* TRADE POLICIES FOR A BETTER FUTURE: THE LEUTWILER REPORT, THE GATT, AND THE URUGUAY ROUND 119, 123 (1987).

120. The Director General of GATT has noted that many problems remained unsolved with respect to the implementation phase. *See Dispute Panel Jump from 1 to 11*, FOCUS, Nov.-Dec. 1991, at 1.

121. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, *supra* note 3, at 362; Petersmann, *supra* note 20, at 111.

122. Jeffrey J. Schott, *The Global Trade Negotiations: What Can Be Achieved?*, INSTITUTE FOR INTERNATIONAL ECONOMICS, Sept. 1990, at 35.

123. Understanding, *supra* note 5, art. 19.

124. *Id.* art. 21.3.

125. *Id.*

after the reasonable period of time has lapsed will it be possible to adopt measures of retaliation.[126]

4. The DSB shall supervise the implementation process.[127]

Another important improvement, which was suggested for the first time by the Leutwiler Report (a study published in March of 1987 per a request from the former Director General of the GATT), is that the "reasonable period of time" for compliance be fixed in advance, subject to the approval of the DSB.[128] In the absence of such approval, the extension of the "reasonable period of time" must be mutually agreed upon by the parties within forty-five days from the adoption of the decision.[129]

Additionally, it is provided that, in the absence of an agreement between the parties, the reasonable period of time will be determined by an arbitrator chosen by the parties or, if the parties cannot agree, by the Director General, who must establish the "reasonable period of time" within 90 days of the adoption of the decision.[130]

In practice, it is quite probable that the parties will resort to arbitration if the DSB fails to approve a proposed period of time. Indeed, if the DSB fails to approve the period of time, this will generally be because the complaining party has blocked the adoption of the decision. Afterwards, it is unlikely that the party will reach an agreement in the brief time period provided by the above article.[131]

When there is a disagreement as to the consistency with a covered agreement regarding measures taken to comply with the decisions of the DSB, the following will occur: the dispute will have to be decided according to the same dispute settlement procedures which have led to the adoption of the decision, with recourse, if possible, to the same panel.[132] The panel will have to issue its report within 90 days of referral of the matter.[133] This provision has been adopted following numerous disputes

126. *Id.*
127. *Id.* art. 21.6.
128. Lacharriére, *supra* note 119, at 132.
129. Understanding, *supra* note 5, art. 21.3(a)-(b).
130. *Id.* art. 21.3(c).
131. *Id.* art. 21.3; Montañà i Mora, *supra* note 77, at 150 n. 241.
132. Understanding, *supra* note 5, art. 21.5.
133. *Id.*

regarding the measures adopted by the losing Member State to comply with a decision.[134]

H. Compensation and Suspension of Concessions (Retaliation)

Retaliation is the last resort of a complaining Member State to obtain implementation of a decision of the DSB within a "reasonable period of time."[135] The Member State has the ability, under certain circumstances, to resort to temporary measures such as compensation or suspension of concessions or other obligations.[136]

1. Compensation

In case of failure to comply with time limitations, two possible remedies are available to the parties. First, the parties may agree upon compensation measures.[137] The terms of such compensation are undefined; but it has been established that no monetary compensation will be considered, and that the winning party may better obtain concessions with respect to products or services.[138]

2. Suspension of Concessions

Second, if no satisfactory compensation has been established by the parties, the party having invoked the dispute settlement may request authorization from the DSB to adopt a measure of retaliation by means of suspension of concessions,[139] which shall be equivalent to the level of the violation[140] and will necessarily be temporary.[141]

The suspension of concessions will generally have to be made in the same sector as that in which the violation was committed.[142]

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134. The most famous case in recent times is the dispute between the United States and the EEC on oilseed subsidies. For a detailed description of the case, see 9 INT'L TRADE REP. 1 (Mar. 25, 1992).

135. Understanding, *supra* note 5, art. 21.3. The role of retaliation as the last resort may be found in the Understanding in art. 3.7 ("[t]he provision of compensation should be resorted to only if the immediate withdrawal of the measures is impracticable") and art. 22.1 ("neither compensation nor the suspension of the concessions or other obligations is preferred to full implementation").

136. *Id.* art. 22.

137. *Id.* art. 22.2.

138. *See id.* art. 22.

139. ZAMPETTI, *supra* note 38, at 827.

140. Understanding, *supra* note 5, art. 22.4.

141. *Id.* art. 22.8.

142. *Id.* art. 22.3.

Additionally, if the Member State that has requested the retaliation measure considers it impracticable or ineffective, it may seek to suspend concessions or other obligations in other areas under the same agreement, stating its reasons in its request.[143] As a last resort, the Member State may seek to suspend concessions in different sectors or under different agreements.[144] Such authorization to retaliate may be given by the DSB within thirty days of the expiration of the "reasonable period of time," unless the DSB decides by consensus to reject the request for authorization.[145]

If the Member State concerned objects to the level of suspension proposed or claims that the principles and procedures of the Understanding have not been followed, he may request to refer the matter to binding arbitration,[146] which will be carried out by the original Panel, if possible, or by an arbitrator appointed by the General Director.

The aforementioned provisions regulate, for the first time, a phase of the dispute settlement procedure which has traditionally remained unexplored.[147] Such provisions help, in conjunction with the adoption of the consensus rule, to make the measures of retaliation more feasible. On the other hand, it should be noted that, since retaliatory measures adopted by weak countries are usually meaningless, the whole system is only likely to work in cases involving Member States with similar economic weight. This is confirmed by an overview of the dispute settlement procedures where implementation problems have arisen.[148]

I. Arbitration

Although the original dispute resolution system did not provide for the possibility of arbitration, arbitration has been added as an alternative means of dispute settlement within the WTO[149] in order to facilitate the solution of certain disputes concerning issues clearly defined by both parties. It is expressly provided that arbitration will be possible only with the approval of both parties. Both parties must also agree on

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143. *Id.* art. 22.3(e).
144. *Id.* art. 22.3(b)-(c).
145. Understanding, *supra* note 5, art. 22.2.
146. *See id.* art. 22.6.
147. Montañà i Mora, *supra* note 77, at 157.
148. *See, e.g., GATT Dispute Settlement Stymied by Non-Implementation of Reports*, FOCUS, Nov.-Dec. 1990, at 12-13.
149. *Id.* art. 25.

the procedure to be followed and they must agree to notify all Member States of the decision to arbitrate well in advance of the actual commencement of the arbitration process.[150] The arbitration award will be binding upon the parties.[151]

Because the Understanding allows parties to resort to arbitration subject to mutual agreement on the procedures to be followed, it is probable that the majority of arbitration procedures will be governed by the 1985 UNCITRAL Model Law on International Commercial Arbitration Rules,[152] or by the 1976 UNCITRAL Arbitration Rules.[153] However, the arbitrator will most likely determine the applicable rules in accordance with GATT. According to Art. 25.4, the provisions set forth by Articles 21 and 22 of the Understanding, which govern the Surveillance of Implementation of Recommendations and Rulings and Compensation and the Suspension of Concessions,[154] will apply "*mutatis mutandis*"[155] to the implementation of arbitration awards.[156]

It is important to notice that existing arbitration experience under GATT is scarce and that it will therefore be necessary to await future developments before it is possible to draw any conclusions as to the use and effectiveness of its dispute settlement procedure.[157] Nevertheless, some pitfalls are already evident. For example, the Understanding does not make it clear if it is open to the parties to withdraw from arbitration once the procedure has started.[158] Nor does it specify whether the parties are allowed to bring an action before the Panel regarding a matter which had already been decided upon by the arbitrators, or regarding a matter similarly decided.[159]

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150. *Id.* art. 25.2.

151. *Id.* art. 25.3.

152. UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985).

153. UNCITRAL Arbitration Rules, 15 I.L.M. 701 (1976).

154. Understanding, *supra* note 5, arts. 21-22.

155. This has been defined to be "[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like." BLACK'S LAW DICTIONARY 919 (5th ed. 1979).

156. Understanding, *supra* note 5, art. 25.4.

157. Since the introduction of arbitration by the Improvement Decision, the procedure has been used at least once. *See Two Panel Reports Adopted*, FOCUS, Nov. 1990, at 1-4.

158. Dillon, *supra* note 4, at 380.

159. *Id.*

VIII. CONCLUSIONS

In the last decades, the constant growth in international commercial relations has made it progressively evident that new rules are needed to govern an increasingly complex international market. Significant progress has been made by the international community in regulating the commercial relations between states, including the conclusion of several treaties and conventions between states and, subsequently, the harmonization and approximation of legislation within states. A "lex mercatoria" has also been developed as a system of international commercial customary rules and the resort to arbitration has provided a common basis for resolution of disputes at an international level.

Notwithstanding these efforts, the demand for a true "transnational law," in the form of a system of universally applicable and enforceable rules, has become increasingly necessary. The critical attention of academics and practitioners has been progressively focused on the structural weakness of the existing international law, as a system of rules of voluntary application, with no effective means to assure compliance when the rules collide with the interests of national states.

Additionally, within the GATT, the inadequacy of the existing procedures has given rise to a long-standing debate between those nations that tended to consider the GATT as nothing more than a forum for diplomatic negotiations, in particular the member states of the European Union and Japan, and those nations that envisaged the GATT as a true legal system,[160] in particular the United States[161] and developing countries. Inevitably, this debate has particularly affected the discussion on the dispute resolution system. Indeed, the states supporting the former view have favored a more flexible system of resolution of disputes, in which preeminence is given to consultations, negotiations, and to diplomatic compromise.[162] The supporters of the "legalistic" view, however, have underlined the need for the dispute resolution system to become independent from diplomatic arrangements, on the ground that it

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160. Judith H. Bello & Alan F. Homler, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Benefits*, 28 INT'L LAWYER 1095, 1098 (1995).

161. For an interesting discussion of the rationale of these different policies, see Richard G. Shell, *supra* note 4, at 843.

162. On this point, see Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAWYER 389 (1995).

would increase compliance with the GATT rules and avoid the differences that normally arise when states with different economic weight have interests at stake.

Many aspects introduced by the Uruguay Round in the dispute resolution system have marked a clear step in the direction of making the system more and more similar to a judicial one. Clear examples are the modification of the principle of "consensus," which, inter alia, has rendered the establishment of a Panel and the starting of a proceeding almost automatic when a Member State intends to "sue" a defaulting Member State, similar to judicial proceedings. The same might be said for the creation of a permanent judicial organ such as the Appellate Body.

However, even though the system has become more "legalistic" in its appearance, it is still far from being capable of securing compliance with the rules, mainly for the lack of coercive measures. Indeed, the whole implementation procedure relies, as a matter of fact, on the possibility for the damaged states to retaliate by means of the suspension of concessions. No other measures, such as sanctions by all Member States or even the expulsion from the GATT, have been envisaged so far. Until then, states with strong economic weight will probably not be intimidated by the sanctions and the settlement of disputes will ultimately be negotiated by diplomats working behind closed doors.

The new elements introduced by the Understanding have certainly rendered the system a more effective means of the settlement of disputes at an international level, and have made it more difficult for a state not to discharge its responsibilities under the Treaty. The full compliance with the rules, however, is not yet completely assured, and one can therefore share the view that the WTO is and will remain, for the foreseeable future, a hybrid creature,[163] both diplomatic and legal, and that the creation of a supranational organization, which may be able to impose its decisions on the Member States, is still a long way to come.

163. Dillon, *supra* note 4, at 398.