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RESOLVING TRADE DISPLUTES: THE MECHANISMS OF GATT/WTO DISPUTE RESOLUTION

Daniel H. Erskine[*]

"For where there is an authority, a power on earth from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power."[1] The resident earthly power resolving controversies between the many sovereign nations preventing the outbreak of war over trade related issues is the World Trade Organization's Dispute Settlement Body. Such a Body grew from decades of experience, and frustration, about the method of settling international conflicts between states about tariff and trade problems.

This work discusses the historical development of the World Trade Organization's dispute resolution system. The first part analyzes a variety of agreements, understandings, and proposals entered into and put forward during the period of 1947 to 1990. The second part addresses the instrument inaugurating the World Trade Organization's current dispute settlement procedure, and describes a number of submissions by nations for improvements to this dispute resolution mechanism.[2] The final section concludes the work by providing a few theoretical considerations.

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[1] John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government, in* Political Writings of John Locke 271 (David Wootton ed., 1993).

[2] *See generally* The Secretariat, *Minutes of Meeting* , TN/DS/M/1 (June 12, 2002); The Secretariat, *Minutes of Meeting*, TN/DS/M/2 (July 3, 2002); The Secretariat, *Minutes of Meeting* , TN/DS/M/3 (Sept. 9, 2002); The Secretariat, *Minutes of Meeting*, TN/DS/M/4 (Nov. 6, 2002).

I. HISTORY

The initial agreement instituting the protocols known as the General Agreement on Tariffs and Trade foresaw the resolution of disputes by "sympathetic consideration" through the informal means of consultation between conflicting contracting parties.[3] GATT looked to traditional diplomatic methods of conciliation, negotiation, mediation, and good offices between states to resolve trade conflicts. Though, serious offenses involving nullification or impairment of a benefit accruing under the agreement could be referred to the collective body of the contracting parties for resolution.[4] The collective then investigated the matter and rendered suggestions or a ruling on the issue.[5] If the infringement upon the rights of one party by another is serious, then the collective can recommend the injured party suspend concessions and other GATT obligations made to the injuring party.[6] Yet, if such action were taken, the injuring party could give notice within sixty days of its desire to withdraw from GATT.[7]

The system reflected a traditional approach to international legal relations. Nations were sovereign, and as such retrained the freedom from imposition of binding collective judgment rendered by an international institution. Such an institution was inferior to the nation-state, and therefore could not enforce its decree without consent of the sovereign

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[3] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXII, XXIII:1, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. *See also* GATT art. VI:7, XII:4, XVI:1, XIX:2, XXVIII (bilateral or multilateral consultations for resolution of restrictive trade measures); GATT art. XII:4, XIX:3, XXIV:7, XXIV:10, XXV:5, XXVIII:4 (multilateral dispute resolution); GATT Secretariat, *Negotiating Group on Dispute Settlement GATT Dispute Settlement System Note* , MTN.GNG/NG13/W/4 (June 5, 1987).
[4] GATT art. XXIII:2.
[5] *Id.*
[6] *Id.*
[7] *Id.*

state. Ultimately, this position proved unworkable in the volatile and important realm of trade relations.[8]

A. 1948 Havana Charter

Noteworthy is the detailed dispute procedures set forth in the Havana Charter of 1948. The Charter reflected the first effort to produce a sophisticated International Trade Organization governing trading relations between member states. Looking to Chapter VIII of the Charter, members whose benefits are impaired or nullified may submit written proposals for amicable resolution of the injury.[9] This is the consultation option.

Another choice available to disputants is reference to arbitration under terms agreed upon by the members.[10] The determination of the arbitrator binds the parties, but not other members.[11] In the event these measures fail, any member may refer the matter to the Executive Board, which must promptly consider whether a treaty violation occurred.[12] The board may take delimited action if a violation is found.[13] If a serious infraction is discovered, the Board "release[s] the Member or Members affected from obligations or the grant of concessions to any other Member or Members…to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired."[14] Any such decision by the Executive Board

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[8] *See* Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 417-585 (Butterworth Legal Publishers, 1993), for a history of disputes and their resolutions. *See* WTO, 2 Guide to GATT Law and Practice: Analytical Index 611-629, 630-787, art. XXII-XXXVIII , (1995) for interpretative history of GATT Articles involved in dispute settlement.
[9] Havana Charter for International Trade Organization, Mar. 24, 1948, ch. VIII, art. 93(1) [Hereinafter Havana Charter].
[10] *Id.* at art. 93(2).
[11] *Id.*
[12] *Id.* at art. 94.
[13] *Id.* at art. 94(2)(a)-(e).
[14] *Id.* at art. 94(3).

can be appealed to the Conference for confirmation, modification, or reversal.[15] Finally, the opinion of the Conference can be referred to the International Court of Justice for an advisory opinion.[16] Such an opinion binds the Organization, and modification of an Organization opinion results if the Court's ruling negates that of the Organization.[17]

The procedures described above were not effective, due to the Charter's failed ratification by the requisite number of signatories. Yet, GATT dispute resolution evolved under the protocols into the implementation of working parties to handle disputes between contracting parties as the main form of resolving conflict.[18] These working parties became panels in 1952.[19] Panels were composed of three to five independent experts from non-disputant parties.[20]

B. 1966 Decision

The Contracting Parties codified procedures for disputes between developed and developing countries in 1966.[21] If a developing contracting party and a developed contracting party could not settle their dispute by consultation, the developing country could request the Director-General of GATT to act *ex officio* by good offices to achieve a solution.[22] If the Director-General fails within two months to effect a solution, either of the disputing parties can refer the matter to the Contracting Parties or the Council. Either of these bodies then appoints a panel of experts with the

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[15] Havana Charter art. 95(1).
[16] *Id.* at art. 96(2).
[17] *Id.* at art. 96(5).
[18] Ernst-Ulrich Petersmann, *Introduction* to International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction, 34-35 (ed. Ernst-Ulrich Petersmann, 1997).
[19] *Id.* at 35.
[20] *Id.*
[21] Decision on Procedures under Article XVIII, B.I.S.D. 14S/18 (Apr. 5, 1966) [hereinafter Decision on Procedures].
[22] *Id.*

consent of the disputants to recommend an appropriate solution.[23] The panel must submit to the Contracting Parties or the Council its recommendation within sixty days after appointment, and those bodies will then issue a decision upon the recommendation.[24] Ninety days after a decision is transmitted to the disputants, the party found in breach must report on its compliance with the decision.[25] If the breaching party is not in compliance, the Contracting Parties or the Council may, upon serious circumstances, authorize the injured party to suspend any concession or obligation.[26]

C. 1979 Understanding

The 1966 Decision was followed in 1979 by a broader Understanding articulating procedures for dispute resolution between all contracting parties.[27] In an Annex to the Understanding, customary GATT dispute practice was affirmed and described. Panels review the facts of a case, the applicability of GATT protocols to the dispute, and arrive at an objective assessment of the matter.[28] Panels consult directly with the disputants, and allow for mutual solution of the dispute between the parties.[29] Failure of a panel to reach a "mutually satisfactory settlement" usually resulted in referral of the dispute to the Contracting Parties, who in turn avail themselves of panels to assist and recommend a ruling under GATT Art. XXIII:2.[30]

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance, GATT Doc. L/4907, LT/TR/U/1, (Nov. 28, 1979) [hereinafter GATT Understanding] (reaffirming the 1966 procedures as well).
[28] Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance, GATT Doc. L/4907, LT/TR/U/1, Annex para. 3 (Nov. 28, 1979) [hereinafter GATT Understanding Annex].
[29] *Id*.
[30] *Id*.

1. Customary GATT Dispute Practices

Working parties, instituted by the Council at the request of a contracting party, establish their own working procedures.[31] Such working parties meet at least twice to consider the matter, and once to discuss conclusions.[32] The membership of the party is open to any contracting party interested in the dispute, with disputants always members of the working party.[33] A final report, reached by consensus, is reported to the Council as an advisory opinion that the Council adopts.

Panels, since 1952, are appointed by the contracting parties to resolve a dispute under GATT Art. XXVIII:2.[34] Disputants propose terms of reference to the Council, which are discussed and approved by the Council. Members of the panel are normally selected from permanent GATT delegations or national administrators involved with GATT activities on a regular basis.[35] Additionally, members of the panel include delegates from developing countries when the dispute involves a developed contracting party and a developing party.[36] These panel members act impartially and independently from their national governments. Some panels include non-governmental experts. The GATT secretariat receives proposed nominees to the panel by the concerned parties, which in turn confirms or denies nominees thereby forming a three to five member panel with the consent of the concerned parties.[37] The panels then act autonomously by setting their own procedures and schedule. Additionally, the disputants present either oral or written

[31] *Id*. at para. 6(i).
[32] *Id*.
[33] *Id.*
[34] GATT Understanding Annex para. (6)(ii).
[35] *Id.*
[36] *Id.*
[37] *Id.* at para. (6)(iii).

communications to the panel, and answer questions posed by the panel.[38] Other interested parties may also be heard, and the panel may consult outside experts and the secretariat on historical and procedural issues.[39]

If no resolution is achieved, a panel sets out its findings of fact, a determination of the applicability of GATT provision, and its rationale for any recommendations or findings.[40] Usually, this report is first given to the parties before it is given to the Contracting Parties.[41] The scope of these reports runs from determination of whether an infringement of GATT protocols occurred to technical opinions, but most include recommendations to the parties. The report is anonymous and the deliberations of the panel secret.[42] The process takes about three to nine months.[43]

2. New GATT Procedures for Dispute Settlement

Reaffirming GATT's commitment to the expeditious resolution of conflicts through consultation, the Contracting Parties laid down procedures to solve disputes failing to resolve themselves through consultation. Underlying the dispute resolution system are the principles of conducting the process in good faith and proceedings not being contentious.[44] First, any one of the disputants may ask either an individual or body to exercise good offices with a view toward conciliation.[45] In a dispute between a developed state and a developing state, the developing state may request the GATT Director-General's good offices.[46] Second, in

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[38] *Id.* at para. (6)(iv).
[39] *Id.*
[40] GATT Understanding Annex para. (6)(v).
[41] *Id*. at para. (6)(vii).
[42] *Id*. at para. (6)(viii).
[43] *Id*. at para. (6)(ix).
[44] *Id.* at para. 9.
[45] GATT Understanding para. 8.
[46] *Id.*

the case of failed consultation, a disputant may request the Contracting Parties establish a panel or working party.[47] The Director-General, after agreement with the disputants, proposes the three to five membership of the panel for approval of the Contracting Parties.[48] The members should be governmental, and not citizens of the disputants countries.[49] The Director-General maintains an informal list comprised of governmental and non-governmental individuals qualified in trade relations, economic development, and other GATT matters.[50] The disputants may raise objection to nominees for compelling reasons within seven working days.[51] Within thirty days after decision of the Contracting Parties the panel must be established.[52]

Panel members serve neutrally and without instruction from their national governments, and should represent a diverse background and wide range of experience.[53] Any contracting party showing a substantial interest in the dispute before the panel has an opportunity to be heard.[54] The panel may seek additional advice from an individual or body on an issue pertinent to the dispute, provided notice is given to the disputants if either resides in the disputant's nation.[55] Disputants have a duty to promptly respond to panel requests for information, and confidential information is not publicly released unless authorized by the contracting party submitting the information.[56]

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[47] *Id*. at para. 10.
[48] *Id*. at para. 11.
[49] *Id*.
[50] *Id*. at para. 13.
[51] GATT Understanding para. 12.
[52] *Id.* at para. 11.
[53] *Id*. at para. 14.
[54] *Id*. at para. 15.
[55] *Id*.
[56] *Id*.

Hence, the panel is to assist the Contracting Parties' function under the guise of GATT Art. XXII:2.[57] The panel renders an objective decision upon the facts, applicability, and conformity of the questioned action with GATT protocols.[58] Such a decision must be in writing if the disputants fail to reach a mutually satisfactory solution of the conflict, and must be submitted to the Contracting Parties.[59] Similarly, if bilateral settlement of the conflict occurs, then a written panel report reflecting the solution and description of the case is necessary.[60] Such written reports must be submitted to the disputants prior to their submission to the Contracting Parties.[61] The resort to panel process should result in prompt production of a decision within a reasonable time, or in urgent circumstances within three months after panel constitution.[62]

The Contracting Parties equally have a duty to promptly consider panel reports and take action if necessary.[63] Special consideration is given to disputes involving developed and developing countries. In these instances, the Contracting Parties meet specially and consider the complained of trade measures' coverage, and their impact on the economy of the developing country.[64] The Parties maintain oversight of compliance with their recommendation through surveillance.[65] At the request of the complaining contracting party, noncompliance by the defendant party with the recommendation within a reasonable time may result in the

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[57] GATT Understanding para. 16.
[58] *Id.*
[59] *Id.*
[60] *Id*. Any Contracting Party with an interest in the dispute can enquire and receive information about the solution as it relates to trade matters. *Id*. at para. 19.
[61] *Id.* at para. 18.
[62] GATT Understanding para. 20.
[63] *Id.* at para. 21.
[64] *Id.*
[65] *Id*. at para. 22.

Contracting Parties making suitable efforts to provide a solution to the situation.[66]

The Understanding adopts some of the procedures outlined in the Havana Charter, but falls short of creating a legalistic framework for dispute resolution. Essentially, the Understanding leaves much to the working parties or panels to decide, and provides ratification of these actions by review of the Contracting Parties. The Understanding represents the first codification of procedural dispute settlement within the GATT. The following discussed documents make improvements to the 1979 Understanding.

D. 1982 Ministerial Declaration

Emphasizing the use of diplomatic means to resolve conflict among the Contracting Parties, the 1982 Ministerial Declaration permits disputants to request the good offices of the Director-General or group of individuals nominated by the Director upon the failure of consultation.[67] The expeditious process is confidential, positions taken are nonbinding in further action, and both parties retain the right to refer the matter to the Contracting Parties.[68]

Further, the Director-General is responsible to report to the Council on any case failing to constitute a panel under the time limits for establishment.[69] Additionally, the Director compensates experts from outside of Geneva serving on the panel, and assists the panel specifically on historical, legal, and procedural aspects of the panel process.[70]

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[66] *Id.*
[67] Decision on Dispute Settlement, at para. i, 29S/13 (Nov. 29, 1982) [hereinafter 1982 Decision on Dispute Settlement].
[68] *Id.*
[69] *Id*. at para. ii.
[70] *Id.* at paras. iii, iv.

Prompt resolution of conflict requires panels to report an inability to meet deadlines, and as soon as possible render the report. The panel report should make a direct finding on whether or not a nullification or impairment of a GATT benefit occurred, and upon making a finding of such violation the panel should set out recommendations for resolving the matter for the Contracting Parties consideration.[71] After a recommendation is made by the Contracting parties to the disputants, the violating party must report to the Contracting Parties within a reasonable time of its compliance or noncompliance with the recommendation stating the reasons for such noncompliance.[72] In such an instance of noncompliance, the Contracting Parties may recommend a compensatory adjustment with respect to products or authorize the suspension of concessions or obligations.[73] Finally, the decision to recommend a solution by the Contracting Parties includes the disputants, and consensus determines whether recommendation is made.[74]

E. 1984 Decision

The 1982 Decision did not quite solve an essential problem with the GATT dispute system involving the procedural process of panel work. In 1984 the Contracting Parties put forth a set of procedures covering the formation of panels and the conduct of their work.[75] The chief problem encountered by the panel process involved their timely formation and completion of their work. Thus, improved procedures were adopted. In the formation of a panel the Contracting Parties indicate to the Director-

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[71] *Id*. at para. v.
[72] *Id*. at para. viii.
[73] 1982 Decision on Dispute Settlement para. ix.
[74] *Id*. at para. x.
[75] *See* Decision on Dispute Settlement, L/5718/Rev.1 (Nov. 20, 1984) [hereinafter 1984 Decision on Dispute Settlement] *available at* http://www.worldtradelaw.net/misc/1984decision.pdf.

General the name of individuals not associated with national administrations endowed with a high degree of competence in international trade and GATT principles, that they believe are qualified to serve as panelists.[76] These individuals form a roster agreed upon by the Contracting Parties.

The Director-General retains its authority to nominate panel members, but may also nominate individuals from the roster, as well as governmental individuals.[77] Parties may still object to panelists for compelling reasons. In the event of disagreement over panel composition causing delay of panel establishment within thirty days, the Director-General, with the consent of the parties and in consultation with the Chairman of the Council, completes the panel's constitution by appointing panelists from the roster of non-governmental individuals to resolve the deadlock.[78]

Panels, once established, retain the ability to set their own working procedures.[79] Though, panels should provide disputants with a proposed calendar addressing the panel's work schedule.[80] Written submissions, requested by the panel, should be received by the panel within the deadline set by the panel.[81]

These improvements were initially adopted on a trial basis for one year, but remained in effect until 1989. The reform of the panel procedure might have caused an increase in panel utilization. From 1985 to the end of 1989, "governments filed 69 complaints resulting in 27 panel decisions, as compared with 46 complaints and 20 panel decisions for the first five

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] 1984 Decision on Dispute Settlement.

years" of the 1980's.[82] The increase in panel use caused another reform of the dispute procedures in 1989.

F. 1989 Decision

Continuing to desire the prompt and effective resolution of conflict under GATT, the Contracting Parties improved dispute procedures to an extent paralleled to their 1979 Understanding.[83] These procedures were to remain in effect on a trail basis until the conclusion of the Uruguay Round under the supervision of the Contracting Parties throughout the Round in an aim of continued improvement and negotiation over GATT dispute resolution procedures.[84]

Formal disputes resolved by bilateral negotiation and arbitration awards were required to be notified to the Council so any party might raise any point regarding such action.[85] Other disputes beginning by formal request for consultation under GATT Articles XXII:1 or XXIII:1 required the contracting party so requested to reply within ten days after receipt of the request, and undertake good faith consultations within thirty days of the request.[86] Failure to follow this procedure grants the requesting party authorization to request constitution of a panel or working party.[87]

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[82] Hudec, *supra* note 8, at 199.
[83] *See* Extension of the April 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, L/7416 (Feb. 22, 1994). *See also* Communication from Switzerland , MTN.GNG/NG13/W/8 (Sept. 18, 1987) (proposing much of the reforms embodied within 1989 improvements).
[84] *See* Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, para. A(1), 36S/61 (Apr. 12, 1989) [hereinafter GATT Improvements]. Hudec, *supra* note 8, at 417-585, for a history of disputes and their resolutions. See 2 Guide to GATT Law and Practice Analytical Index, *supra* note 8, for interpretative history of GATT Articles involved in dispute settlement.
[85] GATT Improvements para. B.
[86] *Id*. at para. C(1) (proposing this time table unless the parties mutually agree to an alternate procedure).
[87] *Id*.

The failure of consultations to resolve a dispute within sixty days after the request, results in the requesting party's right to seek establishment of a panel or working party.[88] Additionally, if the parties jointly believe the consultations failed, then the requesting party may seek a panel or working party remedy within the sixty day period.[89] Request for consultation must be presented to the Council in writing outlining the reasons for the request.[90]

Urgent disputes are subject to an expedited schedule. The parties must conduct consultations within ten days from the request date.[91] If after thirty days of the request consultations fail to resolve the dispute, then the requesting party may seek panel or working party resolution.[92]

Entry into good offices, conciliation, or mediation within sixty days of a request for consultation shall continue for a sixty day period before the requesting party seeks constitution of a panel or working party.[93] Yet, if both parties agree within the sixty day period that the conciliation, mediation, or good offices have failed, then the requesting party may ask for a panel or working party.[94] Resort to the Director-General's good offices, conciliation, or mediation is also available to the disputants.[95]

Another dispute remedy available to the disputants is arbitration. Disputants with clearly defined issues may, by mutual agreement on

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[88] *Id*. at para. C(2).
[89] *Id.*
[90] *Id.* at para. C(3).
[91] GATT Improvements para. C(4) (including as an example of "urgent situation," disputes involving perishable goods).
[92] *Id.*
[93] *Id.* at para. D(1) (allocating no time requirements upon completion of purely diplomatic means of resolving dispute).
[94] *Id*. (explaining that conciliation, mediation, and good offices may continue during panel and working party deliberations).
[95] *Id*. at para. D(3).

process, contract to settle conflict by binding arbitration.[96] Other parties may join the agreement to arbitrate, provided they agree to be bound by the award.[97]

Request for panel or working group process must be in writing, indicating whether consultations were held, provide a summary of the facts and legal basis of the dispute, as well as articulate terms of reference.[98] Standard terms of reference govern a dispute, unless otherwise agreed by the disputants within twenty days of the dispute.[99] A request for a panel or working group is considered at the latest Council meeting following the request, unless the Council decides otherwise.[100] In deciding to establish a panel the Council may authorize its Chairman to create the terms of reference for a panel in consultation with the parties, and circulate the terms to the Council for their comments.[[101]

Panels are composed of three members, unless the disputants agree within ten days of the decision to establish a five-member panel.[102] Panelists are drawn from representatives of the Contracting Parties and an improved and expanded non-governmental list of individuals with knowledge of international trade and GATT principles.[103] Upon the failure to agree on panelists within twenty days of the decision to

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[96] *Id.* at para. E(1)-(3) (requiring disputants to notify all Contracting Parties before beginning proceedings).
[97] GATT Improvements para. E(3).
[98] Special terms of reference must be accompanied by proposed text. *Id.* at para. F(a).
[99] *Id.* at para. F(b)(1). The standard terms of reference are: "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2." *Id*.
[100] *Id.* at para. F(b)(2).
[101] *Id.*
[102] GATT Improvements para. F(c)(4).
[103] *Id*. at para. F(c)(1)-(3).

constitute a panel, either disputant may request the Director-General, in consultation with the Chairman of the Council, to appoint panelists.[104]

Multiple complaints, occurring when more then one contracting party requests a panel, will be dealt with under a single panel whenever feasible.[105] The single panel conducts its proceedings and findings in a manner not impairing the rights of the several parties.[106] Upon the request of one disputant, the panel renders separate reports on each separate dispute.[107] Every disputant obtains the complaints and written submissions of the other disputants, and possesses a right of presence at the oral submissions of other parties to the panel.[108]

Within one week of a panel's constitution, panelists should fix the timetable for the process at least to the first substantive meeting.[109] The entire process should not exceed six months in duration, and may be expedited in cases of urgency to three months.[110] If a panel is unable to complete the process within the appropriate time, then it must communicate in writing to the Council detailing its reason for delay and an estimate on the amount of time necessary to complete the panel's work.[111]

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[104] *Id*. at para. F(c)(5) (requiring the Director-General to inform parties of composition of the panel within ten days of the request).
[105] *Id*. at para. F(d)(1). If separate panels are established to review related complaints, then the same panelists should sit upon these panels to the greatest extent possible. *See id.* at para. F(d)(3).
[106] *Id.* at para. F(d)(2).
[107] GATT Improvements para. F(d)(2).
[108] *Id*. Third Contracting Parties, notifying the Council of their substantial interest in the panel proceeding, have the opportunity for oral and written submissions to the panel, and access to the written submissions of those disputants agreeing to disclose their submissions. *Id.* at para. F(e)(2),(3) (allowing for disputants' access to third party submissions).
[109] *Id.* at para. F(f)(2).
[110] *Id*. at para. F(f)(5).
[111] *Id.* at para. F(f)(6).

In any event, the entire panel process can not exceed nine months in duration, calculated from the date of panel constitution.[112]

Thirty days after submission to the Council of a panel's report, the Council takes action upon the report with written objections to the report given to the Council ten days before the Council's meeting.[113] Decision by the Council on a panel report, unless otherwise agreed, shall not exceed fifteen months from the date of the establishment of a panel.[114] Disputants attend Council meetings, and consensus decision governs action on the panel report.[115]

Compliance with Contracting Parties' rulings or recommendations occurs through report to the Council by the disputant found in error.[116] Also, the Council monitors compliance through status reports by the contacting party in error until the issue is resolved.[117] In disputes involving developing nations, the Council retains the authority granted in the 1979 Understanding to provide an appropriate remedy.[118]

G. Birth of the Dispute Settlement Understanding

As the Contracting Parties came together for the Uruguay Round of Negotiations, a topic of concern was the GATT dispute settlement system. Several countries submitted proposals for improvements of the

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[112] GATT Improvements para. F(f)(6). These provisions, however are alterable by agreement in disputes involving developing nations. *Id.* at para. F(f)(7).
[113] *Id.* at para. G(1), (2).
[114] *Id.* at para. G(4).
[115] *Id.* at para. G(3).
[116] *See id.* at para. I(2) (allowing for a reasonable time to comply if immediate implementation of a Council recommendation is impracticable).
[117] GATT Improvements para. I(3) (explaining that the issue remains on Council agenda six months following ruling, that the issue remains until resolved, and that contracting party in error submits status report ten days prior to Council meeting).
[118] *Id*. at para. I(4). Additionally, developing nations may request legal advice from the Secretariat, and the Secretariat makes available a qualified impartial legal expert to any developing country. *See id.* at para. H(1).

current system.[119] The large number of submissions provided the negotiating group ample fodder for analysis and discussion of the GATT dispute settlement system.

Most submissions offered differing views of dispute settlement within the GATT. Among these were a system emphasizing choice by disputants of "alternative and complementary techniques" permitting flexible response to conflicts.[120] Juxtaposed to the previous submission were others adopting a rule-oriented method creating legally binding adjudications through a sequential approach providing speed and incentives for compliance with Contracting Parties recommendations through institutional devices.[121] Still others saw GATT dispute settlement as a process protecting Contracting Parties' rights, while promoting "security and predictability in the multilateral trading system."[122] Another expressed view emphasized negotiated solution over panel process.[123]

The United States, supported by Canada, urged improvement in the dispute settlement process regarding its aims. The United States desired a system of GATT dispute settlement that adjudged through legal judgment

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[119] *See* GATT Secretariat, *Meeting of 2 and 3 March 1988* , MTN.GNG/NG13/6 (Mar. 31, 1988). Written submissions were given by "Mexico (MTN.GNG/NG13/W/1), New Zealand (MTN.GNG/NG13/W/2), the United States (MTN.GNG/NG13/W/3 and 6), Jamaica (MTN.GNG/NG13/W/5), Japan (MTN.GNG/NG13/W/7, 9 and 21), Switzerland (MTN.GNG/NG13/W/8), the Nordic countries (MTN.GNG/NG13/W/10), Australia (MTN.GNG/NG13/W/11), the European Communities (MTN.GNG/NG13/W/12 and 22), Canada (MTN.GNG/NG13/W/13), Nicaragua (MTN.GNG/NG13/W/15), Argentina (MTN.GNG/NG13/W/17), Hungary (MTN.GNG/NG13/W/18), Korea (MTN.GNG/NG13/W/19), Peru (MTN.GNG/NG13/W/23), [and] a joint submission by Argentina, Canada Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16)." *Id*.

[120] GATT Secretariat, *Summary and Comparative Analysis of Proposals for Negotiations* , MTN.GNG/NG13/W/14 (Nov. 3, 1987) [hereinafter GATT *Summary and Comparative Analysis* Nov. 3, 1987].

[121] *Id.*

[122] *Id.*

[123] *Id.*

whether a party's action was right or wrong.[124] The losing party, then, ought to comply with the judgment rendered.[125] On the other hand, the European Communities and Japan saw the aim of GATT dispute settlement to overcome the particular trade problem, not render legal judgment.[126] GATT rules, under this view, became secondary references subsumed by practical economic, social, or political rationales dictating nonconformity with GATT rules.[127] GATT rules' interpretation lied within the collective consideration of the Contracting Parties application of it to the particular situation presented.[128]

In the area of notification, parties articulated a need for prompt notice before trade measure implementation, in order to effectuate earlier consultations to avoid disputes.[129] Indeed, one proposal sought refusal of party requests under GATT Art. XXIII:2 if prior bilateral negotiations were not held.[130] Another party suggested no party should refuse a request for consultations under GATT Art. XXII.[131]

Looking to diplomatic measures to resolve conflict, some parties urged mandatory resort to conciliation or mediation as the initial step in GATT dispute settlement.[132] Others argued for mutually agreed mediation voluntarily entered into as an alternative option to consultations.[133] One party recommended specific procedures for conciliation, in which the conciliator adjudged if nullification or impairment of a GATT benefit

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[124] John Croome, Reshaping the World Trading System A History of the Uruguay Round 125 (Kluwer Law International, 1999).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] GATT Secretariat, *Summary and Comparative Analysis of Proposals for Negotiations*, MTN.GNG/NG13/W/14/Rev.1 (Feb. 26, 1988) [hereinafter GATT *Summary and Comparative Analysis* Feb. 26, 1988].
[130] GATT *Summary and Comparative Analysis* Nov. 3, 1987, *supra* note 120.
[131] GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129.
[132] GATT *Summary and Comparative Analysis* Nov. 3, 1987, *supra* note 120.
[133] *Id.*

occurred, as well as suggested compensation for conduct found in breach of GATT protocols.[134] Others proposed failed consultations should proceed to good offices by another contracting party, the Chairman of the Council, or the Director-General.[135] Some offered a scheme distinctly separating mediation from the panel process, while another authorized panels to "suggest conciliation proposals even if not necessarily based on provisions of [GATT]."[136] Another proposal sanctioned resort to mediation during panel process, as well as when bilateral consultations failed.[137]

Assessing the role of the GATT Council, the United States addressed the requirement of consensus decision-making seeking greater restrictions upon veto power. The proposal sought to grant the complainant an automatic right to have a panel appointed on demand, and to establish a rule eliminating disputants from Council decisions to adopt rulings on the panel report or to authorize retaliation.[138] The United States urged that Council decisions be binding upon disputants.[139]

Hungary proposed the Council divide decision on a panel report into: (1) decision on acceptance of the legal judgment of the panel in which all Contracting Parties participated; and (2) decision on the panel's recommendations for resolution of the dispute, excluding the disputants.[140] Another saw the Council meeting four times yearly on a regular basis to monitor all ongoing dispute proceedings to ensure compliance with panel

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[134] GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Croome, *supra* note 124, at 125 (proposing to exclude disputants from Council decision referred to as "consensus-minus-two"); GATT B.I.S.D. (36 th Supp.) at 61-67 (1990).
[139] Croome, *supra* note 124, at 125.
[140] *Id*. at 126.

recommendations.[141] In such special meetings one proposed an elected or appointed chairman could preside over the "Dispute Settlement Council," and convene consultations or conduct conciliation to resolve a dispute.[142] Opponents of this plan pointed to the great amount of disputes involving developed countries as a disincentive for developing countries to attend meetings of the Dispute Settlement Council, but believed a deputy chairman could preside over such a special Council meeting if one were established.[143]

One scheme constructed a distinct GATT dispute settlement body, which reported to the Council and monitored the implementation of recommendations.[144] Another proposal suggested the Council resolve some evident cases on its own without the panel process.[145]

Relating to panel procedures, the United States proposal urged that panelist be chosen mostly from non-governmental individuals to ensure greater public confidence in panel proceedings.[146] Brazil put forth a proposal granting developing countries greater favorable treatment in panel cases in an effort to provide such countries with "a higher level of equity."[147] Other recommendations insisted on standardized procedures for the panel process.[148] Some Contracting Parties asked for panel authority for an "interim measure of protection" in the case of urgent

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[141] GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Ernst-Ulrich Petersmann, *Proposal for Improvements in the GATT Dispute Settlement System A Survey and Comparative Analysis* , *in* Foreign Trade in the Present and a New International Economic Order 355 (Detlve Dicke & Ernst-Ulrich Petersmann eds., 1988).
[146] Croome, *supra* note 124, at 124.
[147] *Id*. at 126.
[148] Petersmann, *supra* note 145, at 364. *See* GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129 (discussing how other proposals sought bilaterally agreed and grey area trade restrictions be subject to GATT dispute settlement procedures).

disputes involving perishable goods.[149] One party suggested binding time tables for each aspect of the panel process with unagreed delays authorizing a party to retaliate for damage caused by the disputed measure during the delay upon a finding the measure violated GATT protocols.[150] Others desired the Contracting Parties review each request for a panel to determine its relevance, "the appropriateness of continuing or resuming bilateral consultations as well as the appropriate method of dispute settlement before deciding" whether or not to establish a panel.[151] Bangladesh proposed adoption of advantageous special dispute procedures applicable to least-developed countries.[152]

The European Communities proposed a ban on unilateral action by any contracting party to remedy a trade dispute, as well as a harmonization of municipal law with GATT dispute settlement procedures.[153] A differing view granted compensation upon the failure of a disputant to comply with a recommendation within a reasonable time, and failing to compensate authorized use of countermeasures upon the Contracting Parties' approval.[154] Other suggestions focused on the Council's ability to monitor compliance with recommendations by requiring a party in error to submit written documentation of compliance, including action taken and proposed.[155]

Mexico put forth the first comprehensive reform proposal of the entire dispute settlement process. Its terms included resort to the Director-

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[149] Petersmann, *supra* note 145, at 364.
[150] GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129.
[151] Petersmann, *supra* note 145, at 357. *But cf.* GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129 (submitting that others believed panels more capable of accessing the relevance of a complaint, and proposed automatic constitution of a panel without any decision or deliberation by the Council).
[152] Croome, *supra* note 124, at 227.
[153] *Id.* at 127.
[154] GATT *Summary and Comparative Analysis* Feb. 26, 1988, *supra* note 129.
[155] Petersmann, *supra* note 145, at 369.

General if consultation failed within thirty days to mediate or arbitrate, meeting of the Council specifically for the purpose of conducting dispute settlement procedure activities, and a choice for disputants to be part of Council decisions on adoption and enforcement of panel reports.[156] Canada put forth a similar proposal emphasizing strict deadlines for panel proceedings, prohibition on disputants blocking consensus adoption of panel reports, and detailed provisions for a noncompliant party's subjugation to suspension of benefits.[157]

Further proposals from the European Communities focused on a right to appeal panel decisions to a body of experts.[158] Switzerland sought consideration, through domestic legislation, of private citizens' and corporations' rights in GATT dispute settlement actions.[159]

In 1990, the European Communities and the United States put forth proposals advocating the establishment of an entirely new dispute resolution system for GATT. The proposals were similar in the respect that each called for an appellate body to review legal conclusions, and authorized compensation and the right to retaliate against noncompliant parties.[160] The two proposals diverged on the process of deciding adoption of panel reports. The European Communities desired consensus rule, while the United States urged either consensus decision to adopt the report with the losing parties excluded or automatic adoption of a panel report if disputants failed to appeal or object.[161]

Many Contracting Parties urged codification of GATT dispute procedure, and a declaration of commitment to utilize these procedures

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[156] Croome, *supra* note 124, at 128.
[157] *See id.*
[158] *Id.* at 226.
[159] *Id.* at 227.
[160] *Id.*
[161] *Id.*

consistently.[162] A "single consolidated text of GATT dispute settlement procedures would offer an adequate way of expressing a strengthened commitment to abide by the…system."[163] Thus, in 1990 a draft text on dispute settlement arose.[164]

1. 1990 Draft

Reiterating previous GATT practice, the draft required well-qualified panelists chosen from governmental and non-governmental sources.[165] The draft assures a right to panel process, and presents three options for final drafters to select. The first option permits establishment of a panel at the earliest meeting of the Council upon which the request for a panel appears on the agenda.[166] A second option provides automatic establishment of a panel upon receipt by the Director-General of a panel request.[167] The third option modifies the first option by granting the Council the right to decide upon the establishment of a panel.[168]

The draft text modified the panel process by establishing an interim review stage resulting ten days after receipt of final submission and arguments by disputants.[169] In this period the panel submits its report to the disputants for their written comments, which are received within ten to fifteen days after acquiring the report.[170] The panel report consists only

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[162] Petersmann, *supra* note 145, at 384.
[163] *Id.*
[164] Several documents led to the draft text. *See generally* GATT *Meeting* Mar. 31, 1988, *supra* note 119; GATT Secretariat, *Comparison of Existing Texts and Proposals for Improvements to the GATT Dispute Settlement System*, MTN.GNG/NG13/W/29 (Aug. 8, 1988); GATT Secretariat, *Comparison of Existing Texts and Proposals for Improvements to the GATT Dispute Settlement System*, MTN.GNG/NG13/W29/Rev.1 (Sept. 21, 1988).
[165] GATT Secretariat, *Draft Text on Dispute Settlement*, MTN.GNG/NG13/W/45 (Sept. 21, 1990) [hereinafter GATT *Draft Text on Dispute Settlement*].
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*

of the panel's description of the dispute, findings, and conclusion, excluding the panel's recommendations.[171] The panel, upon request of the objecting party, conducts a further meeting addressing the objections raised in a party's written submission on the panel's report.[172] No objections being raised, the interim panel report becomes the final panel report, and is circulated among the Contracting Parties.[173] If however objections are made, they shall be articulated in the panel's final report.[174]

The draft sets out four options concerning consideration of panel reports. The first and second option in summary state: panel reports are automatically adopted sixty days after receipt, unless a disputant notifies the Contracting Parties of a decision to appeal or the Council decides not to adopt the report.[175] The third option dictates a deadline of 45 days after receipt of the panel report for the Council to discuss it, and requires disputants to notify the Chairman of the appellate body and the Council within ten days after the Council's meeting of a decision to appeal.[176] The final option maintains the consensus decisional model.

A standing appellate body, comprised of three to five members and four alternates or seven members sitting in three member units, hears appeals of panel reports.[177] Members, chosen by the Council, serve for three year terms, must posses expertise in GATT matters, be unaffiliated with any government, and represent divergent backgrounds in law and international trade.[178] Appellate consideration and decision occurs within a maximum of sixty day after notice of appeal.[179]

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[171] GATT *Draft Text on Dispute Settlement*, *supra* note 165.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* (parties may express their view upon panel report).
[176] *Id.* (no notice of appeal results in report's automatic acceptance).
[177] GATT *Draft Text on Dispute Settlement*, *supra* note 165.
[178] *Id.*
[179] *Id.*

The procedures for appellate review are left to the appellate body to draft, and for the Council to approve.[180] The proceedings of the body are confidential, no *ex parte* communications are permitted, and only disputants may participate in the proceedings.[181] Legal issues raised in the panel proceeding or in the panel report circumscribe the scope of the appeal, and the body may modify, reverse, or uphold such legal findings made by the panel.[182] Disputants agree unconditionally in advance of the body's decision to its binding effect.[183]

Four options govern adoption of the appellate body's decision. Options one and two are substantially similar, recommending the decision as the final disposition of the case unless the Council decides not to accept the decision.[184] The third option announces the decision as final and unconditionally accepted, subject to the expression of any views by a contracting party.[185] The fourth option adopts the consensus decision approach.[186]

The implementation of Contracting Parties' recommendations occurs by informing the Council of implementation of rulings.[187] Such a party has thirty to ninety days to implement the recommendations if mutually agreed.[188] Lacking agreement, arbitration within sixty to one hundred and twenty days decides the compliance time.[189]

Utilization of compensation and retaliation as a tool of enforcement is sanctioned in the draft agreement to encourage compliance

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[180] *Id.*
[181] *Id.* (disputants maintain sole right to appeal).
[182] *Id.*
[183] GATT *Draft Text on Dispute Settlement*, *supra* note 165.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] GATT *Draft Text on Dispute Settlement*, *supra* note 165.

with recommendations and rulings of the Contracting Parties.[190] Two options submit alternate procedures implementing compensation: (1) making compensation voluntary and subject to negotiations; or (2) at the expiration of a reasonable time disputants enter into negations to assure a mutually acceptable compensation package, with failure of these negotiations resulting in suspension of concessions.[191]

Similarly, authorization for suspension of concessions or other obligations may result under four options.[192] The first option follows a scheme of failed negotiations to reach mutually satisfactory compensation, resulting in the proposal of suspension measures proportional to the damage suffered to the Council.[193] The Council automatically adopts the proposal with neither the disputants nor a third party allowed to block the measure.[194] The second option sets out procedures applicable to serious failures to comply with recommendations justifying suspension of concessions.[195] The third option requires notification to the Council of a

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[190] *Id.*
[191] *Id.*
[192] The draft text expressly prohibits unilateral action and requires national governments to ratify through legislation GATT dispute settlement procedures. *Id.*
[193] *Id.*
[194] *Id.*
[195] GATT *Draft Text on Dispute Settlement*, *supra* note 165. The procedures are:
(a) The complaining party suspending concessions or other obligations shall notify the respondent party and the Council immediately upon implementing any such suspension.
(b) If the respondent notifies the Director-General within ten days of such suspension that it believes the amount of trade covered by the suspension is not substantially equivalent to the nullification or impairment, the matter shall immediately be referred [back to the original panel] [to an arbitrator appointed by the Director-General] to determine a substantially equivalent amount. [If any member of the original panel is unable to serve, he or she shall be replaced by a member of the appellate body designated by the Director-General.]
(c) The parties shall provide written submissions to the [panel] [arbitrator] within ten days, and within ten days thereafter shall present oral argument to the [panel] [arbitrator]. The [panel] [arbitrator] shall not examine the nature of the concessions or other obligations to be suspended, but shall determine what amount of trade is substantially equivalent to the amount of nullification or impairment.

disputant's intention to suspend concessions or obligations, authorizing the action unless the Council rejects the course of action.[196] The fourth option permits suspension of obligations or concession, temporarily, after a reasonable time in which the disputant fails to comply with recommendations.[197]

Third parties are granted the right to receive parties' submissions and be present at the first meeting of the panel. Believing a trade measure already subject to panel process nullifies or impairs a third party's GATT benefits, a third party may resort to a separate panel process.[198] The original panel hearing the dispute involving the same measure shall reconstitute to adjudge the third party matter under expedited procedures.[199]

Least-developed countries received special dispute settlement procedures in the draft text. If consultations fail, then the Director-General may offer good offices to settle the dispute before request for a panel.[200] The draft text suggests the creation of the "Group of Five," as a separate body for the settlement of disputes involving least-developed nations.[201] If a panel deliberates on a dispute involving a least-developed nation, then

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(d) The [panel] [arbitrator] shall complete its work and issue its determination within x days, unless the parties, in consultation with the panel, agree to a longer period. The parties must accept the [panel's] [arbitrator's] determination as final.
(e) If the [panel] [arbitrator] determines that the amount of the suspension of concessions or other obligations is not substantially equivalent to the amount of nullification or impairment, the suspending party shall immediately adjust the amount of the suspension to comply with the [panel's] [arbitrator's] determination. *Id.*

[196] *Id.* (explaining that objection to suspension referred to binding arbitration calculates the amount of nullification or impairment within three months).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] GATT *Draft Text on Dispute Settlement*, *supra* note 165. (requiring least developed country to request good offices).

[201] *Id.* The Group consists of the Chairmen of: the Contracting Parties; the Council; the Sub-Committee on the Trade of Least-Developed Countries; and the Director-General of the GATT. *Id*.

the report of the panel must indicate explicit consideration and execution of GATT provisions on differential and more-favorable treatment.[202]

Lastly, the draft text authorizes the employ of arbitration under the same procedures utilized by panel process.[203] The Council discusses the arbitration, its award, and monitors implementation of the award under the same procedures applicable to adopted reports.[204] The arbitration award does not bind third parties.[205]

II. THE DISPUTE SETTLEMENT UNDERSTANDING

For the purposes of this work description of certain relevant provisions of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) suffices to provide a backdrop for a discussion of the various governmental proposals to reform the DSU. The original "Dunkel Draft" comprised twenty one single spaced pages divided into twenty five sections and one hundred and twenty three separate paragraphs with a two page annex on procedures.[206] The final Understanding encompasses twenty seven articles and four appendixes. Hence, the DSU represents the most comprehensive single instrument dictating procedures and creating institutions in GATT history.

The major features of the DSU are its application to a majority of World Trade Organization (WTO) disputes, creation of a Dispute Settlement Body as a special session of the Members (formerly

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[202] *Id.*
[203] *Id.* (allowing for agreements to the contrary).
[204] *Id.* (stating that arbitration expenses be paid by GATT if held at GATT headquarters, and the award be consistent with GATT and international law).
[205] GATT *Draft Text on Dispute Settlement*, *supra* note 165.
[206] *See* GATT Director-General, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* MTN.TNC/W/FA (December 20, 1991) (draft named after Arthur Dunkel then GATT Director-General); Secretariat, URUGUAY ROUND - TRADE NEGOTIATIONS COMMITTEE - LEGAL DRAFTING GROUP - MEETING OF 5 - 7 FEBRUARY 1992, MTN.TNC/LD/2 (February 18, 1992).

Contracting Parties), constitution of a permanent Appellate Body, and special procedures relating to non-violation complaints in GATT 1994 Art. XXIII:1(b) and 1(c).[207] The Dispute Settlement Body oversees the process of resolving conflict by establishing panels, adopting panel and Appellate Body reports by consensus with disputants present, and authorizes suspension of concessions or obligations under the new WTO charter.[208] The Appellate Body consists of seven members sitting in three member panels to hear appeals from panel decisions.[209] Appeal is limited to legal issues and interpretations made by the panel, and binding upon the disputant unless the Dispute Settlement Body rejects the decision within thirty days following promulgation among the Members.[210] Regarding non-violation complaints under GATT 1994 Art. XXIII:1(b), the DSU procedures apply differently in each case. In the case of a non-violation complaint, the DSU applies subject to four conditions altering the DSU's provisions.[211] For complaints under GATT 1994 Art. XXIII:1(c) different procedures apply.[212]

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[207] The DSU also sets out special provisions dealing with least-developed Members. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, art. 24, Legal Instruments-Results of the Uruguay Round vol. 31, 33 I.L.M. 112 (1994) [hereinafter DSU Agreement].
[208] *Id.* at art. 2.
[209] *Id.* at art. 17(1).
[210] *Id.* at art. 17(14).
[211] The special non-violation conditions are:
(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;
(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;
(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

Consultation begins the dispute resolution process, with a written request submitted to the Dispute Settlement Body stating the reasons for the request, identification of the trade measures in issue, and a statement of the legal basis for the complaint.[213] The time frame for beginning a consultation is within ten days of receipt of a request, and consultations extend to sixty days after a request.[214] Expedited timeframes govern urgent cases, and third party Members may join in a consultation upon a showing of a substantial trade interest in the ongoing consultations.[215] Developing Members' particular problems and interests should be accorded due regard in consultations involving such Members.[216]

Other diplomatic solutions receive a gloss in the DSU. These include good offices, conciliation, and mediation.[217] Particularly, disputants may agree to continue these diplomatic solutions during the panel process, and the Director-General may offer each of these resolution systems to the disputants *ex offico*.[218]

The panel process of the DSU adopted the ideas of the 1990 Draft Text. Written requests setting out the scope of consultations, the measures

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(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute. *Id.* at art. 26(1)(a)-(d).

[212] The dispute settlement rules and procedures contained in the 1989 Decision apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. *Id.* at art. 26(2). Additional procedures applicable solely to an Art. XXIII:1(c) complaint are:

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

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph. DSU Agreement art. 26(2)(a)-(b).

[213] *Id.* at art. 4(4).

[214] *Id*. at art. 4(3), (7).

[215] *Id*. at art. 4(8), (9), (11).

[216] *Id*. at art. 4(10) (encouraging special consideration for developing countries).

[217] *See id.* at art. 5.

[218] DSU Agreement art. 5(5), (6).

at issue, and the legal basis for the complaint, as well as either standard terms of reference or proposed special terms of reference begin the panel process.[219] Panel composition remains open to governmental and non-governmental individuals chosen from a list kept by the Secretariat.[220] The Secretariat proposes panelist nominations, which a disputant may challenge for compelling reasons.[221] In a dispute involving a developing and developed Member at least one panelist must be from a developing nation.[222]

A panel functions under a codified set of working procedures, unless the disputants agree otherwise.[223] The panel process commences and ends within six months of a request for panel process, but may extend to a maximum of nine months if a panel requests additional time to prepare its report and conduct its examination.[224] Yet, a complaining party may suspend the panel process for up to twelve months.[225] Additionally, the panel releases to the disputants the facts and argument sections of their report for an interim review process.[226] Such a process allows written and oral arguments to the panel, which are noted and included in the panel's final report.[227] Adoption of the final report by the Dispute Settlement Body occurs within sixty days after its circulation to

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[219] *Id.* at arts. 6(2), 7.
[220] *Id.* at art. 8(1), (4) (requiring panelists that are still well qualified and independent).
[221] *Id*. at art. 8(6).
[222] *Id*. at art. 8(10); *id.* at art. 9 (explaining procedure on multiple complaints); DSU Agreement art. 10 (describing third party access to panel process).
[223] *Id.* at art. 12; DSU Agreement app. 3.
[224] DSU Agreement art. 12(8), (9).
[225] *Id*. at art. 12(12).
[226] *Id*. at art. 15(1) (describing process).
[227] *Id*. at art. 15(3).

the Members, unless notice of an appeal or a consensus of the Dispute Settlement Body decides not to adopt the report.[228]

The DSU institutionalizes the standing Appellate Body with a membership of recognized authorities in the fields of law, international trade, and subjects covered in other WTO agreements appointed by the Dispute Settlement Body for four year terms with the possibility of reappoint to only one additional term.[229] These individuals are unaffiliated with any government, representative of the WTO membership, and recluse themselves from decision of a dispute creating a conflict of interest.[230]

The appellate process commences when a disputant notifies the Dispute Settlement Body of its desire to appeal the panel report. The Appellate Body hears appeals only from disputants, not third parties, and should complete its process in sixty days.[231] An additional thirty days may be requested by the Appellate Body to produce its report.[232] The Body addresses each issue raised on appeal, drafting its report anonymously and outside the presence of the disputants.[233] The Body's working procedures result from consultation with the Chairman of the Dispute Settlement Body and the WTO Director-General.[234] An appeal results in either a reversal, modification, or sustaining of the legal findings of the panel.[235] Appellate Body decisions are adopted by the Dispute Settlement Body

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[228] *Id.* at art. 16(4) (altering process from original consensus to adopt GATT practice); *see id.* at art. 20 (allocating nine months for Dispute Settlement Body to decide if no appeal and twelve months if appeal).
[229] DSU Agreement art. 17(1), (2), (3) (providing that the Dispute Settlement Body fills vacancies that arise).
[230] *Id.* at art. 17(3).
[231] *See id.* at art. 17(4), (5).
[232] *Id.* at at 17(5).
[233] *Id.* at art. 17(10), (11), (12).
[234] *Id.* at art. 17(9).
[235] DSU Agreement art. 17(13).

within thirty days of its circulation to the Members, unless a consensus of the Members revokes the report.[236]

The DSU sets out procedures for implementing the recommendation of the Dispute Settlement Body along with authorization for compensation and the suspension of concessions.[237] Regarding implementation of recommendations, the Member must inform the Dispute Settlement Body of its actions taken to implement the recommendation, and if implementation is impracticable the Member has a reasonable time to comply.[238] A dispute about a Member's compliance with recommendations results in resort to DSU procedures.[239] Surveillance of compliance by the Dispute Settlement Body occurs through placement of the issue on the Body's agenda till compliance is achieved.[240] Compensation is voluntary, and suspension of concessions disfavored as a temporary measure. The Dispute Settlement Body assesses the level of suspension as equivalent to the level of nullification or impairment endured.[241] Objection to the level of suspension imposed is resolved through arbitration.[242]

Several issues have arisen under the DSU in application of its procedures and in the functioning of the system. Some commentators attack the entire scheme established by the DSU, while others see the DSU as economically inefficient.[243] Other scholars compare the DSU to other

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[236] *Id.* at art. 17(14).
[237] *See id.* arts. 21, 22.
[238] *Id.* at art. 21(3). *See id.* at art. 21:2(a)-(c) (defining reasonable time period).
[239] *Id.* at art. 21(5).
[240] DSU Agreement art. 21(6).
[241] *Id.* at art 22(4).
[242] *Id.* at art. 22(6).
[243] *See* Sean P. Feeney, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes* , 2 Pepp. Disp. Resol. L.J. 99 (2002); Warren F. Swartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization* , 31 J. Legal

international dispute resolution systems with differing assessments of the effectiveness of DSU proceedings.[244]

A. National Proposals for Change

1 . European Communities

The European Communities (EC) submitted the most far reaching proposal to reform the DSU.[245] The EC seeks textual amendment to the DSU to authorize withdrawal of requests for consultations and panel process at any time, or in the case of panel process up until rending of a final panel report.[246] The EU also seeks to create a system of permanent panelists, who would be appointed to a case by lottery and would hear

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Stud. 179 (2002); Charles E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* , 2 Chi. J. Int'l L. 403 (2001).

[244] *See* Jeffery Michael Smith, *Three Models of Judicial Institutions in International Organizations: The European Union, The United States, and The World Trade Organization*, 10 Tulsa J. Comp. & Int'l L. 115 (2002) (DSU potentially more effective than other systems); Maria Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, With An Analysis of the Decisions of the Court of Justice of the Andean Community*, 19 Ariz. J. Int'l & Comp. L. 863 (2002) (DSU most utilized international dispute system). *See also* Ruth Mackenzie and Philippe Sand, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L.J. 271 (2003) (raising questions of judicial impartiality and independence in international organizations like DSU).

[245] See Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/49 (Feb. 17, 2003), for Australia's proposal covering substantial amounts of DSU.

[246] Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/1 (Mar. 13, 2002) (proposing eighteen month limit on implementation of consultations or request for panel should be deemed withdrawn) [hereinafter *Contribution of the European Communities*]. *See also* Dispute Settlement Body, *India's Questions to the European Communities and its Members States on Their Proposal Relating to Improvement of the DSU*, TN/DS/W/5 (May 7, 2002) (submitting detailed questions concerning each aspect of EC proposal); The European Communities' Replies to India's Questions, TN/DS/W/7 (May 30, 2002) (submitting statistical data and extensive commentary on proposal).

cases in groups of three.[247] The panelists would serve for staggered terms, and would be unaffiliated with any government.[248]

The Appellate Body would be granted the power to remand a panel report back to the original panel for additional findings of fact or other proceedings that the Body might direct.[249] Additionally, compliance with Dispute Settlement Body recommendations would be subject to the DSU's procedure.[250] A disputant disagreeing with its compliance with a recommendation is permitted to request consultations followed by a panel and Appellate Body consideration.[251] A "compliance panel," consisting of the original panelists receives written submissions summarizing the legal basis of the complaint against the recommendations and specifically identifies the measures at issue.[252] The Dispute Settlement Body retains the right to refuse, by consensus, establishment of a compliance panel.[253]

Request for authorizations for suspension of concessions or other obligations under the WTO would be subject to a request for arbitration to adjudge the amount of nullification or impairment incurred as a result of the volatile measure.[254] The arbitration would be conducted by the

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[247] *Contribution of the European Communities, supra* note 246 (roster includes 20 persons chosen by Director-General for six year terms).
[248] *Id.* (proposing that panelists be appointed for either three, four, five, or six year terms with an equal number appointed at each interval, and those appointed to three or four year terms would be eligible for reappointment to a six year term).
[249] *Id.*; Dispute Settlement Body, *Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/43 (Jan. 28, 2003) (submitting proposal that the Appellate Body be able to remand a case back to the panel or compliance panel, with directions for the panel, if the panel's report does not contain sufficient undisputed factual findings).
[250] *Contribution of the European Communities*, *supra* note 246.
[251] *Id.*
[252] *Id*; Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38 (Jan. 23, 2003).
[253] *Contribution of the European Communities*, *supra* note 246.
[254] *Id.*; Dispute Settlement Body, *Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO* , TN/DS/W/35 (Jan. 22, 2003) (suggesting fast track option for determination of reasonable time to comply

original panelists.[255] Failure to implement the arbitrator's award may result in further consultations to reach mutually acceptable trade compensation that in turn may lead to a request for authorization by the Dispute Settlement Body to suspend concession and obligations.[256] A Member subject to suspension may request a withdrawal of authorization on the grounds of removal of the trade measure or dissipation of the nullification or impairment caused by the measure.[257]

2. Canada

Canada proposes a new annex to the WTO creating established procedures to protect business' confidential information produced during panel or arbitration proceedings.[258] Such information would be subject to an agreement on nondisclosure limited to disputants, panelists, Secretariat staff, and experts appointed by the panel.[259] After conclusion of the proceeding such information would be destroyed or returned.[260]

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with Dispute Settlement Body recommendation); Dispute Settlement Body, *Amendment of the Understanding on Rules and Procedures governing the Settlement of Disputes*, TN/DS/W/32 (Jan. 22, 2003)(Japan); Dispute Settlement Body, *Negotiations on Improvements and Clarification of the Dispute Settlement Understanding* , TN/DS/W/22 (Oct. 28, 2002) (Japan's resubmitted proposal joined by thirteen countries on issue previously tabled). *But see* Dispute Settlement Body*, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/26 (Nov. 26, 2002) (Ecuador's differing proposal) [hereinafter *DSU Improvements and Clarifications* Nov. 26, 2002]; Dispute Settlement Body, *Negotiations on Improvement and Clarifications of the Dispute Settlement Understanding* , TN/DS/W/33 (Jan. 23, 2003) (another Ecuadorian proposal).

[255] *Contribution of the European Communities*, *supra* note 246.

[256] *Id.* (proposing that request is accepted unless consensus of Dispute Settlement Body rejects request). If the Member subject to suspension objects to the level of suspension or breach of procedures, then an arbitration results. *Id*.

[257] *Id.*

[258] Dispute Settlement Body, *Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/41 (Jan. 24, 2003) (offering draft annex and procedure texts) [hereinafter *Contribution of Canada*].

[259] *Id.*

[260] *Id.*

Another proposal focuses on establishment of a new panel roster.[261] Members nominate one person with expertise in GATT, international trade, and law who is either a Member's national or not.[262] A statement of the individual's qualifications outlining her capacity to serve as a panelist would be forwarded by the nominating Member to a committee composed of the Chairmen of the General Council, Dispute Settlement Body, and the Goods, Services, and Trade Related Aspects of Intellectual Property councils.[263] The committee evaluates the individual's qualifications to ascertain they meet the standard of expertise necessary to serve on a panel.[264] After the committee completes its evaluation, those individuals approved by the committee are forwarded to the General Council for ratification.[265] Ratified individuals serve on the roster for five years with a chance to serve only one additional five year term upon the General Council's approval.[266] Panelists chosen from the roster by the Secretariat may also be supplemented by propositions by the disputants for panel service.[267] The Director-General, finding insufficient expertise available on the roster to handle a particular issue, may place upon the panel a non-roster person.[268]

Written submissions by disputants and third parties to panel and Appellate Body proceedings should be made public at the time of submission by the Secretariat and available through a public registry.[269]

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[261] *Id.* (looking to rewrite DSU Agreement art. 8(4)).
[262] *Id.* (describing proposal to rewrite DSU Agreement art. 8(4)).
[263] *Id.*
[264] *Contribution of Canada*, *supra* note 258.
[265] *Id.*
[266] *Id.* (allowing substitution of nominee throughout process and Secretariat to maintain statements of qualifications for roster persons, which Members access).
[267] *Id.*
[268] *Id.*
[269] *Id.* (redacting confidential information by disputant for public dissemination). *Accord* Dispute Settlement Body, *Contribution by the Separate Customs Territory of Taiwan ,*

Coordinately, panel and Appellate Body meetings shall be public and broadcast to the public.[270] Yet, panel deliberations are confidential, and Appellate Body reports drafted out of the presence of third parties and disputants.[271]

3. Mexico

Mexico 's chief problem with the DSU is the length of time a WTO inconsistent measure remains in force without any sanction.[272] The solution proposed grants authority to the panel to determine the level of nullification or impairment, which in turn is subject to the Appellate Body's affirmance, modification, or reversal.[273] The Dispute Settlement Body could then authorize suspension of concessions and benefits upon adoption of the report.[274]

Mexico also suggests compensation be based on retroactive assessment of nullification or impairment, rather then the current prospective determination.[275] Further, Mexico advocates for the use of preventative measures in extreme instances where the trade measure

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Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement Understanding, TN/DS/W/25 (Nov. 27, 2002).

[270] *Contribution of Canada* , *supra* note 258 (proposing that confidential information portions of proceeding not be subject to public broadcast).

[271] *Id.*

[272] Dispute Settlement Body, *Negotiations of Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/23 (Nov. 4, 2002) [hereinafter *DSU Improvements and Clarifications* Nov. 4, 2002]; Dispute Settlement Body, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes Proposed Text By Mexico*, TN/DS/W/40 (Jan. 27, 2003).

[273] *DSU Improvements and Clarifications* Nov. 4, 2002 (explaining that determination could remain confidential until circulation of Appellate Body report with panel modifying its opinion on level as a result). *See* Dispute Settlement Body, *Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO* , TN/DS/W/9 (July 8, 2002) (discussing similar problem); *DSU Improvements and Clarifications* Nov. 26, 2002, *supra* note 254. (describing Ecuador 's differing proposal).

[274] *DSU Improvements and Clarifications* Nov. 4, 2002, *supra* note 272.

[275] *Id.*

causes significant damage to a Member.[276] Additionally, the Mexicans propose the right to suspend concessions be negotiable, permitting a complaining party to bargain with a third party Member to transfer its right to suspend in exchange for a trade benefit from the third party Member.[277]

4. Chile and the United States

A joint proposal by these two nations calls for submission of interim reports by the Appellate Body for disputants to strengthen the final report by their commentary.[278] Included in the prior proposal is the right of disputants to delete, by mutual agreement, those findings in the report that are unhelpful in resolving the dispute.[279] Similarly, the Dispute Settlement Body could partially adopt reports to implement only those portions of a report helpful to resolve a dispute.[280]

A further proposal calls for a right of disputants to, by mutual agreement, suspend panel or Appellate Body procedures.[281] Both countries emphasize the need for well qualified expert panelists to hear a dispute, as well as the need for interpretative rules governing WTO agreements.[282] Also, both nations perceive a need to provide additional

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[276] *Id.*
[277] *Id.*
[278] Dispute Settlement Body, *Negotiations on Improvements and Clarification of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement*, TN/DS/W/52 (Mar. 14, 2003) [hereinafter *DSU Flexibility and Member Control*].
[279] *Id.*
[280] *Id.*
[281] *Id. See* Dispute Settlement Body, *Contribution of Brazil to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/45/Rev.1 (Mar. 4, 2003) (proposing a fast track option for measure already found inconsistent with WTO obligations by previous panel or Appellate Body new panel with original members for expedited procedure).
[282] *DSU Flexibility and Member Control*, *supra* note 278; Dispute Settlement Body, *Negotiation on Improvements and Clarifications of the Dispute Settlement Understanding*

guidance to WTO dispute settlement bodies on the nature and task present for resolution.[283]

5. Proposals effecting developing and least-developed nations

China urged reformation of the special and differential provisions applicable to developing members in the DSU.[284] Among China 's proposals are restraints of developed nations against developing nations in utilizing the DSU to prosecute cases against a developing nation.[285] If a developed Member brings a complaint against a developing Member, and the challenged measure survives the complaint (not volatile of WTO provisions), then the legal costs of the developing Member are paid by the developed Member who initiated the proceedings.[286] Finally, China seeks mandatory "technical assistance and capacity building" from developed countries so developing Members may effectively utilize the DSU.[287]

One group of countries suggests conflicts between developed and developing Members that remain unresolved through failure of the developed Member to implement Dispute Settlement Body recommendations should be settled by resort to suspension of concessions and benefits with respect to "any and all [trade] sectors under any covered

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on Improving Flexibility and Member Control in WTO Dispute Settlement, TN/DS/W/28 (Dec. 23, 2002) (Chile and United States original proposal).
[283] *DSU Flexibility and Member Control*, *supra* note 278.
[284] Dispute Settlement Body, *Improving the Special and Differential Provision in the Dispute Settlement Understanding*, TN/DS/W/29 (Jan. 22, 2003) [hereinafter *DSU Special and Differential Provision*]. *See* Dispute Settlement Body, *Specific Amendments to the Dispute Settlement Understanding—Drafting Inputs from China*, TN/DS/W/51 (Mar. 5, 2003); Dispute Settlement Body, *Specific Amendments to the Dispute Settlement Understanding—Drafting Inputs from China*, TN/DS/W/51/Rev.1 (Mar. 13, 2003).
[285] *DSU Special and Differential Provision*, *supra* note 284. (limiting the number to two cases per year brought by a developed country Member against a developing country Member).
[286] *Id.*
[287] *Id.*

agreements.[288] Another group, called the least-developed group, calls for specific textual amendments to the DSU to recognize and account for difficulties faced by least-developed nations.[289] Particularly, during the consultation process, Members should consider and give special attention to the problems and interests of both developing and least-developed Members.[290] In the panel process, a least-developed nation should be permitted to request an additional least-developed panelist to serve with the one appointed to the panel by DSU procedure.[291] The group also supports mandatory compensation for violation of the WTO treaty provisions, and automatic collective retaliation against developed Members noncompliant with Dispute Settlement Body recommendations in disputes involving a least-developed Member and developed Member.[292]

III. CONCLUSION

Surveying ideas for an international regime to solve trade disputes, the problem appears to lie within the desire for enforceable determinations

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[288] *See* Dispute Settlement Body, *Negotiation on the Dispute Settlement Understanding Special and Differential Treatment for Developing Countries*, TN/DS/W/19 (Oct. 9, 2002), for proposal by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, Zimbabwe.

[289] *Id.* See Dispute Settlement Body, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, TN/DS/W/37 (January 22, 2003), for Haiti 's communication. *See* Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, TN/DS/W/42 (Jan. 24, 2003) (proposing significant textual amendment to reflect consideration of developing countries' issues by Kenya). *See* Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text*, TN/DS/W/47 (Feb. 11, 2003) (proposing textual changes reflecting mandatory consideration of developing nations' interests by India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica, and Malaysia).

[290] Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/17 (Oct. 9, 2002).

[291] *Id.* (guaranteeing same right to least-developed country as developing country has, but expanding both by allowing request for an additional panelist representative of their respective status as developed or least-developed).

[292] *Id.*

by competent impartial bodies to bind sovereign nations. Treaty instruments are voluntarily entered into and may be withdrawn from equally as easily. Heretofore, there has never existed an international regime resembling a supranational government of which all nations enter into and remain bound to without the possibility of withdrawal. Unfortunately, as the various proposals and instruments discussed above evidence, there exists a need in the realm of international trade for predictable enforceable judgments.

The need for judicial-type settlement of complaints directly opposes the essence of a treaty regime, where consent and not judgment governs actions by international organizations. Perhaps the task at hand is too great an undertaking for the many nations of the world. In attempting to garner free trade, sovereignty and national interest get in the way. An effective dispute resolution system must understand and confront these key issues.

In formulating such a system, resort to diplomatic tactics proves inefficient. More sophisticated systems are time-consuming. Disputes just do not resolve themselves, and so the current system balances the former considerations by providing procedural guidance and institutional structure. Yet, a system emphasizing speed and ingenuity could provide a better result than the current settlement scheme. Such a system could bring the disputants together for organized negotiation presided over by a neutral. This neutral would guide the process toward settlement. If resolution were not achieved quickly, then the neutral turns decision-maker. He makes a determination of how the dispute should resolve itself. That determination could then be put before a group of three trade experts for conformation. If the determination is not confirmed, then the disputants could resort to a mini-trial process. This process would be an abbreviated presentation of the facts and legal arguments by both sides.

Here an institutionalized judiciary could decide the matter. Their decision would be final. On the other hand, if conformation resulted from the initial determination, then the determination would govern the dispute.

The process is simple, and grants finality to a dispute. Members who do not agree with the decision might be able to take their case directly to the other Members. In such a proceeding the Members representatives would meet as jury. Presentations and arguments could be made by the disputants on a limited time table. Decision rests with a two thirds majority as to whether an infraction of the treaty resulted from the measure. Remedy of the dispute would come in the form of mandatory withdrawal of the offending measure. No compensation or suspension of concessions would result. Noncompliance with such a determination would result in loss of membership in the organization for a limited period. Extension of that time or permanent expulsion would be possible if the offending measure remained in force past the limited period. Here the penalty for noncompliance is the same for every member.

Introduction of such an approach is unlikely, but its ideas and simplicity might encourage others to rationalize the dispute settlement process within the realm of international trade differently. If accountability is necessary for free trade, then an organization's commitment to that goal must rest upon a fair dispute settlement technique. Ease of use mitigates toward greater utilization of the process, and eliminates the need for complex enforcement mechanisms.